ACCC/C/2014/100

In the matter of a communication to the Aarhus Convention Compliance Committee

(1) HS2 ACTION ALLIANCE LIMITED

(2) LONDON BOROUGH OF HILLINGDON

(3) CHARLOTTE JONES

Communicants

and

UNITED KINGDOM

Party Concerned

Communicants' outline reply to the United Kingdom's response to the Communication

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I. Introduction

1. The purpose of this document is to assist the Compliance Committee's consideration of the next steps in relation to this communication in the light of the UK Government's response dated 9 February 2015 and, specifically, to outline the main points that the Communicants will wish to develop at any hearing of this communication.

2. This is, by definition, only an outline reply, and therefore is not intended to be an exhaustive rebuttal of all the points made by the UK Government. Accordingly, silence on any issue should not be taken to indicate agreement. In particular, the Communicants do not propose at this stage to engage in a detailed factual rebuttal of the account given by the UK Government of the chronology relating to HS2, not least because that would at this stage be disproportionate in terms of the length and cost of documentation involved. If the Compliance Committee decides that the communication should now be progressed to a hearing, the Communicants may provide a rebuttal of specific points of particular relevance to the communication in advance of that hearing.

II. Preliminary issues: (a) LBH's standing and (b) domestic remedies

3. By way of introductory comment, the Committee is reminded that this communication relates to a plan/programme for what was described by a Supreme Court Justice in the domestic litigation as *"the largest infrastructure project carried out in this country since the development of the railways in the 19th century"* which *"will undoubtedly have a major impact on the environment"*.[1] That impact, in relation to Phase 1 alone, includes the destruction of 32 hectares of ancient woodland from 19 different sites, 4,800 hectares of farmland and 250 hectares of forest. 330 hectares of the land to be lost are deemed important habitats for wildlife, including 195 hectares of lowland woods and 60 hectares of lowland meadows. It has also caused very substantial blight to individuals living on or near the route (including within the London Borough of Hillingdon), some of whom will lose their homes as a result of HS2.

4. It is telling that, in responding to a communication relating to a matter with once-in-a-generation consequences for the environment, the UK Government has chosen to focus as much on procedural points of standing and domestic remedies as it does on the substance of the communication. This is particularly surprising given that:

   (1) The objection to the London Borough of Hillingdon's standing cannot in any event affect the admissibility of the communication given that there is no objection to the standing of the other two Communicants; and

   (2) The allegation of a failure to exhaust domestic remedies is made despite two of the Communicants (London Borough of Hillingdon and HS2 Action Alliance) having challenged the plan/programme which is the subject of this communication, namely the DNS, all the way to the UK Supreme Court.

5. The UK Government's apparent wish to defeat this communication on a technicality, without regard to the very serious issues raised by the substance of the communication, is without merit and should be rejected.

[1] ***R (HS2 Action Alliance Ltd & others) v. Secretary of State for Transport*** [2014] 1 W.L.R. 324 at para. 130.

(a) Standing

6. The UK Government objects to the standing of the London Borough of Hillingdon ("**LBH**") to bring this communication, on the basis that it not a "*member of the public*" within the meaning of Article 2(4) of the Convention, and thus not a "*member of the public*" entitled to make a communication under para. 18 of Decision I/7.[2]

7. The UK Government's case on this point rests upon the premise that it is not possible for a body such as LBH to fall within the definition of "*public authority*" in Article 2(2) of the Convention for some purposes and the definition of a "*member of the public*" in Article 2(4) for other purposes. That premise is incorrect. The proper analysis is that the appropriate categorisation depends on the capacity in which the body is acting. In the present case, we are not concerned with the actions of LBH as a regulatory decision-maker. We are concerned with the actions of a different body, namely the adoption of the DNS by the UK Government, which affects many constituents of LBH because the route of HS2 which the DNS endorses runs through a large part of Hillingdon. LBH thus brings this communication in a representative capacity on behalf of its constituents.[3] When acting in this capacity, LBH is a "*member of the public*" notwithstanding that when acting in certain other capacities (for example when defending a challenge by a local resident against a local planning decision made by LBH) it is a "*public authority*". There are a number of reasons why this is the proper conclusion.

8. First, the definitions in Article 2 of the Convention do not support the conclusion that the definitions "*public authority*" in para. (2) and "*member of the public*" in para. (4) are mutually exclusive for all purposes. In particular:

[2] This follows on from a recent unsuccessful attempt by the UK Government to persuade the Court of Appeal that LBH should not be entitled to costs protection in relation to litigation concerning HS2 on the basis that LBH is not a "*member of the public*". See ***R (HS2 Action Alliance & London Borough of Hillingdon) v. Secretary of State for Transport*** [2015] EWCA Civ 203, a copy of which is enclosed as Annex 1 hereto. The Court held that, contrary to the UK Government's submission, LBH was entitled to costs protection

[3] LBH has express power to challenge the acts of central Government in the interests of its constituents pursuant to s.222 of the Local Government Act 1972 (enclosed as Annex 2 hereto).

(1) There is clearly a degree of overlap between the Article 2 definitions: see most obviously the definition of *"the public concerned"* in para. (5) which clearly overlaps with *"the public"* in para. (4). This shows that the definitions were not intended to be completely mutually exclusive.

(2) Any *"natural or legal person"* falls within the term *"the public"* under para. (4) and yet such *"natural or legal persons"* can also fall within the definition *"public authority"* in para. (2)(b)-(c). This supports the view that a natural or legal person can be a *"public authority"* for some purposes but a *"member of the public"* for other purposes.

9. Secondly, the UK Government's position is contrary to the Compliance Committee's approach in ACCC/C/2012/68 where it found that a communication by the Avich and Kilchrenan Community Council was admissible (and thus that the Council was for the purposes of that communication a *"member of the public"*) notwithstanding that the Council had statutory duties and would thus be within the definition of a *"public authority"* under Article 2(2)(b) of the Convention (*"natural or legal persons performing public administrative functions under national law"*).[4] The Compliance Committee must have considered that these two terms were not for all purposes mutually exclusive; otherwise, by virtue of being a *"public authority"* for some purposes it could not have been a *"member of the public"* for the purposes of this particular communication.

10. Thirdly, the UK Government's reliance upon the *Aarhus Convention Implementation Guide* is misplaced. There is nothing in the *Implementation Guide* which supports the view that a legal or natural person which is in some contexts a *"public authority"* within the meaning of Article 2(2) cannot in other contexts be a *"member of the public"* within the meaning of Article 2(4). To the contrary, p.48 of the *Implementation Guide* supports the Communicants' submission that the proper categorisation of a body depends upon the context

[4] At para. 81-83.

in which they are operating. On that page it is stated that "*it would seem that a single body may fall under this definition* [i.e. the Art 2(2)(b) definition of "*public authority*"] *with respect to a part of its activities, while other of its activities will be of a private nature.*"

11. Fourthly, there are sound reasons in principle why a local authority acting in a representative capacity on behalf of constituents who would otherwise have to bring proceedings themselves should be considered a "*member of the public*" for the purposes of Article 2(4) of the Convention and thus Decision I/7. The public authority in that context is not acting in its capacity as a regulatory decision-maker. The decision being challenged is not one of its own. It is a decision of a different decision maker which affects the people whom the authority represents. In this capacity the authority is acting on behalf of those who consider that the decision challenged adversely affects the environment and contravenes the law relating to the environment. Its position in this capacity is in substance little different from the "*associations, organisations or groups*" who are expressly brought within the definition of "*the public*" under Article 2(4). Indeed, in cases such as the present which concern large scale national infrastructure promoted by central government, the ability of local authorities to act on behalf of their constituents in holding national government to account for non-compliance with environmental law is crucial since the individual constituents will be less well placed in terms of funding, resources and co-ordination to bring such challenges on their own. It is striking in this context that a consequence of the UK Government's interpretation of Article 2 would be that a local authority in these circumstances could, consistently with Article 9 of the Convention, be precluded by domestic law from bringing a challenge on behalf of its constituents to a decision by national government, no matter how severe the alleged non-compliance with environmental law.

12. Fifthly, the suggestion by the UK Government that its interpretation "*reflects an approach evident in international law more generally whereby local authorities are seen as part of (an emanation of) the state*" (response, para. 19) is without merit. Two

examples are given: the ECHR and EU law. The position under the ECHR is the product of Article 34 ECHR, which limits standing to bring an application to "any person, nongovernmental organisation or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto". The wording is very different from Article 2 of the Aarhus Convention, as is the concept of a "*victim*" which does not exist in the Aarhus Convention. As for EU law, leaving aside the well-established proposition that its parent instrument is no ordinary international treaty (and thus not a good basis from which to draw the general proposition of international law advanced at para. 19 of the UK Government's response),[5] it is uncontroversial that local authorities can rely upon EU-derived law against central government, as happened without objection in the domestic litigation which preceded this communication. The case-law on the isoteric issue of the circumstances in which an unimplemented EU Directive can be relied upon directly in the Courts has no relevance to the Aarhus Convention which does not have direct effect. Ultimately, the proper interpretation of Article 2 of the Aarhus Convention falls to be determined by the wording of the Convention itself and is not assisted by tenuous references to other instruments which are differently worded and embody different concepts and purposes.

(b) Exhaustion of domestic remedies

13. At the outset of this section, the Communicants draw attention to the fact that the UK Government does not suggest that its submissions on exhaustion of domestic remedies justify the Committee reversing its preliminary determination of admissibility. Further, as noted at pp.34-35 of the Compliance Committee's *Modus Operandi*, the exhaustion of domestic remedies is not in any event a strict requirement.

14. The allegation that LBH and HS2 Action Alliance did not exhaust their domestic remedies in the present case is, with respect, bizarre given that:

[5] See e.g. Case 26/62 ***N.V. Algemene Transport- en Expeditie Onderneming Van Gend en Loos v Neder-Landse Tariefcommissie*** [1963] C.M.L.R. 105.

(1) LBH and HS2 Action Alliance challenged the subject matter of this communication, namely the DNS, through all three tiers of the UK court system: the High Court, Court of Appeal and Supreme Court. At every stage, they relied upon Article 7 of the Aarhus Convention as supporting their submission that adoption of the DNS was in breach of the SEA Directive.

(2) Whilst it is true that LBH's and HS2 Action Alliance's reliance on Article 7 of the Convention was expressed in the context of their submissions on SEA Directive, rather than as a free-standing ground of challenge, there is a simple reason for that: there is no free-standing domestic remedy in UK domestic law for breach of Article 7 of the Aarhus Convention. See ***Morgan v. Hinton Organics (Wessex) Ltd*** [2009] Env. L.R. 30 where Carnwath LJ held at para. 22: "*For the purposes of domestic law, the convention has the status of an international treaty, not directly incorporated. Thus its provisions cannot be directly applied by domestic courts, but may be taken into account in resolving ambiguities in legislation intended to give it effect*". The only relevant legislation in play in the domestic litigation was the SEA Directive, in which context Article 7 was relied upon. Aside from that, there was no domestic remedy to exhaust in relation to Article 7 *simpliciter*.

15. It is correct that Charlotte Jones, the Third Communicant, did not participate in the litigation before domestic courts. But it would be wrong to declare that this means that she cannot now participate in the communication. In particular:

(1) As noted above, LBH in challenging the DNS before the domestic courts acted in a representative capacity on behalf of its constituents who consider themselves to be adversely affected by the environmental impacts of HS2. Mrs Jones is one such constituent. LBH's exhaustion of domestic remedies was therefore on her behalf. In these circumstances, she cannot be criticised for failing to incur the time, stress and expense of participating personally in the litigation, particularly given the very high cost of taking a case through three tiers of the UK court system all the way to the Supreme Court..

(2) The underlying principle behind the principle that domestic remedies should be exhausted is that this may lead to any non-compliance with the Convention being corrected internally within the Party concerned, without the need to trouble the Compliance Committee. In the present case, however, there is no prospect that if Mrs Jones were to re-litigate the matters already litigated by LBH and HS2 Action Alliance in the domestic courts, she would achieve a different result to them. Those matters are now the subject of a binding judgment of the Supreme Court. Accordingly, to require her to go to the time and expense of litigating in the domestic courts would, in the words of the Compliance Committee's *Modus Operandi* (at p.35), *"not provide an effective or sufficient means of address"*.

III. The substance of the Communication

16. The Communicants make the following outline points of reply to the UK Government's Response on the substance of the Communication.

17. First, at para. 60 of its Response, the UK Government acknowledges that the DNS was subject to the requirements of Article 7 of the Convention.

18. The question for the Compliance Committee, therefore, is whether prior to the adoption of the DNS on 10 January 2012, the requirements of Article 7 had been complied with. The extensive references in the UK Government's Response (see in particular paras. 47-58) to what has happened after that date, as part of the process by which development consent is being sought and obtained for HS2, are not relevant. The requirements under Article 7 of the Convention for a plan or programme are separate and free-standing from the requirements under Article 6 of the Convention for subsequent decisions on whether to permit the project to which the plan/programme relates. Whether the project-level development consent process for the two phases of HS2 is compliant with Article 6 of the Convention is not a matter which is within the scope of the present communication. The focus of the present communication is solely on whether the preparation of the DNS was compliant with Article 7.

19. Secondly, the UK Government's Response repeatedly mischaracterises the Communication as being premised upon the general proposition that

compliance with Article 7 of the Convention requires a strategic environmental assessment ("**SEA**") in accordance with the SEA Directive (see for example paras. 8, 65 and 67). As set out at paras. 5, 11-12, 15 and 33-34 of Appendix I to the Communication, the Communicants' case is that:

(1) Article 7 requires that during the preparation of a plan or programme, there must be public participation which is *"effective"* and *"within a transparent and fair framework, having provided the necessary information to the public"*;

(2) This did not happen in the circumstances of the present case, because members of the public were not provided with sufficient information for them to make an informed judgment as to the relative environmental and other advantages and disadvantages of HS2 compared to the alternative options (see in particular paras. 11 33 & 34 of Appendix 1 to the Communication). Given the once-in-a-generation scale of HS2 and its acknowledged major environmental impacts (see para. 3 above), the circumstances required members of the public to be provided with information on how the environmental effects of HS2 compared to the alternative options before the plan/programme for HS2 was adopted in the form of the DNS which resolved that HS2 should be promoted instead of those alternative options. Without this information, members of the public could not effectively participate in the preparation of that plan/programme. The scale of the proposal meant that members of the public could not be expected to undertake this work themselves.

20. The Communicants have always said that SEA in accordance with the requirements of the SEA Directive would have been capable of securing compliance with Article 7 of the Convention in the circumstances of this case and would have avoided the deficiencies referred to in the foregoing paragraph (indeed, SEA is the normal means by which EU Member States give effect to Article 7 in the context of plans and programmes[6]). That is not the same thing,

[6] Note in this context the observations of the Compliance Committee in ACCC/C/2006/17 (European Community) that *"most Member States seem to rely on Community law when drafting their national*

however, as saying that Article 7 of the Convention always requires SEA. The requirements of Article 7 are context specific. What matters for the purposes of the present communication is that in the context of a plan/programme for the largest infrastructure scheme for a century with acknowledged potential for major environmental impacts, the information provided to the public about how the environmental impacts of the proposed scheme compared to those of the alternative options was not sufficient to enable effective public participation in the preparation of the plan within a transparent and fair framework.

21. Thirdly, the UK Government's response places great reliance on the scale of the consultation that took place prior to the adoption of the DNS. However, quantity is not a substitute for quality. Unless the public participation leading to the adoption of a plan or programme is "*effective*" and "*within a transparent and fair framework, having provided the necessary information to the public*", then the adoption of that plan or programme is contrary to Article 7 of the Convention regardless of how many people and/or representative bodies were consulted.

22. Fourthly, the points made at para. 68 of the UK Government's response, regarding the four aspects in which the Communication alleges that insufficient information was provided to consultees to enable the preparation and adoption of the DNS to be Article 7 compliant, rely upon a combination of: (a) material which was before the High Court and which nonetheless resulted in the conclusion, upheld by the Court of Appeal and not challenged by the Government in the Supreme Court, that the DNS had failed in significant respects to subject the reasonable alternatives to HS2 environmental assessment or public consultation;[7] (b) material which pre-dated the February 2011 consultation that led to the DNS, which formed no part of the preparation of that plan/programme, and which demonstrates that important alternative options had already been considered at and sifted out prior to the February 2011 consultation, supporting the conclusion that the latter did not represent "*early*" public participation "*when all options are open*" (as required by Article 6(4) taken together with Article 7 of the Convention); and (c) material that post-

legislation aiming to implement international obligations stemming from a treaty to which the Community is also a Party."

[7] See paras. 15, 17 and 19 of Appendix 1 to the Communication and the enclosures referred to therein.

dates the adoption of the DNS on 12 January 2012 and therefore is irrelevant to the question of whether that adoption was compliant with Article 7.

23. On the specific points made in the bullets following para. 68 of the UK Government's response, the Communicants will at any hearing of this Communication take the Compliance Committee through the documentation referred to by the UK Government and explain why it does not support the submissions made at para. 68, and in the meantime makes the following summary points:-

    (1) Environmental effects of the 'Y' network: the UK Government does not deny (nor can it) that prior to the adoption of the DNS, members of the public were not provided with information about the environmental effects either of the Y network or of the alternatives to it, despite the fact that the DNS was a plan or programme which resolved upon the Y network ahead of the alternatives.

    (2) Relative environmental effects of strategic alternatives to high speed rail: There was no public participation in, or consultation on, the pre-2011 Department of Transport work. The reports published in February 2011 as part of the consultation that led to the adoption of the DNS did not provide information on the relative environmental effects of high speed rail compared to other alternative strategies. Their focus was on non-environmental considerations and in particular the relative economic benefits of the various options looked at. The documents published at the same time as the DNS cannot assist the UK Government in demonstrating compliance with Article 7 since they were not available to the public prior to the DNS' adoption. The same goes for the Alternatives Report published as part of the Environmental Statement as part of the project-level development consent process for Phase 1 of HS2 after the DNS was adopted.

    (3) Relative environmental effects of alternative configurations for a high speed rail network. The historic work referred to by the UK Government under this heading pre-dated the preparation of the DNS and was not subject to or informed by public participation. By the time

of the February 2011 public consultation which led to the adoption of the DNS, many of the options which had been looked at in this early work had been 'sifted out' without any public consultation. Further, these options were ruled out without any consideration of, let alone consultation of, how their environmental impacts compared to those of the HS2 network which the DNS resolved upon: as Mr Justice Ouseley held in the High Court (para. 165), "*alternatives to the Y shape, that is the inverted A, the reverse E and S shapes have only been considered and rejected on their economic and business cases*" (a finding which was upheld by the Court of Appeal and not challenged by the Government in the Supreme Court).

(4) Relative environmental effects of an alternative route corridor for the proposed 'Y' network. Again, the UK Government's response relies under this heading upon a combination of (a) work which pre-dated the preparation of the DNS and was not subject to or informed by public participation and (b) material which post-dated the adoption of the DNS and is therefore irrelevant to whether that adoption was Article 7 compliant.

IV. Conclusion

24. There remain serious issues to be considered in this communication. Meanwhile, the development consent process for the HS2 project which has been and continues to be influenced by the Article 7 non-compliant plan/programme, the DNS, continues to be progressed by the UK Government. The Communicants therefore respectfully ask the Committee to:

(1) indicate that the UK Government's objection to LBH's standing to bring the communication, and its objection to the communication on the grounds that domestic remedies have not been exhausted, are without merit, so that the Communicants, the UK and the Compliance Committee can thereafter focus on the substance of the communication; and

(2) progress this communication to a hearing at the soonest convenient date, so that any findings of non-compliance by the Committee can be

taken into account by the UK before the development consent process has concluded.

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17 March 2015

Neutral Citation Number: [2015] EWCA Civ 203

Case No: C1/2015/0234

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE LINDBLOM
CO/11729/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2015

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE SULLIVAN
and
LORD JUSTICE LEWISON

- -

Between:

THE QUEEN ON THE APPLICATION OF HS2 ACTION ALLIANCE	**First Appellant**
-and-	
LONDON BOROUGH OF HILLINGDON	**Second Appellant**
- and -	
THE SECRETARY OF STATE FOR TRANSPORT AND ANOTHER	**Respondent**

- -
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Charles Banner (instructed by **Nabarro LLP Solicitors**) for the **Second Appellant**
James Maurici QC and Ms Jacqueline Lean (instructed by **Treasury Solicitors**) for the **Respondent**
The First Appellant did not appear and was not represented

Hearing date: 24th February 2015

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Judgment

Lord Justice Sullivan:

This is the judgment of the Court.

Introduction

1. The issue in this cross-appeal by the Respondent is whether a local authority, such as the Second Appellant, is entitled to the costs protection conferred on claimants in Aarhus Convention claims by Section VII of Part 45 of the Civil Procedure Rules and paragraph 5.1 of Practice Direction 45.

2. On the 9th December 2014 we dismissed the appeal by the First and Second Appellants against the Order dated 6th August 2014 of Lindblom J dismissing their claim for judicial review of the safeguarding directions made by the Respondent for Phase 1 of the proposed High Speed Two railway: [2014] EWCA Civ 1578.

3. Lindblom J ordered the Appellants to pay the Respondent's costs. There is no challenge to his decision to cap the First Appellant's liability at a maximum of £10,000 pursuant to CPR 45.41 and Practice Direction paragraph 5.1. The First Appellant has played no part in this cross-appeal. There was a dispute before Lindblom J as to whether the Second Appellant was entitled to costs protection under CPR 45.41 and Practice Direction 45 paragraph 5.1. Following an exchange of written submissions, Lindblom J concluded that the Second Appellant was entitled to such costs protection, and by Orders dated the 16th October 2014 and 17th October 2014 (amending the Order dated 6th August 2014) capped the liability of each of the Appellants at £10,000 under CPR 45.41 and paragraph 5.1 of Practice Direction 45. In this cross-appeal the Respondent challenges these Orders insofar as they confer costs protection on the Second Appellant.

CPR 45.41 - 44

4. Section VII of Part 45 of the Civil Procedure Rules makes provision for "Costs Limits in Aarhus Convention Claims", as follows:

> "**45.41**
>
> (1) This Section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.
>
> (2) In this Section, 'Aarhus Convention claim' means a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject. (Rule 52.9A makes provision in relation to costs of an appeal.)
>
> **45.42** Rules 45.43 to 45.44 do not apply where the claimant –

(a) has not stated in the claim form that the claim is an Aarhus Convention claim; or

(b) has stated in the claim form that –

(i) the claim is not an Aarhus Convention claim, or

(ii) although the claim is an Aarhus Convention claim, the claimant does not wish those rules to apply.

45.43

(1) Subject to rule 45.44, a party to an Aarhus Convention claim may not be ordered to pay costs exceeding the amount prescribed in Practice Direction 45.

(2) Practice Direction 45 may prescribe a different amount for the purpose of paragraph (1) according to the nature of the claimant.

45.44

(1) If the claimant has stated in the claim form that the claim is an Aarhus Convention claim, rule 45.43 will apply unless –

(a) the defendant has in the acknowledgment of service filed in accordance with rule 54.8 –

(i) denied that the claim is an Aarhus Convention claim; and

(ii) set out the defendant's grounds for such denial; and

(b) the court has determined that the claim is not an Aarhus Convention claim.

(2) Where the defendant argues that the claim is not an Aarhus Convention claim, the court will determine that issue at the earliest opportunity.

(3) In any proceedings to determine whether the claim is an Aarhus Convention claim –

(a) if the court holds that the claim is not an Aarhus Convention claim, it will normally make no order for costs in relation to those proceedings;

(b) if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant

> to pay the claimant's costs of those proceedings on the indemnity basis, and that order may be enforced notwithstanding that this would increase the costs payable by the defendant beyond the amount prescribed in Practice Direction 45.

5. Practice Direction 45 provides:

> "5.1 Where a claimant is ordered to pay costs, the amount specified for the purpose of rule 45.43(1) is –
>
> (a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;
>
> (b) in all other cases, £10,000.
>
> 5.2 Where a defendant is ordered to pay costs, the amount specified for the purpose of rule 45.43(1) is £35,000."

In the Civil Procedure Rules a Claimant means a person who makes a claim: see the definition in CPR 2.3(1).

Factual background

6. The factual background to the appeal is set out in the judgment of Lord Justice Sullivan: [2014] EWCA Civ 1578. The Appellants' claim form stated that the claim was an Aarhus Convention claim. In support of the proposition that the claim was an Aarhus Convention claim the claim form referred to the pre-action protocol letter dated 29th July 2013 sent on behalf of the First Appellant. In his acknowledgement of service the Respondent did not deny that the claim was an Aarhus Convention claim. The Respondent had understood that the claim for Aarhus costs protection was limited to the First Appellant because the pre-action protocol letter was sent on behalf of the First Appellant. Whether or not there was a misunderstanding between the parties prior to the 6th August 2014 when Lindblom J handed down his judgment, before this Court there was no dispute that the Appellants' claim for judicial review had proceeded upon the basis that the Respondent's decision to make the safeguarding directions was subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25th June 1998 ("the Aarhus Convention").

The Aarhus Convention

7. Article 9 (Access to Justice) of the Aarhus Convention provides (so far as relevant) as follows (emphasis added):

> "…2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned"
>
> (a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, 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 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedure prior to recourse to judicial review procedures, where such a requirement exists under national law.

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 ..."

8. "Public authority" is defined in Article 2(2) as:

(a) Government at national, regional and other level;

> (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
>
> (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
>
> (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.
>
> This definition does not include bodies or institutions acting in a judicial or legislative capacity;

"The public" and "The public concerned" are defined in Articles 2(4) and (5), respectively:

> "4. The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;
>
> 5. "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental rotection and meeting any requirements under national law shall be deemed to have an interest."

Lindblom J's Order

9. In his written submissions to Lindblom J the Respondent did not dispute that the claim was an Aarhus Convention claim. The Respondent submitted that the Second Appellant was not a "claimant" for the purposes of paragraph 5.1 of Practice Direction 45 because the provisions of CPR 45.41-44 and Practice Direction 45 had to be construed against the background that they were intended to implement the protections conferred by the Aarhus Convention, and the Convention drew a distinction between "the public" or "the public concerned" with environmental decisions, upon whom it conferred rights; and "public authorities", upon whom it imposed duties. It was submitted that the Second Appellant was a "public authority" for the purposes of the Aarhus Convention; was not therefore entitled to the protection conferred by Article 9(3) on "members of the public"; and that "claimant" in paragraph 5.1 of Practice Direction 45 should be construed accordingly.

10. In his Order dated 16th October 2014 Lindblom J rejected that submission for the following reasons:

> "(1) In my view the provisions for costs protection in Aarhus Convention claims are clear, complete, and self-contained. The costs capping regime in CPR r.45 was not made to apply only

to claimants who are members of the public. It does not provide that claimants other than members of the public are disqualified from the costs protections it affords. It relates to claims of a particular nature rather than to any particular type or category of claimant. As Mr Elvin submits, the provisions of CPR r.45.43(1) and para 5.1 of Practice Direction 45 entitle all claimants in claims challenging decisions within the ambit of the Aarhus Convention to a costs cap at whichever of the two specified levels is appropriate. There is nothing in CPR r.45.41-44 or Practice Direction 45 to indicate otherwise.

(2) For the costs protection under these provisions to be engaged it is necessary only that the claim is an "Aarhus Convention Claim", as defined in CPR r.45.41(2). The definition of such a claim does not require the claim to have been brought by a member of the public. Para 5.1 of PD45 contemplates two distinct types of claimant. The first is an "individual", the second either "a business or other legal person" or someone who has issued a claim on behalf of such an organisation or body. The purpose of the distinction is to divide claims to which the higher level of costs protection applies from those in which the protection is at the lower level. In the second category of claimant, comprising businesses and other legal persons, there is no additional requirement for the claimant to be a non-governmental organisation. Local authorities and other public bodies are not excluded. Nor is there any qualification in terms of the claimant's means, or its ability to fund the proceedings, or the likelihood of its being able to meet from its own resources any order for costs which might be made in favour of another party.

(3) I recognise that the provisions of the Aarhus Convention – which "has the status of an international treaty, not directly incorporated" – may be taken into account in "resolving ambiguities" in legislation intended to give effect to it (as Carnwath L.J., as he then was, said in ***Morgan v Hinton Organics (Wessex) Ltd*** [2009] C.P. Rep. 26). However, I do not think one needs to resort, or should resort, to the Aarhus Convention itself as an aid to the interpretation of the provisions of CPR r.45.41, which are, I believe, entirely unambiguous.

(4) But if I were wrong about that, I would not accept Mr Mould's submission that the concept of access to justice for members of the public under article 9 of the Aarhus Convention must necessarily exclude a local authority bringing a claim in the interests of those living in its area. So far as I am aware, there is no case law to that effect, domestic or European. I note the decision of the Aarhus Convention Compliance Committee ruling admissible a communication made by Avich and

> Kilchrenan Community Council and the preliminary determination on admissibility in the recent communications made jointly by Hillingdon, HS2AA and Ms Charlotte Jones. But those decisions are not jurisprudence, and I do not think it would be right to give them any significant weight here. I also note Mr Mould's reliance on the comments made in the UNECE Aarhus Implementation Guide which emphasise the importance of several definitions, including those of a "public authority", the "public" and the "public concerned" in establishing the scope of the convention "in terms of the persons who should be bound by its obligations, as well as those who should be allowed to use the rights described..." But I do not think that guidance helps Mr Mould. It does not seem to me to preclude the possibility of one public authority acting in the public interest when it seeks judicial review of a decision made by another authority, even though its own administrative acts may themselves be subject to scrutiny by the court in proceedings brought by an individual claimant."

For convenience, we have numbered the four reasons.

Discussion

11. Mr. Maurici QC acknowledged that paragraph 5.1 of Practice Direction 45 divided claimants into two categories – individuals claiming as such and not as, or on behalf of a business or other legal person, and all other cases – and that, on the face of it, a local authority claimant fell within the latter category. He submitted that there were three reasons why this apparently unqualified category of claimants should be qualified by the exclusion of "Public Authorities" as defined in the Aarhus Convention:

    (1) Since Section VII of rule 45 dealt with "Costs Limits in Aarhus Convention Claims" and was expressed to apply to "a claim for judicial review …. which is subject to the provisions of the [Aarhus Convention]" (see rule 45.41(2) with emphasis added), it was necessary to refer to the terms and purpose of the Convention when deciding what was an Aarhus Convention Claim.

    (2) The new costs protection rules in Section VII of Rule 45 were intended to give effect to the access to justice rights conferred by Article 9 of the Aarhus Convention, but those rights were conferred only on "members of the public."

    (3) Lindblom J's interpretation of paragraph 5.1 of Practice Direction 45 would lead to "bizarre consequences". For example Central Government would be entitled to costs protection if it challenged an environmental decision made by a local authority.

    We will deal with these three reasons in turn.

12. We accept Mr. Banner's submission that the Respondent's reason (1) (above) ignores the words "of a decision, act or omission" in rule 45.41(2). Those words make it clear that whether or not a claim for judicial review is an "Aarhus Convention claim"

depends upon the nature, or claimed nature (see the last part of the rule), of the decision act or omission that is the subject of the claim. It is plainly necessary to have regard to the Aarhus Convention for the purpose of determining that issue, but once that issue has been resolved (affirmatively in the present case), further recourse to the Aarhus Convention is unnecessary for the purpose of deciding whether the claim for judicial review is an "Aarhus Convention claim" for the purpose of Section VII. Once it is established that a claim for judicial review is an "Aarhus Convention claim" the costs liability of a party to that claim is dealt with in rule 45.43 and Practice Direction 45 without further reference to the Aarhus Convention.

13. Turning to reason (2) (above), the Ministry of Justice said in Cost Protection for Litigants in Environmental Judicial Review Claims Outline proposals for a cost capping scheme for cases which fall within the Aarhus Convention Response to Consultation CP(R) 16/11, published on 28th August 2012, that the Government would put proposals based on the principles set out in the Response to Consultation to the Civil Procedure Rule Committee for consideration at the earliest opportunity. The Civil Procedure Rules were then amended by the inclusion of Section VII in Part 45 of the CPR. While it is true that the Response to Consultation referred to the fact that the Aarhus Convention "requires parties [to the Convention] to ensure the public have access to a procedure to challenge decisions subject to the public participation procedures…" (emphasis added); it is also the case that the Response to Consultation said that Aarhus costs protection would be limited to judicial review claims, thus excluding statutory appeals against environmental decisions, with the consequence that the amended rules in the CPR are not, in at least one important respect, Aarhus compliant: see The Secretary of State for Communities and Local Government v Venn [2014] EWCA Civ 1539 at paragraphs 33 and 34. There is also an indication that the Government was concerned that the new costs protection rules should not "undermine legal certainty and promote satellite litigation thereby increasing the potential for delay in the challenge process": see paragraphs 5 and 6 of "Conclusion and Next Steps" in the Response to Consultation.

14. Against this background, it would not be right to infer a limitation excluding "Public Authorities" as defined in the Aarhus Convention from those claimants who can benefit from costs protection under paragraph 5.1(b) of Practice Direction 45 in an Aarhus Convention case. To infer such a limitation would do that which the Government wished to avoid: it would undermine legal certainty and promote satellite litigation and thereby increase the potential for delay in the challenge process. Inferring a limitation upon the type of claimant who can benefit from costs protection under Practice Direction 45 would be doubly inappropriate because CPR 45.43 expressly provides that the Practice Direction may prescribe a different amount for the costs cap according to the nature of the claimant. Thus, if it is considered that a higher figure would not be prohibitively expensive for local authority claimants in general, or for particular kinds of local authority, eg London Borough or District Councils, then the Practice Direction may prescribe a higher figure, or figures. Mr. Maurici submitted that in Venn both Lang J at first instance and this Court on appeal had used the Response to Consultation as an aid to the interpretation of CPR 45.41. That is not correct. The wording of the rule was clear: it excluded statutory appeals. The Response to Consultation merely confirmed that the exclusion of statutory appeals was deliberate, it was not referred to for the purpose of altering the clear

wording of the rule: see paragraph 7 of my judgment, and paragraph 30 of Lang J's judgment in Venn [2013] EWHC 3546 (Admin).

15. Turning to reason (3), the words in the Practice Direction mean what they say. While interpreting the word "claimant" in Practice Direction 45 in accordance with the definition in CPR 2.3(1) (thus giving the word its ordinary and natural meaning) might conceivably have "bizarre consequences" as contended by the Respondent, those consequences are more theoretical than real. In the great majority of cases, Central Government will be the defendant, not the claimant, in any environmental challenge. Given the deliberately broad definition of "Public Authority" in Article 2(2) of the Aarhus Convention (see paragraph 8 above), it might be said that excluding from costs protection all "Public Authority" claimants including, arguably, those at the very lowest level (parish councils in the England), when they challenge on behalf of their local inhabitants major environmental decisions taken by Central Government, would produce consequences that were no less "bizarre".

16. For these reasons, which largely echo reasons (1)–(3) given by Lindblom J (see paragraph 10 above) the provisions of Section VII of Part 45 of the CPR and Practice Direction 45 are clear, and it is neither necessary nor appropriate to refer to the Aarhus Convention in order to place a gloss upon the ordinary and natural meaning of the word "claimant" in Practice Direction 45. It follows that the Respondent's cross-appeal must be dismissed.

Public Authority/member of the public

17. Underlying the Respondent's cross-appeal was the submission that:

> (i) Article 9(3) of the Aarhus Convention conferred protection against (inter alia) prohibitively expensive costs upon members of the public as defined in Article 2(4), and not upon public authorities, as defined in Article 2(2) of the Convention; and
>
> (ii) the two definitions were mutually exclusive, so that a public authority for the purpose of the Convention could not under any circumstances be a member of the public for the purpose of the protections conferred by Article 9(3).

18. The Second Appellant agreed with submission (i) (above), but contended in response to submission (ii) that, while a legal person could not be both a public authority and a member of the public in respect of the same environmental decision, the two definitions were not mutually exclusive in all circumstances. A local authority was a legal person, and a legal person could be either a member of the public (Article 2(4)) or a public authority (Article 2(2)(b) and (c)). If the environmental decision was that of the local authority itself, then it would be the "public authority" for the purpose of the Aarhus Convention. On the other hand, if the environmental decision was made by another public authority, and the local authority was challenging that decision for the purpose of protecting the interests of its inhabitants under section 222 of the Local Government Act 1972, then the local authority, as a legal person, was as much a member of "the public" as "associations, organisations or groups" that might be set up for the same purpose.

19. Lindblom J accepted the Second Appellant's submission: see reason (4) in paragraph 10 above. This conclusion of Lindblom J was obiter. Mr. Maurici invited us to decide that it was wrong, but in view of our conclusion as to the meaning of CPR 45.41-44 and Practice Direction 45 (paragraph 16 above), any view that we might express about this issue would also be obiter.

20. In Decision I/7 the Parties to the Aarhus Convention established the Compliance Committee. The Committee has power to consider communications brought "by one or more members of the public" concerning a Party's compliance with the Convention: see paragraph 12 of the Annex to Decision I/7. The Second Appellant (with others) has brought two communications to the Compliance Committee. On 2nd July 2014 the Committee made a preliminary determination that the two communications were admissible. The United Kingdom Government was notified of this preliminary determination. The United Kingdom Government's Response dated 9th February 2015 to the preliminary determination, drafted by Mr. Maurici and Ms Lean, included an objection to the admissibility of the communication from the First Appellant upon the basis that it was a "public authority" within Article 2(2) of the Convention and not a "member of the public". Unsurprisingly, Mr. Maurici's oral submissions before us echoed the Government's response to the Compliance Committee. The Second Appellant has yet to reply to the Government's response, but it is fair to assume that its reply will, in substance, repeat Mr. Banner's oral submissions before us.

21. In addition to the provisions of the Aarhus Convention itself, we were referred to the UNECE's Aarhus Implementation Guide (2014), the Compliance Committee's decision ACCC/C/2012/68, and the Opinion of Advocate General Kokott in Commission v UK [2014] 3 WLR 853. While the parties' submissions were ingenious, they were, with respect, shadow boxing, because there is nothing in those materials which deals expressly with the issue that is now before the Compliance Committee.

22. The Aarhus Convention is an international treaty. We were told that there are now 46 parties to the Convention, including the European Union. Given the breadth of the definition of "Public Authority" in Article 2(2), the implications of the Respondent's submission that a public authority (so defined) cannot be a member of the public for the purposes of Article 9(3) even if it is seeking to protect the interests of its own local inhabitants when challenging an environmental decision made by another public authority are potentially of considerable significance for all of the parties to the Convention. In these circumstances, the sensible course is to let the Compliance Committee complete its determination of the issue. We were told that the Compliance Committee may not be able to determine the issue before the end of this year, but there does not appear to be any real urgency given that the position under our domestic law is clear, and if it is thought appropriate CPR 45.43(2) confers a degree of flexibility as to the amount of the costs cap for different types of claimant.

Status: ✅ Law In Force

Local Government Act 1972 c. 70

Part XI GENERAL PROVISIONS AS TO LOCAL AUTHORITIES

Legal proceedings

This version in force from: **July 3, 2000** to **present**

(version 2 of 2)

222.— Power of local authorities to prosecute or defend legal proceedings.

(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—

(a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name, and

(b) they may, in their own name, make representations in the interests of the inhabitants at any public inquiry held by or on behalf of any Minister or public body under any enactment.

(2) In this section "local authority" includes the Common Council [and the London Fire and Emergency Planning Authority] [1] .

Notes

1. Words added by Greater London Authority Act 1999 c. 29 Sch.29(I) para.20 (July 3, 2000)

Modifications

Whole Document	Modified in relation to the joint board by Hull and Goole Port Health Authority Order 2011/939, art. 7(2)
	Modified in relation to the transfer of functions to the National Assembly of Wales by National Assembly for Wales (Transfer of Functions) Order 1999/672, Sch. 1 para. 1, art. 2
Pt XI s. 222	Modified in relation to the Combined Authority by Barnsley, Doncaster, Rotherham and Sheffield Combined Authority Order 2014/863, Pt 4 art. 11(b)

	Modified in relation to Greater Manchester Combined Authority by Greater Manchester Combined Authority Order 2011/908, Pt 4 art. 11(b)
	Modified in relation to the Combined Authority by Halton, Knowsley, Liverpool, St Helens, Sefton and Wirral Combined Authority Order 2014/865, Pt 4 art. 14(b)
	Modified in relation to certain bodies established by or under 1985 c.51 by Local Government Reorganisation (Miscellaneous Provisions) Order 1990/1765, art. 4(3)
Pt XI s. 222 - s. 223	Modified in relation to the Conservation Board for the Chilterns Area of Outstanding Natural Beauty by Chilterns Area of Outstanding Natural Beauty (Establishment of Conservation Board) Order 2004/1778, Pt IV art. 29(1)
	Modified in relation to the Conservation Board for the Cotswolds Area of Outstanding Natural Beauty by Cotswolds Area of Outstanding Natural Beauty (Establishment of Conservation Board) Order 2004/1777, Pt IV art. 29(1)
	Modified for the purposes of the functions, rights and liabilities assigned to Isle of Wight Council by virtue of SI 2010/1216 by Cowes Port Health Authority Order 2010/1216, art. 4(2)
	Modified in relation to National Park authorities by Environment Act 1995 c. 25, Sch. 8 para. 3(1)(g), Pt III s. 65
	Modified for the purposes of the functions, rights and liabilities assigned to Portsmouth City Council by virtue of SI 2010/1217 by Portsmouth Port Health Authority Order 2010/1217, art. 4(2)

Subject: Local government

Keywords: Local authorities' powers and duties; Proceedings; Prosecutions