The Environmental Law Foundation

Costs Barriers to Environmental Justice

A Report in association with BRASS

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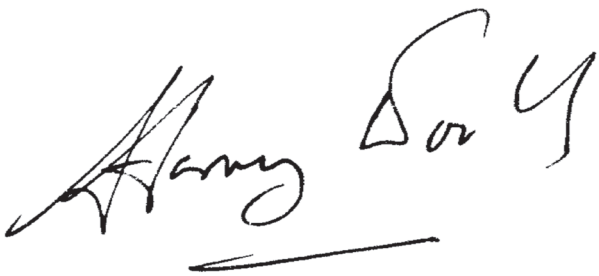
Designed by Dafydd Davies

Foreword

I am pleased to introduce this significant Report, based, as it is, upon the long and practical experience of the Foundation. With its eighteen year history of supporting and working with local communities, the statistical findings here represented need to be taken seriously. Access to justice is rightfully recognised as the entitlement of all but this is only meaningful if that right is capable of being converted into action: it is here that the Report spells out existing shortcomings and where reform is essential. The Foundation and those responsible for the Report are to be congratulated for this important piece of work.



About E.L.F. and BRASS

The Environmental Law Foundation (ELF) is the leading organisation providing free initial legal advice to those with environmental concerns. Founded in 1992 it has pioneered access to environmental justice by establishing a national network of legal and technical advisers who provide initial advice and representation for free to potential litigants. The Foundation aims to secure access to environmental and social justice for all; ensure communities are empowered to improve their quality of life; and provide for the protection of citizen's right to a healthy environment now and in the future.

The ESRC funded Centre for Business Relationships, Accountability, Sustainability and Society (BRASS) Centre at Cardiff University was started in 2001 and awarded the largest research award ever made for social sciences at a Welsh University. The BRASS Centre is a joint venture between the University's schools of Business, City and Regional Planning and Law. It brings together the three Schools' existing research expertise on issues of social, economic and environmental sustainability. The combination of these strengths, backed by the research funding, allows Cardiff University to build upon its international reputation for excellence in these fields. Much of the work in BRASS concerns issues of socio-economic and environmental sustainability and questions concerning the role of local communities in sustainable development.

Radoslaw Stech (BRASS) conducted the research and wrote the report in cooperation with Professor Robert Lee (BRASS) and Deborah Tripley (E.L.F.)

This Report was officially launched in the House of Lords on 14th January 2010

Acknowledgements
The Environmental Law Foundation would like to express its sincere thanks to all the volunteer caseworkers who provided valuable assistance to the authors for the purposes of this research. In particular, we would like to express our thanks to Tom Brenan and Emma Montlake at E.L.F. We would also like to provide our special thanks to Matrix Chambers, Doughty Street Chambers and Allen & Overy Solicitors, without whose generous support this research could not have been concluded. Finally, we thank 39 Essex Street Chambers, Blackstone Chambers and DLA Piper Solicitors.

As with our previous research findings we consider this report demonstrates the urgent need to ensure that the justice system delivers access to environmental justice in a way that is not prohibitively expensive, something in which our research continues to show it is failing.

About the authors

Radoslaw Stech holds a BA (Honours) and MA in Political Science from Poland, LLM (European Legal Studies) and MSc (Socio-Legal Methodology) from Cardiff University. He has also undertaken cultural studies at Oxford University and was a stagiaire in the European Union Committee of the Regions' Commission for Sustainable Development, where he contributed to writing policy analyses. Radoslaw is currently undertaking a PhD on the Aarhus Convention at BRASS and is funded by the Economic and Social Research Council.

Professor Robert Lee is a Professor at and former Head of Cardiff Law and Co-Director of the publicly funded Research Centre for Business Relationships Accountability Sustainability and Society at Cardiff University. Prior to becoming Dean at Cardiff, Robert had worked for two top ten UK law firms, and he remains a professional development consultant to one of the largest law firms in Europe, working on pan-European delivery of legal services.

He has worked for UNEP and UNDP on a series of international projects, including a judicial handbook on environmental case-law and the role of the rule of law in achieving the Millennium Goals. Professor Lee is a former Member of the Education and Training Committee of the Law Society of England and Wales and of the Lord Chancellor's Standing Advisory Committee on Legal Education, remaining a member of the Legal Education Working Party of the Society of Legal Scholars. A significant body of his work is on linkages between environment and human health and he is a Fellow of the Royal Society of Medicine.

Deborah Tripley is the Chief Executive of the Environmental Law Foundation. Deborah has extensive legal expertise in both environmental and public law. Prior to becoming Chief Executive she practiced environmental and public law with Fenners Chambers specialising in conservation, marine and regulatory issues. She has advised on a range of subjects including representation of WWF-UK on the draft Marine Bill and has represented the environmental concerns of community groups in planning inquiries. Deborah was previously Head of Legal with Greenpeace and advised the organisation on several significant environmental legal challenges including the successful application to the High Court challenging the government's failure to apply the EC Habitat's Directive to the offshore oil and gas licensing regime (R v Secretary of State for Trade & Industry & Ors, ex parte Greenpeace Ltd., 1999.)

Deborah is a trustee of the Greenpeace Environmental Trust and Genewatch and has produced several articles on access to environmental justice issues for Legal Action Group.

Contents

1. Introduction

In May 2008 a Working Group chaired by the Hon. Mr Justice Sullivan examined current approaches to costs and case management in judicial review and how Protective Costs Orders might be developed to provide more assistance in environmental challenges (the Sullivan report) [1].

The Sullivan report was interested in particular in reviewing the current implementation by the UK government of the Aarhus Convention access procedures requiring that access to administrative reviews of environmental decisions are "fair, equitable, timely and not prohibitively expensive." [2]

The UK Government is a party to the UNECE Convention on Access to Information, Public Participation in decision-making and Access to Justice in environmental matters (the Aarhus Convention), which provides environmental litigants with enhanced rights of access to justice. The UK ratified Aarhus in 2005.

Almost at the same time that the UK Government ratified the Aarhus Convention the Court of Appeal gave judgement in the case of CornerHouse, (R (CornerHouse Research) v Secretary of State for Trade & Industry), [3] setting helpful guidance on the application of Protective Costs Orders (PCOs) to those categories of public law cases considered to be within the public interest and of general public importance.

In its Aarhus Convention Implementation Report [4] the UK Government claims that there are a 'variety of ways in which the courts can take action to ensure that costs are proportionate and fairly allocated'. It says:

"In the context of judicial review, provisions also exist for the court to make a PCO …at the outset of proceedings (or at any other stage)."

The implementation report claims that:

"Guidance on PCOs has been established by the Court of Appeal, which means that judges hearing judicial reviews in England and Wales are obliged by the doctrine of binding precedent (based on the hierarchy of the courts) to take it into account in considering any application for a PCO. These provisions on costs capping and PCOs can help to provide certainty to a party as to their potential exposure to an adverse costs order if they are ultimately unsuccessful."

One of the aims of this research is to build upon previous studies carried out by E.L.F. in the field of access to environmental justice.

1 *Ensuring Access to Justice in England and Wales (May 2008) available at: http://www.ukela.org/content/page/1007/Justice%20report.pdf*

2 *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25th June 1998 at Aarhus, Articles 9(3) and (4)*

3 *[2005] 1 WLR 2600*

4 *DEFRA, Aarhus Convention Implementation Report, April 2008*

However, the Sullivan report found that a number of issues were raised by the Cornerhouse judgment in the context of environmental cases. In particular, the Sullivan report had concerns that applicants for a PCO must demonstrate that their case raises issues of 'general public importance'. It considered that:

'many environmental challenges would not cross this threshold, where it is interpreted as meaning that a case must decide a new point of law, or be of wide scale importance or affect people over a very wide area.'

This research goes some way to test out the validity of these competing claims.

The research focuses upon those E.L.F. cases where clients received advice to proceed to judicial or statutory review of an environmental decision, but did not do so, on grounds of costs.

"We conclude that the current principles concerning costs and the potential exposure to costs in judicial review proceedings in England and Wales inhibit compliance with the requirements of Aarhus concerning access to environmental justice"

Sullivan Report May 2008

The choice of the timeframes covers the date from which the UK ratified the Aarhus Convention (February 2005) to July 2009.

One of the aims of this research is to build upon previous studies carried out by E.L.F. in the field of access to environmental justice (see further below) and important work carried out by the organisation as part of the Coalition of Access to Justice on the environment (CAJE) [5]

The question whether or not the UK satisfies the requirements of the Convention is currently topical and prescient for the following reasons:

- The European Commission has sent a letter of formal notice to the UK under Article 226 of the EC Treaty raising concerns about the UK's failure to fulfil its obligations under Article 3(7) and 4(4) of the Public Participation Directive. [6]

- The UN's Aarhus Convention Compliance Committee has made a preliminary determination to admit the Cultra Residents' Association complaint against the Department of the Environment in relation to an order for costs arising out of litigation concerning the runway extension at Belfast City Airport. [7] Adjudication in this case is awaited but a finding of a breach of Convention rights would necessitate a change in policy which, in turn, would demand a better understanding of litigation costs' issues in such cases.

[5] *The Coalition for Access to Justice in the Environment (CAJE) comprises WWF, FOE, RSPB, Greenpeace, Capacity Global and E.L.F.*

[6] *Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, which formed part of the EU process for ratifying the Aarhus Convention*

[7] *For background see Kinnegar Residents' Action Group; Re Judicial Review [2007] NIQB 90 (7 November 2007)*

- In May 2008 the Sullivan Report [8] concluded that:
  "Our overall view is that the key issue limiting access to environmental justice and inhibiting compliance with article 9(4) of Aarhus is that of costs and the potential exposure of costs. What is notable about the problem is that, by and large, it flows from the application of ordinary costs principles of private law to judicial review, and within that, or ordinary principles of judicial review to environmental judicial review. We consider that the first of those does not take proper account of the particular features of public law. And that the latter is only acceptable in so far as it maintains compliance with Aarhus."

- In January 2009 Lord Justice Jackson was appointed to lead a fundamental review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. [9] Concerning environmental judicial review matters he has suggested that one way costs shifting may be an appropriate way forward.

- In the recent decision of Morgan and Baker v. Hinton Organics [10] the Court of Appeal for the first time reviewed (without actually deciding) the applicability of the Aarhus Convention to private law environmental disputes. The Court was "content to proceed on the basis that the Convention is capable of applying to private nuisance." This raises the prospect that Aarhus may apply to private law cases but poses practical problems of how to apply Aarhus principles in different species of private law claims that might come before the courts.

E.L.F. deals with some 600 inquiries per year concerned with environmental problems. In the field of public law it has a significant role to play in bringing forward cases and conducting research into barriers to access to environmental justice.

In 2003 it conducted quantitative analysis of its cases and published *Civil Law Aspects of Environmental Justice* [11] report as part of the Environmental Justice Project. The report was funded by the Department for Environment, Food and Rural Affairs. A desk top study carried out at the start of the study found that there were no known specific studies completed on access to environmental justice in England and Wales that provided even basic information on the number of environmental cases taken each year. This study started with a blank canvass in order to carry out primary research in law to get even this amount of core data together.

[8] *See supra note 1*
[9] *Jackson, Lord Justice, Review of Civil Litigation Costs: A Preliminary Report (May 2009) available at: http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm*
[10] *[2009] EWCA Civ. 107*
[11] *Paul Stookes, 'Civil Law Aspects of Environmental Justice' (Environmental Law Foundation, London, 2003)*

Since then E.L.F.'s data has continued to have a unique role to play in providing basic information about the role of the ordinary citizen in bringing environmental litigation within the UK system. A second piece of research based on qualitative interviews was undertaken in 2003. In 2004 we published a report, entitled '*Environmental Justice*' [12] which made a number of recommendations including a recommendation for the Amendment to the Civil Procedure Rules and Practice Direction.

The current research focuses in particular on E.L.F.'s judicial and statutory review caseload. Our data set of client cases and accompanying monitoring material provides unique and richly detailed material. We have expended our own resources to carry out the research the primary purpose of which is to evaluate whether costs continues to act as a significant barrier to individuals and communities when challenging environmental problems through the High Court.

The findings of our research were unsurprising to those of us who receive calls on a daily basis from individuals and community groups desperately seeking help in solving environmental problems affecting their lives. E.L.F. provides support to some of the poorest in our society who are often disproportionately affected by the adverse effects of pollution and poor quality of environment. A failure to provide the under-represented and marginalised in our society with the fullest access to environmental justice has a direct impact upon the protection of their rights including those of their children and grandchildren in the achievement of an environment adequate to their health and well being – the principal aim of the Aarhus Convention.

Despite the growing significance of issues surrounding the protection of the environment and the wide spread view of a need for strong law enforcement it is with great concern that E.L.F. notes the findings of this research indicating that costs remains as substantial a barrier as ever before to the achievement of access to environmental justice.

[12] *'Environmental Justice' (a joint report published by WWF, Leigh, Day & Co and E.L.F., 2004)*

2. Research background

This study follows research conducted by the Environmental Law Foundation in 2003 [13], which, in part, focused on an examination of E.L.F. referrals between January 1999 and December 2002 (hereafter "E.L.F. 2003 Study"). This research reviewed 668 cases tracking the conclusions of these cases.

The E.L.F. 2003 Study analysed the following data: the type of environmental concerns affecting or potentially affecting the communities; the likely cause of action at law; and the number of people potentially affected by the environmental concerns. Further, the study examined the socio-economic profile of the clients contacting E.L.F. based upon information from an Equal Opportunities Programme. [14]

The study reviewed the conclusions of the cases over a narrower timeframe between 2001 and 2002. This part of the study found that: 79 cases concluded successfully; 140 had unsuccessful conclusion; 49 remained ongoing; and 104 cases could not be determined due to a lack of recent data. [15]

The study subsequently looked at those cases which concluded successfully and highlighted that a significant body (46 percent) ended in "successful representation to planning committee meetings and appeals" [16]

Crucially, the study looked at the cases which did not conclude successfully and sought to establish the barriers to a satisfactory conclusion:

"In 35% of these cases the clients were advised that there were no reasonable prospects of success. In a further 31 % of cases the cost of pursuing legal action was the main reason for its failure i.e., they were advised that they could reasonably pursue the matter and were likely to have done so but for the cost or potential costs they may be incurred" [17]

The other reasons identified, such as stress, personal reasons, or adverse court judgments, represented much smaller proportions of the cases. Thus, the E.L.F. 2003 Study identified costs as a major barrier to pursuing legal action in connection with environmental concerns.

The current research project follows the previous one, but in light of current debates associated with the Aarhus Convention and the alleged problems of satisfying the requirements of the third pillar of that Convention (access to justice), the study focuses on judicial review cases over a four and a half year time period.

[13] *See supra note 11*
[14] *This is further explained in the methodology section (below)*
[15] *See supra note 11*
[16] *Ibid, p. 25*
[17] *Ibid, p. 25*

3. Methodology

The study answers the following questions:

a) What proportion of JR cases received a negative opinion as to the prospects of success at judicial review?
b) What is the proportion of JR cases where clients were advised to take further steps towards JR?
c) Given the answer to the above question, did clients not proceed primarily because of costs?

Focus, research aims and questions

The research focuses on a review of E.L.F. files, which have been referred to either one or more advisers between the beginning of 2005 and July 2009. The choice of the timeframes was driven by the fact that the UK has been the Party to the Aarhus Convention since early 2005 (ratified in February). Cases between August and December 2009 were not subject to examination in order to avoid any conflict of interest in relation to cases which might still be active.

The initial aim of the research was to establish the number of cases, which were at the stage of judicial/statutory review (hereafter JR cases) between January 2005 and July 2009. The study investigated the following main questions:

a) What proportion of JR cases received a negative opinion as to the prospects of success at judicial review?
b) What is the proportion of JR cases where clients were advised to take further steps towards JR?
c) Given the answer to the above question, what proportion of clients did not proceed primarily because of costs?

The research questions dwell on issues such as how many? or what proportion? rather than why? or how? indicating that the research is largely quantitative in nature. Having said that, the collection of data for the purpose of creating a quantitative database required extended documentary analysis. [18]

[18] *Jane L. Fielding, Nigel Gilbert Understanding Social Statistics (Sage Publications, London, 2000); Terry Hutchinson Researching and Writing in Law (Lawbook Co., Sydney, 2006)*

Preparations

The research began with preliminary overview and study of E.L.F. files as well as the study of the previous reports of the Foundation. Particular attention was paid to the E.L.F. 2003 Study.

Further studies were made of the way in which case workers and interns work in the E.L.F. office. The researcher was given appropriate training as to the method of cases handling and as to the content, document retention in and the operation of an electronic database.

The scope of the study has been the subject of numerous deliberations. The Research Team has been in constant contact. It was decided that the research data would be collected by one researcher in order to ensure the independence of the study. Nevertheless, it was agreed that E.L.F. employees would provide necessary contextual information as to the cases, their background and conclusion as necessary. Interns were not be included in data collection during the research study.

Sources

The data has been drawn from three sources. Firstly, we reviewed the electronic database consisting of basic details such as a short overview of the case, funding of the case etc. Secondly, and crucially, we analysed every paper file in order to complement the data from electronic database as well as to seek significant data in order to answer the research questions. Thirdly, we used Equal Opportunities Forms (hereafter EOFs) completed and sent in confidentiality by the clients. EOFs provide personal information which is not individually identifiable such as age, ethnicity and income bracket. It must be emphasised that we were able to match the data from the EOFs with the relevant client by means of the postcode, which occurred on both the EOFs and the electronic database. However, all necessary precautions have been taken to avoid any breach of confidentiality.

The sources were, in some cases, incomplete. As a result we did an intensive and extensive attempt to contact the clients and the advisers. This included attempts to make contact at various times during the week and the weekend. There are a number of cases where we could not contact the client or the adviser since people had changed their address. Nevertheless this number is low (six only).

The most important documents sought in the files related to the advisers' assessments of the case and their opinion concerning grounds for judicial review. Secondly, the research sought the clients' opinions as to the barriers to pursuing legal action.

Data collection

The research uploaded quantitative data into the statistical software package, SPSS, which is widely used by private, governmental and non-governmental organisations.

The data was collected between June and November 2009. This research included preliminary work, data collection from the files and intensive work to contact the clients/advisers in order to fill in any gaps. The telephone interviews were conducted during the day, evenings and weekends and as a result of this the number of missing cases is less than three per cent of the total so that this has no significant effect on the validity of the findings.

Analysis and presentation

A crucial part of the analysis was the cross-tabulation of two variables in the SPSS system namely the prospects of success and the conclusion of the case which could be reviewed alongside the clients' responses. The presentation involved exporting outputs from the SPSS to Excel since the latter offers better visual tools for data presentation.

The research focuses on the review of E.L.F. files, between January 2005 and July 2009.

4. Representation

E.L.F. is based in London but receives enquiries from all regions of England and Wales as well as from Scotland and Northern Ireland. We analysed 717 cases over the four and a half year time period. Figure 1 shows the regional representation of E.L.F. referred cases.

The bulk of cases (183, 25.5 percent) came from the South East and from Greater London (122, 17 percent). The fewest cases came from Northern Ireland and Scotland, where E.L.F. has a limited number of advisers. The regional representativeness of E.L.F. cases does not fully reflect the demographic distribution of the population in the UK. [19]

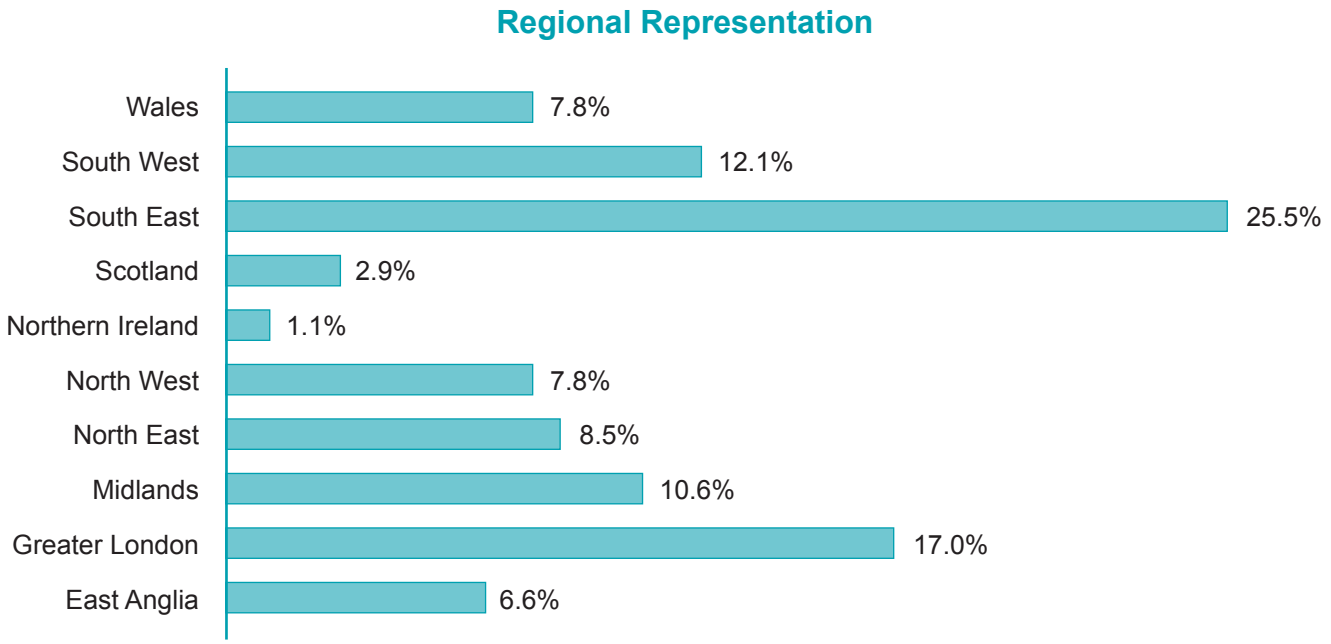


Figure 1:
Regional representation of E.L.F. referred cases 2005 – July 2009

[19] *Office for National Statistics 'Census 2001' available at <http://www.statistics.gov.uk/census2001/census2001.asp*

Table 1 shows the annual representation of E.L.F. cases. The proportion of cases from the South East has been particularly high (over 25 percent) over 3 years and dropped slightly to 22 percent in 2008. This proportion has risen to 26 percent in 2009 but the research covers only 7 months of the year, thus, the proportion may well settle below or above the average. The proportion of cases from Greater London and East Anglia decreased slightly in 2008.

Annual number and percentage of E.L.F. cases according to region										
	2005		2006		2007		2008		2009 (until July)	
Region	Count	%	Count	%	Count	%	Count	%	Count	%
East Anglia	10	5%	31	8%	15	9%	5	4%	4	6%
Greater London	30	16%	31	19%	31	18%	20	15%	10	15%
Midlands	18	10%	13	8%	19	11%	16	12%	10	15%
North East	17	9%	9	6%	15	9%	12	9%	8	12%
North West	13	7%	12	8%	12	7%	15	11%	4	6%
Scotland	6	3%	5	3%	5	3%	3	2%	2	3%
Northern Ireland	0	0%	1	1%	4	2%	2	2%	1	2%
South East	52	28%	40	25%	45	27%	29	22%	17	26%
South West	23	12%	19	12%	19	11%	20	15%	6	9%
Wales	19	10%	17	11%	4	2%	12	9%	4	6%
Totals	188		178		169		134		66	

Table 1:
Regional representation of E.L.F. referred cases 2005 – July 2009

Conversely, the proportion of cases from North East and North West, taken together, has been modestly represented, in a range from 14 percent to 16 percent between 2005 and 2007. The proportion increased to 20 percent in 2008 and stood at the rate of 18 percent in July 2009.

It is particularly difficult to achieve good case representation that reflects the distribution of the UK population. This may reflect the fact that E.L.F. is a charity with limited resources and strong links in the southern regions of the UK. Nevertheless, the analysis suggests that E.L.F. may be increasing its presence in the North of England, which had an industrial base historically which has left some legacy of environmental damage and a need for redevelopment. However, the increase of cases in the North in 2008 may be an anomaly, comparable to that of the Welsh cases, which dropped suddenly in 2007 but re-established at the usual rate in 2008.

5. E.L.F. cases

Local groups and communities seek legal advice from E.L.F. at various points of environmental concern. As Figure 3 indicates most of the clients (244, 34 percent) received support in relation to consultation, including early and informal consultations before a planning application has been submitted. The second largest group of cases are those at judicial/statutory review (210, 29 percent). A third group of cases (196, 27 percent) concerns complaints, civil law and enforcement issues and associated environmental legal advice. There were also 67 cases (10 percent) in which clients needed help during a public inquiry.

The research centres upon cases which have been dealt by lawyers in the E.L.F. network (E.L.F. Members) or by the lawyers working within the organisation (E.L.F. Plus Scheme). Some of these cases could shift from one category to another; for example those at the consultation stage could reach public inquiry or judicial review. However, such situations are not always reported back so that there might be more cases subject to judicial review than those reported here.

This research focuses on judicial/statutory review cases and the following analysis relate solely to these cases.

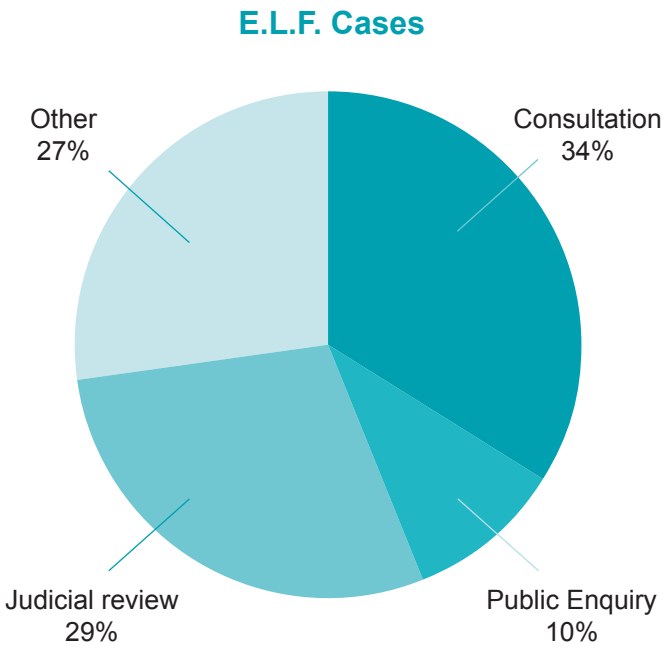


Figure 2:
Proportion of E.L.F. cases between January 2005 and July 2009

6. Costs as a barrier in judicial / statutory review cases

General remarks

This section of the report focuses on judicial/ statutory review cases within E.L.F. and aims at distinguishing cases which could not proceed further due to costs or risk of incurring costs, despite receiving encouraging advice from at least one E.L.F. legal adviser – a qualified and usually specialist solicitor or barrister.

The ability to pursue a judicial review case is closely linked to the financial resources of those seeking access to justice. Citizens, whose earnings do not go beyond certain threshold, are eligible to obtain legal aid. This is not a simple formula because some people on low income may possess properties or savings excluding them from the benefit of legal aid. [20] Nevertheless, it is interesting to review the income of clients who contacted E.L.F. and with a potential application for judicial review. The data below is taken from the Equal Opportunities Forms of the clients who wanted to bring judicial review challenge. Table 2 below provides a breakdown of income groups.

It is striking that most of the clients (64, nearly 45 percent) stated that their income did not exceed £10.000. Nearly 60 percent of the clients earned less than £15.000. The second highest income band is the range between £20.000 and £29.999 but this is only 16.7 percent. There have been a relatively small proportion of clients (nearly 17 percent) whose income exceeded £30.000. It must be pointed out that no initial check is made on this declaration of income and that groups may choose a low income applicant in the hope of gaining charitable assistance from E.L.F. [21]

Income of E.L.F. judicial review clients		
Income band	**Count**	**Valid percent**
under 10.000	64	44.8%
10.000-14.999	21	14.7%
15.000-19.999	10	7.0%
20.000-29.999	24	16.8%
30.000-39.999	10	7.0%
40.000-49.999	3	2.1%
50.000 or over	11	7.7%
Total	143	

Table 2:
Income of E.L.F. clients seeking judicial review [22]

[20] *see example, p. 20*

[21] *Though in fact ELF's interest is in pursuing environmental matters irrespective of the financial resources of the client*

[22] *Data for 2005-July 2009 taken from EOFs*

The level of income of clients seeking judicial review does not differ much from the income of clients seeking support in relation to all cases identified in Figure 2 above. The comparison between the Table 2 with the Table 3 indicates that the proportion of clients with the lowest income is exactly the same, at 45 percent. This proportion has been the same between 1999 and 2002. However, the proportion of clients seeking judicial review and earning more than £20.000 (34%) is slightly higher that the proportion of all clients with the same income (29%). This may indicate that citizens with higher income may be more knowledgeable as to judicial review procedures and are more likely to contact E.L.F. with regard to this procedure.

Table 3 also indicates that there has not been much change to the proportion of clients in each income group since 1999. E.L.F. is still contacted, in majority, by the poorest sectors of the community. Nevertheless, there were more citizens with the higher income (£30.000 and above) contacting E.L.F. between 2005 and 2009 than between 1999-2002, though in later years there would be more people entering this income bracket.

Proceedings halted by cost considerations

This research identified 210 potential cases of judicial review between 2005 and 2009. The cases had been referred to an adviser, who familiarised themselves with documents sent by the client and the outcomes of the preliminary work done in the E.L.F. office. Out of 210 judicial review files slightly more than half (107, 51 percent) received a negative opinion as to prospects of success in (or available grounds for) judicial review. It must be highlighted that some of these might have been considered as arguable cases save for being time-barred [23]. In cases with a negative opinion, the clients might be advised as to alternative avenues such as complaining to an Ombudsman or petitioning the decision-makers.

Income of E.L.F. clients: comparison				
	1999-2002		2005-2009 (until July)	
Income Band	**Count**	**Valid percent**	**Count**	**Valid percent**
under 10.000	209	45%	220	45%
10.000-14.999	95	20%	73	15%
15.000-19.999	58	12%	50	10%
20.000-29.999	54	12%	64	13%
30.000-39.999	23	5%	36	7%
40.000-49.999	15	3%	19	4%
50.000 or over	11	2%	25	5%
Totals	465		487	

Table 3: Income of E.L.F. clients in all cases; a comparison [24]

[23] *It is not known the extent to which concerns as to funding caused delay in these cases but this must be a possibility.*

[24] *Data for 1999-2002 taken from E.L.F. 2003 report (supra note 11)*

Nearly the same number of cases (97, 46 percent) was considered worthy of further work in support of litigation. The remaining 6 cases (3 percent) fall into the category of missing data and received an opinion from an adviser that was not reported on the file and we could not contact the lawyer or the client to determine any outcome.

This following analysis focuses on the cases in which the advice was that the case should proceed.

Of the 97 cases which were advised to proceed, 35 (36 percent) proceeded further but 54 (56 percent) did not do so explicitly for reasons of cost. A further 5 (5 percent) did not proceed further due to reasons other than cost and 3 cases (3 percent) were proceeding at the time of writing this report. The outcome is presented illustratively on Figure 4 below.

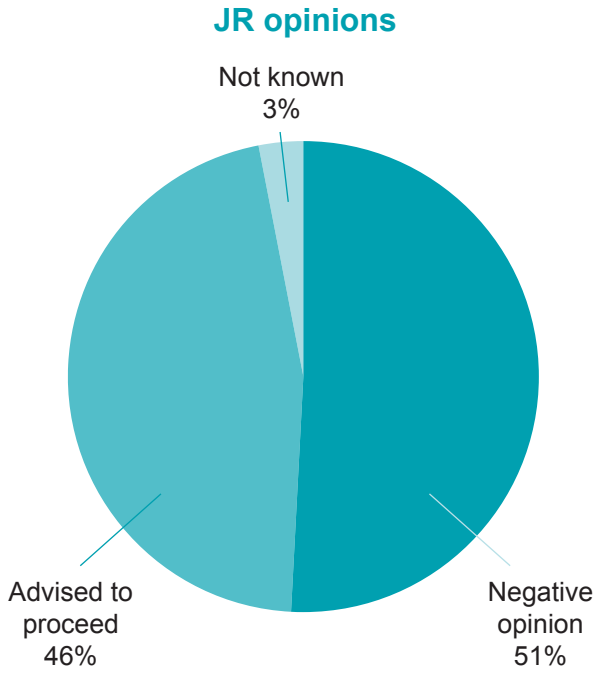


Figure 3:
Judicial review opinions for the years 2005 -2009 (July)

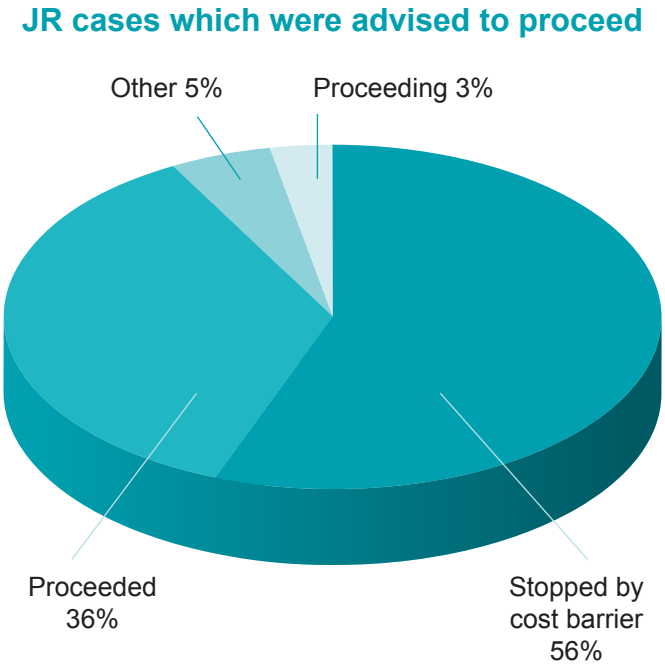


Figure 4:
Outcomes of cases which were advised to proceed

This result is striking because it shows that the clients in more than half of the cases, which had been subject to a preliminary case review by qualified lawyers and offered the opportunity to proceed, encountered an impassable cost barrier.

Further, of the mentioned 54 cases failing on a costs basis the research identified 26 in which the adviser or advisers issued an opinion highlighting that positive grounds for judicial review and/or likely prospects of success at judicial review.

Case studies

In the first group of 28 cases, which were halted by the cost barrier, an adviser wished to undertake further work before issuing an opinion as to the grounds for and prospects of success in an application for judicial review. Most of the advisers provide sufficient free initial advice which is enough to review the issues and decide whether or not an application should be made. In judicial review cases speed is of the essence. However, some cases are more complicated and require further referrals either to a specialist technical consultant or to counsel, which the E.L.F. Advice and Referral service is not always in a position to provide. In such situations, the clients may be unable to afford to issue further proceedings, being ineligible for legal aid or without access to legal expenses insurance.

In the second group of 26 cases, the clients are stopped by the cost barrier even though an adviser or advisers has issued an opinion that there were grounds for judicial review. This can be illustratively presented by examples of cases from 2006, 2007, 2008 and 2009 offered below. The names of the clients have been changed in the examples given.

Mrs Jones' case

In the first case Mrs Jones from a Residents' Association contacted E.L.F. at the beginning of 2006. The group opposed a planning permission to build a three storey school with car park, a children's centre and a leisure centre with car parks and new roads on a 27 acre area which was historically recreational open space. The issue was referred to the Secretary of State, who decided that the permission should be granted. The development was believed to have significant environmental impact on the surrounding area and would affect around 1000 people.

There were two advisers looking at the case, a solicitor and a barrister. At first, and within the free initial advice offered through the E.L.F. scheme, one of the advisers could not issue a clear-cut opinion. The client sought further advice, which found grounds for judicial review, with chances of success estimated at 50% - 65%. The client was also informed about potential adverse costs if the case was lost and decided not to pursue the matter further. In the end the client commented that the "most frustrating thing is that we haven't got the money". [25]

Ms Lewis' case

In the second case, Ms Lewis from a Residents' Association contacted E.L.F. at the end of 2007. The group opposed a planning permission for the development of a fruit market. More than 500 houses would be affected by noise and light pollution caused by overnight distribution of products to the market. The decision-makers allegedly failed to consider other suitable sites for the market and did not perform the required Environmental Impact Assessment. The development was thought to heighten also the risk of flooding already existing in the area.

The case was considered by both a solicitor and a barrister. The barrister rapidly came to a conclusion that this development would need to be subject to an Environmental Impact Assessment. The opinion was that the case could be successfully challenged by way of a claim for judicial review. The client could not proceed however due to the risk of costs.

Mr Williams' case

In the third case, Mr Williams contacted E.L.F. at the end of 2007. He opposed a planning permission for the erection a number of affordable dwellings on the one hand and a number of local needs dwellings on the other in Devon. The two developments were treated as separate applications but ought to have been considered in conjunction especially in relation to the affordable housing requirements. The site itself was on the border of a national park.

The case was reviewed by a solicitor in 2008, who saw a number of irregularities in the decision-making process. The council did not consider appropriately the magnitude of the development and its impact on the area. Advised that it would be appropriate to seek judicial review claim of the Council's decision. The client, however, stated that the costs would prove prohibitive and decided not to proceed.

[25] *Mrs Jones, taken from the case file*

Mrs Roberts' case

In the fourth case, Mrs Roberts contacted E.L.F. in 2009. She represented her mother who opposed planning permission for a development of blocks of flats next to her mother's house. The site had drainage problems and was situated in proximity to the flood plain, a number of water courses and culverts. The design of the development required the felling of a number of trees on the site. The development was believed to be contrary to planning policy guidelines governing flood risk and the decision-makers were said not to have taken a geo-environmental report into account. In addition, the environmentally-related human rights issues were said to be present.

The case was considered by a barrister, who found inadequacies related to drainage and highway safety aspects of the development. Crucially, the adviser highlighted that the decision-makers failed to have regard to the issue of land contamination and stated that there were grounds for judicial review. The chances of success were assessed at around 50%. The client stated that the risk of costs was too high to proceed.

Cases that proceeded

The study identified 35 cases that proceeded and, as Figure 5 indicates, the largest group (15, 43%) reached the High Court. Ten cases (29%) were settled and some cases (6, 17%) were quashed at permission stage of the application for judicial review. There were also 4 cases that concluded through other legal avenues such as judicial review application made by another party.

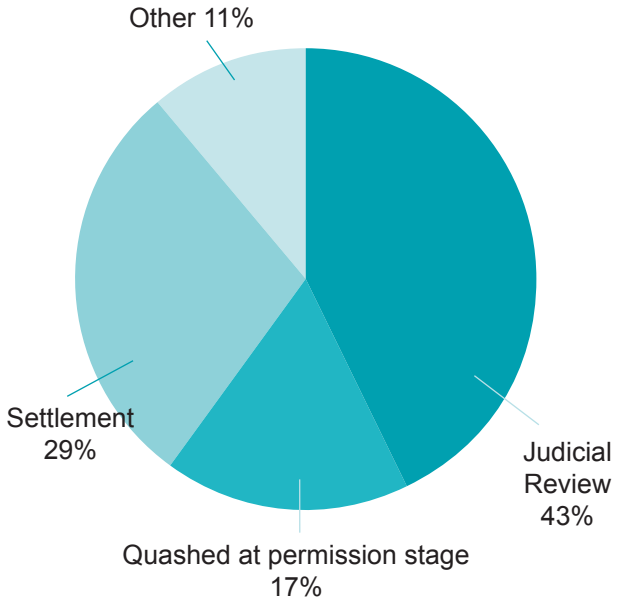


Figure 5:
Judicial review cases, which proceeded between 2005 and July 2009

The number of cases going forward to judicial review is particularly interesting. Regardless of the final conclusions of this report, this number is high when compared with other reported statistics. [26]

Category of applicant	Total number of cases
Established environmental NGOs	25
Ad hoc identifiable grouping	20
Ad hoc collection of individuals	21
Individual applicants	42
Other	2

Table 4:
Estimated number of public interest court cases brought by environmental NGOs, citizen groupings, or individuals 1995-2001 [27]

Table 4 shows the number of judicial reviews taken by various groups and individuals between 1995 and 2001. In general, the overall number of judicial review cases (110) brought over a seven year period of time is not striking. As a result, 15 cases brought through support from E.L.F. constitutes a significant number. This significance is also highlighted when we look at a number of judicial reviews pursued in their own right by major UK NGOs between 2005 and 2009 (Table 5).

NGO	Total number of cases
Friends of the Earth	4
Greenpeace	2
WWF	2

Table 5:
Summary of Judicial Reviews undertaken by a selection of NGOs between 2005-2009 [28]

Interestingly, the clients in two out of six cases which proceeded but were quashed at the permission stage of application for judicial review wanted to proceed nonetheless through to the oral hearing of the permission stage. They stated that they could not do so due to costs.

[26] *In E.L.F. 2003 Report (supra note 11) there are eight applications for judicial review*

[27] *Maurice Sheridan 'United Kingdom report' in N. de Sadeleer, G. Roller and M. Dross (eds) Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal (Europa Law, Groningen, 2005)*

[28] *Aarhus Convention's Compliance Committee, available at <http://www.unece.org/env/pp/compliance/Compliance%20Committee/27TableUK.htm*

7. Protective Costs Orders

The research discovered that an application for a Protective Cost Order (PCO) was lodged in only one out of 26 cases with supposedly good prospects of success. There were a few cases in which the clients stated that they had considered an application for a PCO but found it still to be prohibitively expensive.

The case where an application for a PCO was lodged concerned local residents wishing to register an area, consisting of a pond surrounded by land on two sides, as a village green. The land has been used and the pond has been fished for many years by the local community; facts which were underpinned by witnesses' testimony. Subsequently, a significant part of the pond was purchased with an intention of establishing a fish farm.

The Council stated that there had been an interruption to the use of the land and the local community would have to issue a further application with regard to the status of the land. The latter proceeded to a public inquiry where an Inspector excluded the pond from any protected status.

The client, who was retired but ineligible for legal aid, was advised by an E.L.F. adviser (in this instance Queen's Counsel) to judicially review the above decision. The prospects of success were estimated at 50% but the insurance could not cover the legal costs. The matter proceeded ultimately by way of a Conditional Fee Arrangement together with Counsel's application for the PCO.

The PCO was not granted because, in the judge's view, the issues raised were not of general importance and the public interest did not require that they should be resolved. In addition, the judge added:

"Further, I would only consider it just to make a protective cost order if the same or similar cap was applied to the costs which the claimant might recover from the Defendant and/or the interested party. The cap would be set so far below the estimates of recoverable costs under the conditional fee agreement made by the claimant as to defeat its purpose" [29]

[29] *R v. Sunderland City Council [2008] CO/6798/2008 (Application for a protective costs order)*

Counsel, who is a specialist on the law relating to village greens, advised on issuing an application for the PCO by way of an oral hearing. The client could not risk the potential costs at this stage.

There is one other example of a case in which an application for a PCO was considered by an adviser. A client opposed planning permission for commercial and residential development in a woodland area, which is part of the green network. The development included the erection of retail units, houses and more than 50 apartments.

Counsel identified numerous grounds for judicial review suggesting that this would be a good arguable case in the Courts. For example, the Council had failed to take into account relevant considerations and to give adequate reasons for the decision. Counsel advised:

"However the claimant will no doubt be advised that there is no guarantee of success. There is always a risk of an order for costs if the application for permission or the substantive claim fails. On the information presently available to me I do not think that an application for a protected costs order is likely to succeed because the issues, while of great importance to the claimant and the local community, are unlikely to be considered 'of general public importance'; nor can it be said that it is in the public interest for those issues to be resolved" [30]

The client decided not to proceed with the case in the light of this advice.

[30] *Opinion of Counsel, taken from the cases file*

8. Conclusion

The primary purpose of the Environmental Law Foundation is to facilitate access to legal advice and assistance to those looking to protect and improve their local environment and quality of life. It does so primarily through a network of specialist lawyers and consultants across the UK, all of whom provide initial free guidance and support to those in need of assistance.

It does not collect data as such other than to enable this process of pro bono legal advice and assistance. Nonetheless the monitoring of its workflow, a task undertaken by most well-run charities, when combined with the information on the case file, has allowed the construction of a data base of environmental complaints received by E.L.F. over a four and a half year period.

It is difficult to know the extent to which the E.L.F. case load is representative of wider environmental concerns in the community at large. This report illustrates that the E.L.F. client base exhibits certain features. It consists of not very wealthy people concerned primarily about the impact of development in the area in which they live. This may be anywhere in the UK but a quarter of the caseload comes from the south east of England.

Nonetheless, we can say that, of these people, their prospects of making an application, successful or otherwise, for judicial review are rather slender. Just over half of the people are advised not to try. Without more investigation we cannot know the extent to which factors such as delay in finding access to a source of (free) advice inhibited the making of an application. However, even if all of these complaints were misconceived in terms of the prospects for judicial review it leaves another half (almost) of the cases in which further legal work towards judicial review was advised.

Of the cases in this category, only just over one third proceeded much further. More than half (56%) of cases fell at this stage and overwhelmingly this was at the costs' hurdle. Of the cases that fell away at this point about half of these had by that stage at least one and sometimes two legal opinions suggesting that the case should proceed to judicial review.

Doubtless not all of these cases would have succeeded; but a court hearing is a significant element of access to justice whatever the outcome, assuming the case is not vexatious or frivolous. However good or bad the legal assessments made by E.L.F. members (and the members regularly scrutinise environmental claims) we doubt that any of the cases fell into such a category following evaluation by lawyers both inside and outside E.L.F.

So the research indicates the collapse of more than half of E.L.F. cases on which, at the very least, our advisers would have liked to do more work in support of an application for judicial review. Overwhelmingly (in all but 5% of these cases) the reason for this was that of exposure to costs. For these clients the availability of protective costs orders made no practicable difference. In some instances this was because of the absence of issues unlikely to be considered of general importance and in the public rather than the client's private, though very genuine, interest. In other instances it was the client's own costs or route to funding that was an equally pressing issue once the pro bono assistance was exhausted.

Telephone calls reach E.L.F. every day. E.L.F. will continue to assist the callers. There are many people who derive benefit from advice that is given over the phone without the need for further assistance. There are many phone calls back to us acknowledging this. There are many people for whom pro bono advice and assistance is sufficient without the need for a court hearing. There are clients who, however aggrieved, have no prospects of a remedy in law.

Where however, our clients wish legitimately to challenge the behaviour of public bodies in the handling of a matter that impacts on the environment and/or the local community, and that matter cannot be resolved by some form of compromise, then difficulties arise. For our research shows that, at that point, challenge by way of an application for judicial review is unlikely to constitute a viable remedy for the majority of our clients. This is overwhelmingly because of the inability to bear the costs or risk of costs of the application. This denial of access to environmental justice, particularly when the challenge is to a public body, seems shabby and mean spirited in a modern democracy.

This denial of access to environmental justice, particularly when the challenge is to a public body, seems shabby and mean spirited in a modern democracy

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