

**Response of the Coalition for Access to Justice for the Environment (CAJE)
on the
UK's Implementation Report under the Aarhus Convention**

Summary of main points

Failure to respect deadlines

CAJE is concerned that the UK fell far short of the deadline of 14th September 2007 to publish its draft report for public consultation (the draft report was eventually published for consultation on 25th January 2008). In responding to the draft report, CAJE expressed concern that the failure to meet the deadline may preclude information about the UK being included in the synthesis report prepared for the third Meeting of the Parties (MOP) in Riga in June 2008. In our view this would have been a highly regrettable position.

Content of the Report

CAJE is concerned about the content of the UK's draft and final Reports, which we believe give an incomplete (and therefore misleading) representation of the position with regard to access to environmental justice (the third pillar of the Convention) within the UK.

Protective Costs Orders (PCOs)

CAJE believes that both of the UK Reports misrepresent the position with regard to Protective Costs Orders. Current case-law on PCOs was formulated on the basis of *Corner House*, which was not an environmental case and did not take the requirements of the Aarhus Convention into account. As such, it is our view that PCOs provide only a partial solution to the problem of prohibitive costs and that the present UK position on costs is not in compliance with the Aarhus Convention. CAJE requested that the final UK Report be reworded to reflect the current limitations of the PCO regime, however, these concerns were not reflected in the final UK report. In response to the draft report, CAJE also requested that Defra and the Ministry of Justice pursue amendments to the Civil Procedure Rules to give effect to the requirements of the Aarhus Convention in environmental cases. In this respect we note that the UK's final report (page 30) refers to the fact that Defra and the Ministry of Justice have been reviewing these issues over the last year.

Injunctive relief

CAJE believes that both of the UK Reports misrepresent the position with regard to injunctive relief. CAJE requested that the draft UK Report be amended to clarify that an applicant may be required to provide a cross-undertaking in damages and that there is evidence to demonstrate that such an undertaking has been deemed to be "prohibitively expensive" within the context of Article 9(4) of the Convention. These comments were not reflected in the final UK report.

CAJE believes that in environmental cases in which injunctive relief is sought, the Court must make all reasonable efforts to ensure the case is heard within one month of permission being granted and that the requirement to provide a cross-undertaking in damages in environmental cases should be removed where the Court is satisfied that relief is required to prevent irreparable harm to the environment and necessary to preserve the factual basis of the legal proceedings.

Reference to responses

Finally, CAJE is concerned that the UK's final report (page 30) refers to the fact that only "...two stakeholders highlighted that financial difficulties remain in bringing environmental cases". CAJE assumes that its response was one of these referred to. CAJE is, however, a

coalition of six environmental groups (Capacity Global, Environmental Law Foundation, Friends of the Earth, Greenpeace, the RSPB and WWF-UK) and, on this occasion, our response was supported by two other NGOs (the Campaign for the Protection for Rural England and Buglife – the Invertebrate Conservation Trust). CAJE therefore believes that the UK's reference to responses received in relation to costs is somewhat misleading, in that it suggests that only a very small number of respondents are concerned about the costs issue. CAJE is anxious to clarify that this is not a true reflection of the actual situation.

Introduction

1. The Coalition for Access to Justice for the Environment (CAJE¹) welcomed the opportunity to comment on the UK's Draft Implementation Report under the Aarhus Convention, which was published for public consultation on 25th January 2008.
2. As a general point, CAJE remains very concerned that the UK fell far short of the deadline of 14th September 2007 to prepare and publish its draft report for public consultation. We were concerned that² the failure to meet this deadline may have precluded information about the UK being included in the synthesis report prepared for the third Meeting of the Parties (MOP) in Riga in June 2008. In our view this would have been a highly regrettable position as it may have prevented the MOP from being able to reach a strategic view on the implementation of the Convention within Contacting Parties.
3. CAJE is also very concerned about the content of both of the UK's Reports, which we believe give an incomplete (and therefore misleading) representation of the position with regard to access to environmental justice (the third pillar of the Convention) within Great Britain. Firstly, there seems to be little consideration of the situation in Northern Ireland and secondly, the Reports fail to clarify that the *Corner House* judgment will only apply to the Courts in England and Wales. Our detailed concerns are set out below.

Article 9(4) – “not prohibitively expensive”

4. Both of the UK Reports state that the fees for bringing a judicial review are reasonable. While we would not disagree with this view, CAJE has continually stated that court fees alone represent a small proportion of the likely costs an individual or organisation may incur when embarking upon civil action.
5. As stated in the UK Reports, the general principle in civil proceedings is that the unsuccessful party will be ordered to pay the costs of the successful party. This means that, unless public funding is available, an unsuccessful applicant will have to cover their own legal fees plus (at least a proportion) of the costs of the defendant. In Judicial Review proceedings this will be a public body funded by the public purse. Additionally, there is always the threat that the applicant may have to cover the costs of an interested third party.
6. We are pleased to note that the UK now appears to recognise that such costs fall within the ambit of Article 9(4) of the Convention (the UK's previous position being that “*not prohibitively expensive*” related solely to the level of court fees incurred by an applicant). However, it is our view that the text of the UK reports, particularly in relation to Protective Costs Orders (PCOs), is somewhat disingenuous. Whilst we agree that PCOs can help to

1 The Coalition for Access to Justice for the Environment comprises Capacity Global, the Environmental Law Foundation, Friends of the Earth, Greenpeace, the Royal Society for the Protection of Birds and WWF-UK. Whilst not currently members of CAJE, the contents of this response are also endorsed by the Campaign to Protect Rural England (CPRE) and Buglife – The Invertebrate Conservation Trust.

2 This is apparent from attendance by CAJE representatives at meetings of the parties to the Aarhus Convention and your response to the request for information about the UK's Aarhus Implementation Report submitted by Friends of the Earth.

provide certainty to a party as to their potential exposure to an adverse costs order, the level of exposure can still be “prohibitively expensive” for that particular individual or organisation and may result in a decision to discontinue proceedings. Moreover, as outlined below, the basis upon which PCOs were constructed was not developed with the Aarhus Convention in mind and, in our view, is not currently Aarhus compliant.

Protective Cost Orders (PCOs)

7. Both of the UK Reports refer to the importance of guidance on PCOs arising from the judgment of the Court of Appeal in *R (Corner House Research v Secretary of State for Trade and Industry*³ (“*Corner House*”). The Reports state that “*These provisions ... can help to provide certainty to a party as to their potential exposure to an adverse costs order if they are ultimately unsuccessful*”.
8. However, the Reports fail to clarify that in *Corner House*, the Court of Appeal confirmed that PCOs should only be granted in “... the most exceptional circumstances” and set out a number of conditions it regarded as pre-requisite for their consideration. These were that:
 - (a) The issues raised are of general public importance;
 - (b) The public interest requires that those issues should be resolved;
 - (c) The claimant has no private interest in the outcome of the case;
 - (d) Having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order; and
 - (e) If the order is not made, the claimant will probably discontinue the proceedings and will be acting reasonably in so doing.

In addition to these conditions, the Court of Appeal said that if those acting for the applicant were doing so *pro bono*, this would be likely to enhance the merits of the application for a PCO.

9. It is important to clarify at the outset that *Corner House* was not an environmental case. However, CAJE is concerned that, in the absence of any other case-law, the conditions which have become synonymous with *Corner House* are being applied *de facto* to environmental cases. These conditions are not, in our view, applicable to environmental cases (for reasons set out below). It is, therefore, our view that *Corner House* has provided only a limited solution to the issue of prohibitive costs for individuals and NGOs wishing to pursue environmental cases. We examine a number of the *Corner House* conditions below.

Public Interest Cases

10. The *Corner House* conditions were discussed in a Report produced under the Chairmanship of Sir Maurice Kay and published by Liberty and the Civil Liberties Trust⁴ in 2006. The Report concluded that the Courts should be prepared to grant PCOs in public interest cases, which it defined as cases meeting the criteria set out in paragraph 8 (a) and (b), above.
11. It is our experience that the Courts rarely exercise their powers to make PCOs. We would submit that this is, at least in part, because the judiciary has put a restrictive interpretation on what is already a restrictive set of criteria. For example, in respect of criteria (a) and (b) referred to in paragraph 8 above, in *River Thames Society v First Secretary of State & 3 ORS sub nom Lady Berkeley v First Secretary of State*⁵, the Hon Mr Justice Underhill

3 [2005] 1 WLR 2600

4 *Litigating the Public Interest – Report of the Working Group on Facilitating Public Interest Litigation* (2006) published by Liberty and the Civil Liberties Trust

5 [2006] EWHC 2829

refused an application for a PCO on the basis that the issue raised, despite involving a large development in a fairly prominent local site, was not one of general public importance.

12. As set out below, CAJE does not believe that the appropriate test for a protective costs order in environmental cases is a generic public interest test as in other types of administrative law cases. In any event, to the extent that a public interest test is relevant to the issues of costs in environmental cases, the relevant threshold is currently set much too high.
13. The relevant legal test under the Aarhus Convention is whether the costs situation prevents access to justice in environmental matters from being “fair”, “equitable” and “not prohibitively expensive”. The existence of a public interest is already built into the nature of the case. That is because the Aarhus Convention proceeds on the basis that the maintenance of the rule of law in environmental matters is inherently in the public interest and that maintaining the rule of law in this area requires that members of the public have access to the courts to challenge environmental decisions in a manner that is fair, equitable and not-prohibitively expensive. The approach in the Convention recognises that, in the absence of such access by those seeking to protect the environment, both environmental law and the environment itself will suffer. The reason why the Convention assumes that environmental cases engage a strong public interest in this regard include that such cases:
 - a. Rarely involve much, if any, element of private interest save that of establishing standing before the Court;
 - b. May involve the irreversible loss of, and damage to, areas and/or species of biodiversity importance and the wider environment; and
 - c. May affect large numbers of people.

By contrast, we note that *Corner House* refers to the fact that PCOs should only be granted in “...the most exceptional circumstances”⁶. For the reasons given above, we do not believe that such a high threshold is applicable in the environmental context.

No private interest

14. The Liberty Report also concluded that it should not be a condition for obtaining a PCO that the person or body applying for it have no private interest in the outcome of the case⁷. Whilst judicial doubt has been expressed as to the appropriateness of workability of this criterion⁸ it has, in practice, prevented individuals from obtaining a PCO (see *Rita Goodson v (1) HM Coroner for Bedfordshire and Luton (2) Luton and Dunstable Hospital NHS Trust*⁹. However, CAJE is mindful that *Goodson* was not an environmental case and that the Court of Appeal has recognised that this criterion may not be appropriate in the context of access to justice in environmental matters¹⁰.

Pro bono representation

15. The inclusion of *pro bono* representation as a factor in whether to grant a PCO is also regrettable. It is of concern to CAJE that in order to be able to conduct what the court

6 See paragraph 72 of the Judgment

7 See page 10 of the Liberty/Civil Liberties Trust Report

8 See *Susan Wilkinson (petitioner) v (1) Celia Kitzinger (2) Attorney-General (Respondents) & Lord Chancellor (Intervenor)* [2006] EWHC 835

9 LTL 12/10/2005: (2006) ACD 6: Times

10 See the comments of Lord Justice Carnwath in *R (on the application of Derek England (Appellant) v Tower Hamlets London Borough Council (Respondent) & Team Ltd & ORS (Interested Parties)* LTL 20/12/2006 (Unreported elsewhere), which refers to *R (on the application of Sonia Burkett) v London Borough of Hammersmith and Fulham* LTL 15/10/2004

considers litigation of public importance, we (and the lawyers we instruct) are expected to work for free. Many individuals and NGOs are unable to instruct the lawyers of their choice and, in any event, finding lawyers who are prepared to work *pro bono* at short notice (i.e. within JR timescales) is difficult. Reliance upon goodwill and charity can only go so far towards achieving access to justice. It is our contention that *pro bono* assistance does not, and cannot, provide a meaningful contribution to access to environmental justice in the long-term.

Limiting liability

16. The restrictive effect of the above criteria is compounded by the fact that PCOs thus far have tended to be granted on a fairly formulaic basis. The approach of the courts has generally not been to exclude liability for the costs of the Defendant, but to set a limit on the claimant's liability at a level which is broadly proportionate to its size and unrestricted income. So, for example, in *R v The Prime Minister ex p CND* [2002] EWHC 2712 (Admin) the Divisional Court made a PCO in favour of the claimants to the extent that any award of costs against them should be capped in the sum of £25,000. Similarly, in *R (on the application of the British Union for the Abolition of Vivisection) v Secretary of State for the Home Office* [2005] EWHC 531 (Admin), the Hon Mr Justice Bean capped BUAV's liability at £40,000 (as opposed to the £20,000 BUAV proposed) on the basis of the financial resources of the parties and the likely costs in the case.
17. The resounding issue for many here is again that of uncertainty as to the exact level of liability faced. A number of large NGOs, such as WWF, Greenpeace and the RSPB do not apply for PCOs on the basis that the level of their turnover and/or unrestricted income would result in a limit on liability that would not, in practice, be very different from that which might arise from the normal application of the costs rules. Although the payment of costs in that order would not cause the organisation to cease operating, it would require the NGO to re-direct significant resources away from other planned activities (for which the NGO is accountable to its members and trustees) and, along with the possibility of an order for costs in favour of an interested third party, has a considerable "chilling" effect. In this context it is important to have regard to the fact that costs orders in these types of cases will regularly run into tens of thousands of pounds. Anecdotal evidence suggests that these levels of costs are much higher than in other EU countries.
18. There is a further problem in relation to PCOs which is that even the process of applying for such an order engages costs risks that are potentially significant (certainly for very small NGOs or for local environmental amenity associations). The guidance given by the Court of Appeal in *Corner House* means that any person applying for a PCO is at risk of liability for costs both for the public authority's response to such an application (up to £1,000 where there is no hearing and up to £2,500 where there is such a hearing) and also for the authority's costs of replying to the application for judicial review up to that stage (un-quantified but potentially several thousands of pounds).
19. It is also worth mentioning that the costs exposure referred to above can be multiplied where there is also an interested party or parties. CAJE is aware of a recent case in which the claimant sought a capped PCO against a defendant and an interested party which would have been entirely taken up by the defendant but it did not prevent the interested party from applying for its costs. Fortunately, the application was rejected, but the situation would have been very worrying for the claimant had they only applied for a PCO in respect of the defendant's costs for the sake of saving £1,000 exposure.
20. Finally, CAJE would like to make one further point in relation to certainty. In *Davey v Aylesbury Vale District Council*¹¹, Lord Justice Sedley sets out the relevant provisions of

11 [2007] EWCA Civ 1166

Article 9(3) and (4) of the Aarhus Convention and the EC Public Participation Directive and then goes on to give some guidelines for addressing whether a successful defendant should be able to recover its reasonably incurred preparation costs (see Annex B of this response). However, the guidelines in paragraph 21 are essentially “after the event” criteria which in themselves raise a conundrum for claimants – whether to apply for a restrictive PCO (e.g. as to capping) or to gamble on not having adverse costs awarded at the end of the case. As such, we would argue that Davey does not address the Aarhus requirement that costs should not be “prohibitive” as it provides no guarantee to the claimant at the outset of the case, requiring them to pursue it to the end before they find out whether their costs will be limited.

21. For all of the reasons above, CAJE would prefer to see an explicit reference in the Civil Procedure Rules to the need for the Courts to take a more flexible approach to PCOs in environmental cases. For example, some NGOs currently benefit from a variation on the traditional PCO in which each party “bears its own costs”. These costs are sufficiently significant to warrant careful consideration of prospective legal action (for few environmental NGOs routinely enlist the support of *pro bono* lawyers in litigation) yet they do not represent an insurmountable hurdle to overcome. Other individuals or groups may prefer a capped liability such as that outlined above. In some exceptional circumstances, individuals or NGOs may request a total exclusion of liability on the basis that any other order would result in access to justice being *prohibitively expensive*. There may also be other mechanisms, aside from PCOs, that may serve to enhance access to environmental justice.

PCOs - summary

22. *Corner House* drew attention to the problem of prohibitive costs and the judgment represents a step towards a workable solution. However, the Court of Appeal itself expressed hope that the Civil Procedure Rules (CPR) Committee and the senior costs judge might formalise the *Corner House* principles in an appropriate codified form¹². CAJE supports this view (subject to our comments about specific environmental issues, above). We are concerned that the development of jurisprudence cannot, by its very nature, provide the requisite level of certainty for claimants and that the specific requirements of the Aarhus Convention may not be properly distinguished.
23. CAJE is, therefore, of the view that the CPR should be amended to make explicit reference to the Aarhus Convention and the contribution that PCOs (in a variety of forms) could make to the achievement of access to justice in environmental matters. We believe such orders should still be made at the discretion of the Court but that it should be made clear that the application the conditions set out in the *Corner House* judgment is not appropriate. We attach a draft amendment to the CPR in respect of Judicial Review applications that CAJE prepared some three years ago (see Appendix A). We will be considering this again in the light of the publication of a report prepared under the Chairmanship of the Hon. Mr Justice Sullivan and an anticipated consultation by the Rules Committee. CAJE is also mindful that appropriate amendments should also be made to other Parts of the CPR in respect of injunctions and costs in civil environmental cases generally.
24. **In summary, CAJE is concerned that both of the UK Reports misrepresent the position with regard to Protective Costs Orders. Current case-law on PCOs was formulated on the basis of *Corner House*, which was not an environmental case and did not take the requirements of the Aarhus Convention into account. As such, it is our view that PCOs provide only a partial solution to the problem of prohibitive costs and that the present UK position on costs is not in compliance with the Aarhus**

12 *Corner House* judgment, paragraph 81

Convention. CAJE requested that the draft UK Report be reworded to reflect the current limitations of the PCO regime. These concerns were not reflected in the final UK report. CAJE also requested that Defra and the Ministry of Justice pursue amendments to the Civil Procedure Rules to give effect to the requirements of the Aarhus Convention in environmental cases. In this respect we note that the UK's final report (page 30) refers to the fact that Defra and the Ministry of Justice have been reviewing these issues over the last year.

Injunctive Relief

25. Both of the UK Reports state that adequate and effective remedies, including injunctive relief in appropriate cases are available. However, the draft UK Report made no reference to the requirement for the applicant to provide a cross-undertaking in damages - a requirement which has been shown to represent a significant barrier to the achievement of access to justice¹³. CAJE highlighted this fact in its response to the UK but no reference to this point was made in the final UK report.
26. CAJE believes that in environmental cases in which injunctive relief is sought, the Court must make all reasonable efforts to ensure the case is heard within one month of permission being granted and that the requirement to provide a cross-undertaking in damages in environmental cases should be removed where the Court is satisfied that relief is required to prevent irreparable harm to the environment and necessary to preserve the factual basis of the legal proceedings.
27. **In Summary, CAJE requested that the draft UK Report be amended to clarify that an applicant may be required to provide a cross-undertaking in damages and that there is evidence to demonstrate that such an undertaking has been deemed to be “prohibitively expensive” within the context of Article 9(4) of the Convention. These comments were not reflected in the final UK report. CAJE believes that in environmental cases in which injunctive relief is sought, the Court must make all reasonable efforts to ensure the case is heard within one month of permission being granted and that the requirement to provide a cross-undertaking in damages in environmental cases should be removed where the Court is satisfied that relief is required to prevent irreparable harm to the environment and necessary to preserve the factual basis of the legal proceedings.**

Other issues in relation to Article 9(4) of the UK's Implementation Report

28. CAJE notes that earlier (non-public) drafts of the UK Implementation Report dated 19th October and 23rd November 2007 refer to a report published by the European Commission that “...suggests there may be an issue in relation to the allocation of costs between litigants in environmental cases that go to court”. These draft reports also refer to the fact that this view is shared by some of earlier research commissioned by Defra¹⁴. CAJE is disappointed to note that any reference to the findings of either the EU or UK-commissioned research in this respect were removed from the draft UK report issued for public consultation on 25th January 2008. It is unclear why references to the findings of these reports were removed, however, the consequence of their removal is to present an

13 See, for example, the decision in *Lappel Bank*, in which, by the time the RSPB's challenge to the legality of a planning permission had been upheld, the development had taken place, in the absence of an injunction (a cross undertaking in damages having been insisted upon as a pre-condition to an injunction) and the protected habitat had been destroyed: *R v Secretary of State for the Environment ex parte the Royal Society for the Protection of Birds* [1997] Env L.R. 431

14 See pages 25 and 27 of the Draft UK Implementation Reports dated 19th October and 23rd November respectively. These documents were provided to Friends of the Earth in response to a request for information about the UK's Aarhus Implementation Report submitted by FoE on 29th November 2007.

incomplete and inaccurate position as to the current status of research on costs, at least in England and Wales.

Other issues in the UK Implementation Report

Article 9(3) - Standing

29. Both of the UK Reports refer to the UK's "extensive approach" to legal standing before the administrative courts. Whilst we do not disagree with this view, we remain concerned about the disparity between the existing rules on standing¹⁵ and evolving case law. **CAJE believes that the CPR should also be amended to reflect current jurisprudence on standing and make explicit reference, on the basis of the Aarhus Convention, to the need to grant standing to individuals and NGOs in environmental cases.**
30. Finally, Article 9 (3) of the Convention refers to the potential to challenge acts and omissions by private persons as well as public authorities. The only mechanism we are aware of in this respect is in the civil courts for nuisance/negligence and statutory nuisance - neither of which entitle the claimant to any public funding or PCOs. Whilst perhaps a relatively smaller number of such cases will concern the protection of the environment, CAJE notes that that the UK does not comply with the Convention in this respect.

Article 9(4) - Timeliness

31. Between 2000-2003, there were an average of 18 environmental judicial review cases per year in the High Court and the average length of proceedings was six months from the date of lodging the application to the final court order. Statistics obtained from the Administrative Court in 2007 show that the average length of time for a case to be concluded has since increased to nine months (an increase of 33%) as a result of a significant increase in the number of cases now lodged with the Court¹⁶.
32. These additional cases are not environmental cases. The statistics show that the number of environmental cases lodged annually between 2002 and 2007 has remained consistent. However, the general increase in the number of cases lodged is causing considerable delays in the Administrative Court, to the extent that it is now questionable whether environmental cases are dealt with in a timely manner. While timeliness may not be an issue in every environmental case, it is certainly so in cases for which interim relief would ideally be sought (see above).
33. Our conclusion would therefore be that whilst the average length of proceedings in the UK is comparatively good (when judged against other Parties), we are concerned that timeliness is increasingly becoming an issue for some environmental cases, at least in England and Wales.

Article 9(5) - Community Legal Service (CLS)

34. Public funding is theoretically available in environmental public law cases – on the same basis as for other public law cases. However, in practice, such funding is usually only granted on the basis of a significant community contribution from the local community. In many cases this will have the effect that funding is not sufficient to allow the case to proceed. CAJE considers that further thinking is required by the Legal Services Commission to ensure that its processes are sufficient to ensure that access to justice in environmental matters (where it is involved) are "*not prohibitively expensive*".

15 Section 31(3) Supreme Court Act 1981

16 Statistics obtained by Sir Jeremy Sullivan and presented to a Public Law Project Conference on Judicial Review in September 2007. It is understood that there now in the order of 1,000 applications for judicial review lodged every month.

35. Article 9(5) requires contracting parties to consider the establishment of appropriate *assistance mechanisms* to remove or reduce financial and other barriers to access to justice. In terms of funding, firstly, CAJE does not believe that public funding fulfils this requirement as it is extremely restricted and not available to NGOs. Furthermore, although the government refers to the availability of public funding for certain low income applicants, the test remains one of 'public interest' and is not concerned with cases where the principle aim is the protection of the environment or a challenge to environmental decision making. Finally, CAJE is not aware that the UK Government has introduced or considered any other funding mechanisms in order to give effect to this provision.

Conclusion

36. CAJE remains of the view that the current costs rules continue to represent a significant obstacle to the achievement of access to justice in the UK. There is now a plethora of reports in the UK and within the EU that support that conclusion. We remain concerned that Defra and the Ministry of Justice consistently refuse to acknowledge that any significant problem exists and, moreover, seek to misrepresent the position when reporting to the UNECE Aarhus Secretariat. We respectfully requested that the draft UK Report be amended to reflect our concerns. In this respect, CAJE notes that the final UK report refers to the fact that two stakeholders highlighted that financial difficulties remain in bringing environmental cases (in which respect, please see comments made earlier).
37. In the light of the above, CAJE decided that it may be helpful to send a copy of its submissions directly to the UNECE Aarhus Compliance Committee and the Secretariat in order to ensure that the position in the UK is fully reported on at the third Meeting of the Parties.
38. Please do not hesitate to contact the CAJE members contacted below should you wish to obtain further information or clarification on any of the points made in this submission:

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Annex A

POSSIBLE DRAFT AMENDMENT TO CPR PART 54

Background

Please find below a possible amendment to Part 54 of the Civil Procedure Rules (CPR) in relation to Protective Costs Orders (PCOs).

CAJE was prompted to send this draft amendment to the Civil Procedure Rules Committee as a result of LJ Brooke's comments in *Burkett*, which centred on the very high costs of legal action and a possible conflict with the provisions of Article 9 of the Aarhus Convention and the judgment in *Corner House*, in which the Court of Appeal explicitly expressed their hope that the Civil Procedure Rules committee would act to codify.

CAJE believes that the amendment strikes an appropriate balance between the merits of providing certainty on an issue which has its basis in an international convention which the UK has ratified whilst at the same time retaining the Court's discretion to grant an Order on such terms and conditions as it deems appropriate. As such, it represents an important but fairly conservative step forward, which we believe the judiciary (at least) may support.

CAJE notes that PCO applications have not been restricted to environmental cases. We therefore believe that it would be useful to make specific reference to Orders made under the Aarhus Convention in order to ensure that the provisions of the Convention are duly considered by the Court.

Proposed amendment to Part 54 CPR

Protective Costs Orders (including Orders made under Article 9 of the UNECE Aarhus Convention)

54.20A

- (1) A Protective Costs Order ('PCO') means an order made by the Court in a claim for judicial review with the purpose of limiting or extinguishing the potential liability of the Claimant for the costs of any other party.
- (2) A PCO made in accordance with Article 9 of the UNECE Aarhus Convention shall have the express purpose of facilitating access to justice in environmental matters.
- (3) A PCO may be made on such terms and subject to such conditions as the Court deems appropriate.
- (4) An application by the Claimant for a PCO should usually be included in the Claim Form but may be made at any stage.
- (5) An application for a PCO (whether in the Claim Form or otherwise) must be accompanied by:
 - (a) a draft Order;
 - (b) an explanation why the applicant is seeking the PCO; and
 - (c) a statement of the facts relied on.

(6) In the case of an application for a PCO made in a Claim Form

- (a) Any party wishing to resist the application must:
- (i) say so in his acknowledgment of service; and
 - (ii) set out his grounds for resisting the application

(7) Where the Court refuses to grant a PCO on the papers the applicant may request the decision to be reconsidered at a hearing. A request under this paragraph must be filed and served within 7 days after service of the reasons for refusal to grant the PCO.

(8) Where an application for a PCO has been refused at a hearing in the High Court the applicant may apply to the Court of Appeal for permission to appeal that refusal. Such application must be made within 7 days of the decision of the High Court.

(9) An application to set aside a PCO must be made within 7 days of the PCO being granted. A PCO will only be set aside where there are compelling reasons for doing so. An unsuccessful application to set aside a PCO will normally result in an award of costs against the applicant on an indemnity basis.

AMENDMENT TO PRACTICE DIRECTION PD54

Rule 54.20A – Protective Costs Orders

PCO without a hearing

20A.1 The Court will generally, in the first instance, consider an application for a PCO without a hearing. Where an application for a PCO has been made in or accompanying the Claim Form, the Court will usually grant or refuse the PCO at the same time that it makes the order giving or refusing permission to proceed.

20A.2 Where an application for a PCO is refused without a hearing then the court will not generally make an order for costs against the claimant. However, where an order as to costs is made against the applicant for a PCO in such circumstances the applicant's liability for costs will not normally exceed £1,000 in respect of each receiving party.

PCO hearing

20A.3 Neither the defendant nor any other interested party need attend a hearing on the question of a PCO unless the Court directs otherwise.

20A.4 Where the defendant or any party does attend a hearing on an unsuccessful renewed application for a PCO then the court will not generally make an order for costs against the claimant. However, where an order as to costs is made against the applicant for a PCO in such circumstances the applicant's liability for costs will not normally exceed £2,500 in respect of each receiving party.

Annex B

Extract from Davey v Aylesbury Vale District Council

“17. To the sources of policy and law referred to by Auld LJ, Robert McCracken QC for Mr Davey adds what is set out in art. 9 of the Aarhus Convention (ratified by both the UK and the EU):

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

This policy is explicitly adopted in the Public Participation Directive 2003/35/EC, Art. 3.7.

18. It is because of the need to keep the costs of environmental litigation down without encouraging or rewarding misconceived challenges that issues such as the present one arise. What we are asked to decide is whether, as a general rule, an order made following a full judicial review hearing that a successful defendant should recover its costs will entitle it not only to its acknowledgment costs but to any reasonably incurred preparation costs. Such a general rule, as James Findlay for the local authority stresses, would do no more than follow the practice in civil litigation; but, for reasons I have outlined, that is not a sufficient justification in public law.

19. Each side is able to point to an anomaly in the other party's case. Mr McCracken points out that a claimant who fails to obtain permission will have to pay the defendant's acknowledgment costs but not its preparation costs. Why then, he asks, should a claimant who has a good enough case to secure permission but who in the end loses be worse off? Mr Findlay points out that a claimant who succeeds at trial will recover all his costs including preparation costs. Why, he asks, should the same not be the case for a successful defendant?

20. If there is a satisfactory answer to each of these questions, it has to lie in the calibrated exercise of the court's power – a power which is in effect an obligation - to adapt its provision for costs to the conduct and outcome of the case before it. The method of fine-tuning an award of costs to a defendant who has successfully opposed the grant of permission, set out by this court in Mount Cook (above), illustrates the proper approach. Absent such fine-tuning, the position is as described by Collins J in R (Thurman & Earle) v LB Lewisham (CO/2806/2003) :

" The costs of dealing with a threatened claim are generally irrecoverable, unless a claim is made, gets permission and eventually the claimant loses."

21. Taking the same approach, these seem to me to be the appropriate guidelines for dealing with the present problem. They should be read subject to the caveats set out in the judgment of the Master of the Rolls.

(1) On the conclusion of full judicial review proceedings in a defendant's favour, the nature and purpose of the particular claim is relevant to the exercise of the judge's discretion as to costs. In contrast to a judicial review claim brought wholly or mainly for commercial or proprietary

reasons, a claim brought partly or wholly in the public interest, albeit unsuccessful, may properly result in a restricted or no order for costs.

(2) If awarding costs against the claimant, the judge should consider whether they are to include preparation costs in addition to acknowledgment costs. It will be for the defendant to justify these. There may be no sufficient reason why such costs, if incurred, should be recoverable.

(3) It is highly desirable that these questions should be dealt with by the trial judge and left to the costs judge only in relation to the reasonableness of individual items.

(4) If at the conclusion of such proceedings the judge makes an undifferentiated order for costs in a defendant's favour

(a) the order has to be regarded as including any reasonably incurred preparation costs; but

(b) the 2004 Practice Statement should be read so as to exclude any costs of opposing the grant of permission in open court, which should be dealt with on the Mount Cook principles.”