

Substantive issues: Access to justice

ClientEarth intervention

Wednesday 28 October 3-5.30pm (2-4.30pm BST)

Thank you. Honourable chair, honourable delegates,

1. General introduction

Access to justice is the backbone of the Convention. Ensuring adequate access to justice is necessary to safeguard all of the other rights the Convention seeks to protect.

Access to justice and the mechanisms intended to ensure it should not be seen as a nuisance. Rather, they improve the quality of decision-making whilst contributing to enhanced environmental protection. It is important, then, to safeguard access to justice even – perhaps particularly – in times of crisis.

I'd like to highlight a number of important (and troubling) developments. I'll refer to some state parties to demonstrate the kinds of regressive slides we are concerned about – but these references are illustrative only – they are not necessarily the most egregious examples.

2. Persecution of environmental defenders in Belarus

First: a central topic for the Working Group is protection of people against harassment and other forms of retaliation where they are using the rights under the Convention.

We already heard earlier today about the persecution of persons using their Convention rights in **Belarus**. These people were not able to obtain a fair trial and the nature of their imprisonment was condemned at the last Meeting of the Parties – and this condemnation accepted by Belarus.

It is of the utmost importance that Parties condemn these practices in order to uphold and prioritise access to justice in *all* Parties to the Convention.

3. EU Aarhus Regulation amendment

Second: we draw attention to the **EU's** proposal to amend its Aarhus Regulation. We have some concerns about these proposals. Whilst a colleague will consider this in more depth under item III, for now, I simply highlight how important the engagement and commitment of the Parties to this Convention is to ensure that the EU will truly comply with all aspects of Art. 9(3) of the Convention.

4. Proposals in MS to restrict access to justice

Finally, we see in a number of Parties, proposals or the adoption of measures that restrict access to justice. This backsliding is highly concerning. We see this in a number of Parties but pick up just a few examples:

- a. **Bulgaria:** First, as the delegates will be well aware, there continues to be a caution imposed on Bulgaria for failing to remedy certain access to justice failures. However, Bulgaria has not shown any further willingness to improve the situation. Rather, it has adopted a number of legal reforms that were explicitly intended to restrict access to justice for NGOs, by increasing costs and limiting certain cases to one-instance court review. This is now the subject of a new

communication against Bulgaria before the Committee. This open disregard for the Convention's requirements is deeply alarming.

- b. COVID related developments:** Second, COVID is challenging for all of us and requires us to adapt, as demonstrated by today's remote meeting. However, as the Committee has made clear, restrictive measures should be limited to what is absolutely necessary and the minimum requirements of the Convention still need to be observed. However, we understand that this approach has not been followed in all Parties. In fact, in some, access to justice rights are being unjustifiably limited.

In **Hungary**, for instance, there has been significant relaxation to permitting requirements and this continues in spite of the end of the designated 'emergency situation'. In addition to posing enormous environmental risks, this also undermines public participation rights and access to justice. Because there is no permitting process, people are not informed about proposed activities before they begin. And, removal of the need for a permit also removes the need for public authorities to comprehensively engage with proposals – the usual assessments and evidence do not exist – making challenging decisions or obtaining redress incredibly hard.

In **Ireland**, there have been numerous problematic developments and failures in response to the pandemic which seriously jeopardise people's Convention rights. Two examples: first: Recent legislation allows for the conduct of administrative appeals via an audio-only telephone line. This has already been used on a number of appeals in forestry, despite the practical issues this created having been highlighted to authorities. Fairness and effectiveness of review are compromised.

Second: persons considering the need for judicial review are seriously impeded. An Bord Pleanála, the appeals body for planning decisions and decision maker for strategic developments still does not provide for online public access to its file. – It only holds physical files in Dublin. It is essential for anybody contemplating judicial review to inspect these files. Legal restrictions – not to mention the health risks – associated with travel make this practically impossible for many people. Meaning they are effectively precluded from accessing justice. There are similar issues in **Poland** where 90% of courts are closed or have restricted access yet the vast majority of case files are kept as physical copies only in court buildings.

I emphasise these are just two issues – drawn from a plethora of concerns raised by colleagues in Ireland.

- c. Planning acceleration:** Third, we are concerned that a purported need to accelerate the planning process is being used as a justification for restricting access to justice across a range of countries and in various different forms.

Access to justice – and the processes that seek to secure it – are frequently perceived as an obstacle to speedy development. There seems to be a sense that by removing access to justice rights and mechanisms, the planning process will proceed more quickly and more



effectively. But, in reality, this approach does not accelerate these initiatives. Removing these important safeguards leads to less legal certainty and, as a result, increases the risk of litigation.

Overall, our experience indicates that planning processes function better where access to justice is embedded from the outset. Enabling people to engage in meaningful ways will lead to enhanced community buy-in; less uncertainty and more timely and effective justice.

We are seeing moves in this direction in **the UK**. Major infrastructure projects are fast-tracked through a process that limits scrutiny of individual projects. Permitted development rights – with no public participation – are being extended to cover more substantial types of development. More worrying and radical proposals were published in August 2020. Government is seeking an “overhaul” of the country’s planning system that will “streamline” the process and “cut red tape”.

[In Ireland, we have seen legislative proposals to severely restrict the ability of people and environmental NGOs to challenge public decisions across a range of areas. Its proposals include tightening standing rules and amending costs rules increasing the financial risk and impact of challenging public decisions in a country where costs of litigation are amongst the highest in the EU. These proposals present a significant and unjustified constraint on access to justice in Ireland.]

It is very concerning that the general approach seems to be to remove and reduce scope for public engagement across planning processes.

- d. **Reforms:** Finally, we are concerned about reforms to processes integral to access to justice. For instance, an Independent Review of Administrative Law is underway in **England and Wales**. The Review is assessing judicial review and whether it strikes the right balance between enabling effective public decision-making and enabling citizens to challenge unlawfulness. An initial Call for Evidence closed earlier this week. We are concerned that the government intends to narrow the scope of judicial review – severely impeding access to justice including on environmental matters

5. **Closing:**

To conclude, we appeal to the Parties to take a clear and robust stance against the persecution of environmental activists in Belarus. These developments are deeply disturbing and must be condemned.

Access to justice is the keystone of this Convention. We ask the Parties to acknowledge the general regressive trend we have identified and we trust our concerns about this are shared. And, in light of the critical importance of access to justice, we ask Parties to denounce, cease and reverse any backsliding in this regard.

Thank you very much.