Environmental
Law Foundation

access to environmental justice for all

Submission re: Non compliance of UK government with article 9 of the Aarhus Convention.

This submission is made in support of the Kent Environment and Community Network (KECN) complaint to the Compliance Committee on non compliance with article 9 of the Aarhus Convention ('the Convention').

A. Introduction

1. **The Environmental Law Foundation** (E.L.F.) is the leading national UK charity founded in 1992 that helps people use the law to protect and improve their local environment and quality of life. Through its network of specialist lawyers and consultants across the UK, E.L.F. provides free advice and continuing support to those in need of assistance[1].

2. **The KECN** is a recently constituted environmental organisation which we set up in order to campaign for environmental justice primarily in Kent through measures such as the sharing of expertise and resources with other campaigning groups and individuals.

3. KECN has expressed its concerns to E.L.F regarding changes to local government and planning that have meant a decreasing amount of public participation in environmental decision making by local authorities. As noted by KECN the Local Government Act 2000 introduced the "Cabinet System" and abolished many decisions by way of committees. Additionally, third parties have no right of appeal in

[1] Further information on the E.L.F. from: http://www.elflaw.org/site/

6

planning applications and therefore there is no administrative review of the factual evidence available to the public unless the government decides to 'call-in' an application for its own determination when it may require an inquiry to be held. However, government policy is that there should be few occasions when it will need to exercise its powers of 'call-in' for the determination of planning applications.

4. In practice, the only remedy available is judicial review. However, judicial review is not available for the review of the factual findings of the decision maker but is restricted to reviewing the procedural legality

5. The submissions made by KECN can be categorised as follows:

(a) A breach of Article 9 (2) (b): This requires that members of the public concerned having a sufficient interest must have access to a review procedure before a court of law/and or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6. (Article 6 deals with public participation in specific activities listed in Annex 1).

This provision has been implemented subsequently by article 3(7) EU Public Participation Directive 2003/35/EC (PPD Directive)

(b) A breach of Article 9 (3): This provides a catch all for those environmental decisions not falling within article 6 and requires review procedures for members of the public to challenge the 'acts and omissions of private persons and public authorities which contravene provisions of its national law relating to the environment.' Arguments advanced in relation to Article 9(2) and (4) will apply therefore equally here.

(c) A breach of Article 9 (4): Review procedures established in compliance with the Convention must provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

B . Breaches of Article 9 (2) (b)

7

6. The failure to provide any appropriate mechanism for the review of article 6 decisions by way of a challenge to the substantive legality of a decision is a breach of both EU law and the Convention.

7. KECN submit that the failure by the UK Government to provide any third party rights to review the substantive as well as the procedural legality of planning decisions is in breach of Article 9(2) (d). For reasons outlined below it is argued that rights to review by way of judicial review are an inadequate transposition. Additionally, it is submitted that the wording 'substantive' review must be given meaning in the context of UK jurisprudence and that the current judicial review system only applies to the legal substance of a decision and not to a review of the factual findings.

8. Research into implementation of the Convention by each Party [2]refers to other some European jurisdictions that are not limited to reviews only on the legal merits of decisions taken by public authorities. In Portugal, for instance, there is provision for the public to bring a Popular Action that takes the form of any civil or administrative judicial procedure. In particular the law (as expressed at the date of publication in this document) regulating urban and spatial planning (Decree-law 380/99 of 22-9) expressly states the right of popular action to all those with an interest to directly challenge local and spatial plans.

9. With regards its conclusions on researching the position in the UK the report explicitly acknowledges that[3]:

> 'The lack of a right to public inquiries/hearings in environmental matters may have the result of reducing access to justice as decision-making may be, or be seen to be, operating behind closed doors.'

10. The report further concludes that:

> ' The lack of a right to legal representation in public inquiries/hearings is able to act as a barrier to an effective right to access (likewise with regard to a lack of a right to access to scientific representation in complex cases).'

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[2] Access to Justice in Environmental Matters - Country Reports and Case Studies, Part III, Portugal-United Kingdom, ENV.A.3.ETU/2002/0030

[3] Ibid, p.152

11. These comments reflect the experience of KECN when attempting to participate in the planning decision making processes within the UK. As stated by them, the failure to provide an adequate review forum where there is a sense of equality of arms enabling those opposed to development to test the evidence and adduce witness evidence is fundamentally unfair and inequitable.

12. Article 9(2) must be read in conjunction with Article 9(4) requiring that procedures provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

In the comprehensive Report prepared by IEEP on behalf of WWF-UK[4] it is noted that the concept of 'effective remedies' in Article 9(4) of the Aarhus Convention is clearly derived from Article 13 of the European Convention of Human Rights (ECHR). Thus, full compliance with the Convention requires those whose rights are affected, an effective remedy before a national authority.

13. This submission supports the contention of KECN that judicial review does not provide the public with an effective remedy and therefore is not fair and equitable. E.L.F. supports the view that in the planning context, in particular where there are significant environmental concerns and/or an individual's quality of life is affected, there is a need to provide appropriate review mechanisms that allow for access to a tribunal or court that has powers to review both facts and law.

14. However, whatever approach is adopted certain minimum legal standards must be met.

15. The IEEP report suggests that the notion of 'fairness' incorporated into article 6 ECHR has an obvious similarity to the requirement under Article 9 (4) of the Convention for procedures to be 'fair and equitable'.

16. There has been extensive case law on what constitutes fairness under article 6 ECHR. In order to be able to engage article 6 it must first be demonstrated that the hearing concerns the determination of individual civil rights and obligations.

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[4] Compliance by the European Community with its obligations on access to justice as a party to the Aarhus Convention, an IEEP Report for WWF-UK, June 2009

17. However, where there is a dispute concerning such a right it may be possible to argue that fairness is not achieved without access to a court. Significantly in this context, in Hatton v UK[5] the court found that judicial review did not provide sufficient scope of review of complaints about the impact of an increase in night flying on the applicants' private and family lives and homes and there was a finding that there had been a breach of Article 13 (effective remedies) by the UK government. Similarly in Powell and Rayner[6] the Commission found a violation of Article 13 since there was no possibility of action in nuisance for the increase in noise, no possibility of compensation and official noise control measures were ineffective.

18. In Okyay v Turkey[7] the Court found that domestic rights to a healthy and balanced environment coupled with a right to compensation where authorities failed to comply with court orders gave rise to rights of access to a court. The applicant's civil rights were engaged if one took these proceedings as a whole.

19. The position in the context of Article 13 ECHR is not straightforward or clear.

20. Nevertheless, it is submitted that there is sufficient evidence that the situation in the UK does not provide a sufficiently fair and equitable review procedure to comply with the Convention. Moreover, in the context of planning matters it is argued that an any improvement to the costs procedural rules will not provide a sufficient cure to the breach. Instead, for their to be 'fairness' there must be a re-balancing of the equality of arms so that where individuals are exposed to serious health consequences or serious interference in their private and family life the review mechanisms should allow for a access to a court with powers to consider both issues of fact and law.

C. Breaches of Article 9 (4)

21. There has been much judicial activity in relation to this area of concern.

22. The European Commission sent a formal notice to the UK under article 226 of the EC Treaty in October 2007 in relation to a complaint for breach of the EU Directive

[5] Hatton v UK (36022/97) (2003) 37 E.H.R.R. 28

[6] Powell and Rayner v UK (9310/81) (1990) 12 E.H.R.R 355

[7] Okyay v Turkey (36220/97) (2006) 43 E.H.R.R 37

brought by CAJE (coalition for access to justice – a coalition of non governmental organisations, including E.L.F).

23. CAJE argues that current costs rules relating to the judicial review procedures is prohibitively expensive leading to many litigants unable to pursue challenges. The normal rule in the UK is that the loser must pay the winner's legal costs (ie: that costs 'follow the event'). At the beginning of a case applicants may apply for a protective costs order – this may limit the costs the public authority may recover at the end of the case (if successful). However, following the approach laid down by the Court of Appeal in R on the application of Cornerhouse v Secretary of State for Trade and Industry (2005) EWCA Civ 192 such orders are available only where cases raise matters of 'general public importance.'

24. Many environmental cases fail to satisfy this narrow test. Recent research produced by the E.L.F supports and underlines how a failure by the UK government to amend costs rules amounts to a significant barrier to accessing environmental justice for ordinary litigants.

25. The report ' Cost Barriers to Environmental Justice ' was published in January 2010 and notes that during 2005-2009 over half of all cases (54 in total) dealt with by E.L.F and considered suitable for judicial review did not proceed for reasons of costs. Nearly 60% of the claimants earned less than £15,000 a year. For these clients the availability of protective costs orders made no practicable difference.

26. A decision on the EU complaint is pending.

27. In *Commission v Ireland* (16th July 2009) the European Court of Justice confirmed that judicial discretion cannot be regarded as valid implementation of the obligations arising from EC Directives:

> 92. *As regards the fourth argument concerning the costs of proceedings, it is clear from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, that the procedures established in the context of those provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures. Such a condition does not prevent*

the courts from making an order for costs provided that the amount of those costs complies with that requirement.

93. *Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts.*

94. *That mere practice which cannot, by definition, be certain, in the light of the requirements laid down by the settled case-law of the Court, cited in paragraphs 54 and 55 of this judgment, cannot be regarded as valid implementation of the obligations arising from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35.*

95. *The fourth argument is thus well founded.* (own emphasis added)

28. It has been argued by CAJE that a fundamental problem with the 'costs follow the event' rule is that although a claimant in an environmental case can control its own legal costs it has no control over the costs of the other parties. As such, its liability is potentially open ended. For example, in one E.L.F case a pensioner with limited income was concerned about the loss of a local village green.

29. Ultimately, a decision taken by a planning inspector on the registration of the land as a village green was inconsistent with the facts and the law. The client was advised by Queen's Counsel on a pro bono basis to judicially review the decision and apply for a p.c.o. Subsequently, the High Court ruled that the case did not satisfy the relevant tests of public importance and a p.c.o was rejected. Even at this very preliminary stage of proceedings the Council claimed costs of £16,500. As a result of these costs the client decided to withdraw from the case.

30. Environmental NGO's have also complained of facing bills of tens of thousands of pounds and in one case nearly £200,000 for bringing judicial review cases[8] The Milieu Ltd reports commissioned by the European Commission suggest that these levels of costs are much higher than in other EU countries[9]. Indeed, it is clear that in other similarly sized jurisdictions within the EU (such as France or Germany) the level of costs that might be incurred by a claimant bringing an environmental legal challenge is very much less than in the UK.

31. In May 2008, a Working Group on Access to Justice published "*Access to Environmental Justice in England and Wales*"[10].

32. The remit of the Working Group was to examine whether current law and practice prevented concerned individuals and groups from achieving access to justice in environmental matters and to make recommendations where such barriers existed.

33. The Report summed up the UK position in its foreword:

> "*For the ordinary citizen, neither wealthy nor impecunious, there can be no doubt that the Court's procedures are prohibitively expensive. If the problems identified in this report are not addressed it will not be long before the UK is taken to task for failing to live up to its obligations under the Aarhus Convention*". (emphasis added)

34. The Working Group also undertook comparative research by examining the position on costs and injunctions in France, Germany, Hungary, Italy, the Netherlands and Spain. In most other jurisdictions examined it was noted that a "loser pays" principle applies in environmental public law proceedings, but this principle was qualified by a number of important factors. In particular:

> **(1)** It is more usual for the court to decide that the parties are to bear their own costs in public law proceedings – this being the general rule rather than the exception;

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[8] ENDS report 420, January 2010.

9 See the Milieu Ltd Reports undertaken for the European Commission. The UK report and the full suite of reports can be found at: http://ec.europa.eu/environment/aarhus/study_access.htm

10 Available at: http://www.wwf.org.uk/search_results.cfm?uNewsID=656

(2) In all jurisdictions examined the costs payable are capped by a professional body/statutory scale and, in comparison to the UK, such costs are usually very limited (i.e. in the low thousands of Euros and not tens or hundreds of thousands); and

(3) In some of the jurisdictions it is the case that natural persons challenging public law decisions can be ordered to pay costs only in exceptional circumstances,

35. There has been no formal response to date from the UK government to the findings of the 'Sullivan report'.

36. There are currently two complaints before the Aarhus Convention Compliance Committee[11] concerning the issue of costs in the UK. Complaint number 27[12], brought by the Cultra Residents' Association, concerns a costs order amounting to just under £40,000 incurred by them in respect of an unsuccessful judicial review of a decision to expand Belfast Airport. Complaint number 33[13], brought by Client Earth, concerns a decision on the part of the Marine Conservation Society not to pursue judicial review against the Port of Tyne Authority because of the possibility of incurring an adverse order for costs. CAJE submitted an Amicus intervention to the Committee in respect of both complaints[14].

37. Complaint number 27 was discussed by the Compliance Committee in July 2009 (CAJE attended to make observations) and complaint number 33 was discussed in September 2009.

38. A finding is awaited from the Compliance Committee on this issue.

Lord Justice Jackson's review

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[11] **Communications ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33**

[12] Available at: http://www.unece.org/env/pp/compliance/Compliance%20Committee/27TableUK.htm

[13] Available at: http://www.unece.org/env/pp/compliance/Compliance%20Committee/33TableUK.htm

[14] Amicus intervention available via either of the two links above

39. On the 14 January 2010 Lord Justice Jackson concluded his year-long review of Civil Litigation Costs and published his final Report (available at: http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf).

40. The Report recommends that all cases concerning judicial review, personal injury and clinical negligence should be subject to qualified one way costs shifting.

41. Chapter 30 makes specific reference to the Aarhus Convention (including Article 9(4) and the requirement for contracting Parties to provide injunctive relief (as appropriate) and be fair, equitable, timely and not prohibitively expensive). The Report also refers (*inter alia*) to: (1) CAJE's ongoing complaint against the UK in respect of the prohibitive costs of environmental litigation; (2) outstanding complaints against the UK currently being examined by the Compliance Committee; and (3) CAJE's meeting with His Lordship on 23rd July 2009.

42. The Report cites six principal reasons for its conclusion, the first of which is that it is "the simplest and most obvious way to comply with the UK's obligations under the Aarhus Convention".

43. This appears to be an explicit recognition that the UK is currently not in compliance with the provisions of Article 9(4) of the Convention, in that "it is not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the very considerable financial risks involved" (paragraph 4.1 (iv)).

44. Paragraph 4.1 also concludes that it is undesirable, for reasons stated by the Court of Appeal, to have different costs rules for environmental judicial review and other judicial review cases (sub-section ii) and that the existing PCO regime does not protect claimants from excessive costs liability because it fails to provide certainty, is expensive and can come into play too late in the procedure (sub-section vi).

D. Conclusion

45. There is mounting pressure on the UK government to take action to properly implement Article 9(4) of the Aarhus Convention. The arguments suggesting costs

15

are a significant barrier to the achievement of environmental justice appear overwhelming.

46. Less consideration has been given as yet to whether the review mechanisms put in place within the UK fully comply with Articles 9 (2) (3) and (4) in so far as the procedural rules of judicial review operate significant barriers to the achievement of fairness and equity within the system.

47. In the submission of E.L.F there are also strong arguments in favour of the need for greater access to the courts in certain planning decisions by way of third party appeals.