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A pillar of justice

The impact of legislative reform
on access to justice in England
and Wales under the Aarhus
Convention

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Executive Summary

The Aarhus Convention and the UK

The UNECE Convention on Access to Environmental Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the “Aarhus Convention”)¹ was adopted in 1998, linking for the first time in binding international law, human rights and environmental protection.

The objective of the Convention as stated in Article 1 is to guarantee the rights of public access to information, participation in environmental decision-making, and access to justice in environmental matters, so that “...*present and future generations...*” have the right “...*to live in an environment adequate to his or her health and well-being...*”. The rights-based approach encompassed in these three ‘pillars’ established the Aarhus Convention as a new kind of environmental agreement that linked substantive and procedural environmental rights, sustainable development and the involvement of all members of the public. As such, the Aarhus Convention brought to the forefront the space for public interaction with public authorities to contribute to environmental protection and government accountability within a democratic context.

One of the most important domestic legal mechanisms, encompassing the dynamic of public participation, access to information and accountable governments, is Judicial Review (JR). JR represents almost the sole mechanism for civil society to challenge the decisions, acts and inactions of public bodies affecting the environment in the courts, and as such, it is imperative that it operates fairly and effectively.

Both the UK and the EU (the latter as a party in its own right) signed the Aarhus Convention in 1998 and ratified it in 2005. The EU then adopted two new Directives on access to environmental information and public participation in decision-making. The UK duly amended its statutory regime to ensure compliance with the new requirements in relation to the Convention’s information rights and public participation pillars.

In terms of compliance with the third pillar concerning access to environmental justice, the UK government relied on the existing process of JR alongside statutory reviews - at that point assuming they were Aarhus compliant. However, as set out below that has not proved to be the case and the UK remains to this day in non-compliance with certain provisions of the Convention.

Report Findings

In analysing data collected from the Ministry of Justice alongside anecdotal reports prior to 2013, this report aims to inform our understanding of the impacts of legislative reform on access to environmental justice in England and Wales.

It is fundamentally important in a democratic society that reforms to legislation do not undermine the right of any citizen to access justice. This is especially important in environmental matters where there is an accepted and well-established public interest in such cases coming forwards – win or lose.

Unfortunately, this report shows that legislative reforms governing the JR procedure (and some statutory reviews), which were criticised at the time as presenting a backwards step away from the type of access to justice required by the Convention, have done exactly that.

¹ United Nations Economic Commission for Europe (UNECE), Convention on access to information, public participation in decision-making and access to justice in environmental matters (‘The Aarhus Convention’) [Online] (1998). Available [here](#).

The reforms do now appear to be having damaging consequences on Aarhus Convention claims² and thus on access to justice in England and Wales.

The four key findings from this report are:

1. The number of Aarhus Convention claims peaked in 2015-16 but have now fallen back to 2013-14 levels. The continuing decrease in cases is a concerning trend given their clear public interest basis in the context of the continuing parlous state of the environment generally, and by extension, environmental governance.
2. There has been an increase in the number of challenges to the status of Aarhus Convention claims by defendant public bodies seeking to remove costs protection from claimants. This will be partly due to newly reduced adverse costs exposure from losing such applications. We await further data to confirm any trend in the actual success rate of such challenges out of the total challenges made annually. Most recently, there has been an unexplained steep fall in the number of challenges.
3. The number of Aarhus Convention claims granted permission to proceed has markedly decreased since April 2016. This decline follows the passage of the Criminal Justice and Courts Act 2015 (CJCA 2015), which introduced a new test requiring the High Court to refuse permission for JR where it appears to the court to be "*highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*"³. Notwithstanding this, Aarhus Convention claims continue to demonstrate a higher success rate at the permission stage when compared to JRs generally.
4. The average number of Aarhus Convention claims per month that are ultimately successful for the claimant at final hearing fell by two-thirds between April 2016 and May 2019. While it is possible the CJCA 2015 has played a role in this, it does not, in our view, fully explain the continuing decline. It is possible that some other factor(s) are in play here that bear further investigation, including judicial approach and standards of review, as well as possibly limitations in underlying environmental law. Despite this, Ministry of Justice Quarterly Statistics demonstrate that Aarhus Convention claims are approximately twice as successful as JR claims generally at first instance⁴.

The findings in (3) and (4) above, that Aarhus Convention claims have a higher success rate at permission and first instance trial compared to JRs generally, undermines the claimed need for the legislative reforms (in 2015 and 2017 – as set out in the sections below) to address an alleged increase in 'unmeritorious' cases. The data shows this is not the case and that these reforms have impacted adversely on Aarhus Convention claims and the UK's ability to comply with the Aarhus Convention.

JR is generally the legal mechanism of last resort available to claimants to address decisions by public bodies on environmental issues, many of which are of wide public interest. As above, the data suggests that legislative reforms have made this mechanism less accessible.

² By 'Aarhus Convention claims' we mean environmental claims covered by Article 9 of the Convention to the extent that they are incorporated in the domestic fixed costs protection jurisdiction under the Civil Procedure Rules part 45 (and associated Practice Direction). In practice this means environmental and planning Judicial Review and some statutory review, as defined in rule 45.41. To note that due to UK non-compliance this does not cover all claims covered by Article 9 of the Convention, such as private law claims in nuisance and negligence.

³ Section 84 CJCA.

⁴ I.e. as decided at the High Court – not taking account of unsuccessful claims that are then ultimately successful in the Court of Appeal or Supreme Court.

The combined impact of an increase in challenges by defendant public bodies to the status of Aarhus Convention claims (thus potentially removing costs protection), a fall in cases being granted permission, and an overall fall in success rate creates a concerning picture of an uninviting and challenging system that can (and does) deter claimants from pursuing JRs. Indeed, we would suggest the findings in (1) could already be indicative of a loss of public faith in JR as an effective (or even fair) means of redress due to declining numbers of claims.

In light of accelerating environmental degradation, and the continuing rise in public concern for environmental issues, especially climate change, it is imperative that the UK maintains a clear, transparent and accessible system of review that provides citizens with an effective and affordable means of holding decision-takers to account when the need arises. In order to facilitate the broad access to justice required by the Convention, the administration of justice in environmental matters must be better adjusted towards claimants' needs so it can operate fairly and implement the system they are entitled to under the Convention, and be less about managing the numbers of claims down and/or evading the provision of effective remedies. Ultimately, that will depend on credible and more confident governance, that is not afraid of public challenge on controversial environmental decisions within a democratic system.

Key Recommendations

The number of Aarhus Convention claims has fallen significantly since April 2016

- We recommend the reinstatement of a slightly modified version of the 2013 Aarhus fixed cost caps regime.

Despite minor imperfections, the 2013 regime worked and significantly improved access to justice by providing advance clarity and certainty with regards to adverse costs exposure. The caps should be set at a maximum of £5,000 for individuals and £10,000 in all other cases and apply throughout the duration of the first instance proceedings. The level of these caps should be reduced where it can be shown that those figures are prohibitively expensive for a claimant. This cap should also remain throughout all other stages of proceedings. The imposition of a new additional cap (at the same levels) upon any appeal should be granted exceptionally and only where this would not be prohibitively expensive for the claimant, taking into account all costs incurred up to that point. The default position should be the same cap remains in place for all appeals, because it represents the limit already set above which it is 'prohibitively expensive'. We also recommend the removal of the reciprocal cap of £35,000 on the costs recoverable by successful claimants. There is no basis for a reciprocal cap in the Aarhus Convention and it can render complex environmental cases "too expensive to win".

- This would negate the requirement for claimants to provide a statement of financial information when submitting the claim form (unless applying for a reduction in the cap). It would also address the emerging tendency for defendant public bodies to request intrusive and detailed information (which can act as a deterrent for claimants) and challenge the level of the cap, even at late stages of the proceedings.
- Clearer and more tightly drawn provisions are required in any event to manage the costs position on appeal up to the Supreme Court.
- This should then be monitored and followed by an evidence-based consultation that explores how best to ensure all Aarhus Convention claims under Article 9 of the Convention are not 'prohibitively expensive' for claimants, such as: reducing court fees,

instigating 'qualified one-way costs shifting',⁵ payment of costs from central funds; and/or, as the case may be, on retaining the above system.

The number of challenges to the status of Aarhus Convention claims is rising; further data is required to verify success rate trends

- We recommend the 2013 indemnity basis for costs awards for unsuccessful challenges to Aarhus Convention claims be reinstated. This would mitigate aggressive behaviour by some defendant public bodies by reversing the cost exposure and – crucially - avoid an amount of unrecoverable costs for claimants who successfully defend such challenges to their eligibility to costs protection.
- We also recommend clearer rules and guidance to ensure challenges are made on an informed basis and environmental claimants receive the full benefit of Aarhus protection, to which they are entitled.

The number of cases granted permission has fallen since early 2016

- We recommend that Aarhus Convention claims are exempt from the requirements of section 84 of the Criminal Justice and Courts Act 2015, namely that permission to JR is refused where it appears “*highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*”. We would suggest this should be considered for other non-environmental JRs too.
- Alternatively regarding section 84, while it is conceptually undesirable in principle to allow defendants to ‘get away’ with unlawful behaviour due to the claimant being declined permission or a remedy (on the basis that the Judge agrees the same decision would have been made even if lawfully conducted) there are practical arguments for this. However, the authors recommend that this should not prevent a case being given permission, if it is to apply at all. Unlawful conduct should be judged and exposed at court in any event. There are sound public policy reasons for doing so, not least in the wider benefit of stating the law, and that claimants feel they are fairly treated within an effective legal process, and that justice be seen to be done (at least to some extent). That said, the Aarhus Convention does require access to an effective remedy too, so this approach may not lead to full compliance.

The success rate of environmental JRs has fallen substantially since early 2016

- We recommend conducting a full review to identify why Aarhus Convention claims’ success rates at permission and first instance are falling. This should extend beyond cost considerations to encompass other issues such as judicial attitudes/approach and the intensity of review.

⁵ i.e. that unsuccessful claimants do not have to pay adverse costs, but can recover own costs when they win, thereby not being ‘prohibitively expensive’ in either case.

Introduction

The Aarhus Convention and the UK

The UNECE Convention on Access to Environmental Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the “Aarhus Convention”)⁶ was adopted in 1998, linking for the first time in binding international law, human rights and environmental protection.

The link between environmental concerns and human rights was formally made at the 1992 UN conference on Environment and Development in Rio de Janeiro, when 178 countries adopted the Rio Declaration.⁷ Significantly, Principle 10 of the Rio Declaration called for ‘environmental issues to be handled with the participation of all concerned citizens’ and introduced the rights to access to information, decision-making and justice.

The adoption of the Aarhus Convention brought the procedural rights and requirements of Principle 10 of the Rio Declaration on Environment and Development into effect. Though regional in scope, the comprehensive framework for procedural environmental rights and obligations on public authorities has been used as a model for countries throughout the world. The UN records that there are currently 39 signatories and 47 Parties.⁸

The objective of the Convention, as stated in Article 1, is to guarantee the public rights of access to information, participation in decision-making and access to justice in environmental matters; in order to contribute to the protection of the right of every person (present and future) “to live in an environment adequate to his or her health and well-being”. The rights-based approach encompassed in these three ‘pillars’ established the Aarhus Convention as a new kind of environmental agreement that linked substantive and procedural environmental rights, sustainable development and the involvement of all citizens concerned. It was the first international legal instrument to explicitly refer to a right to a healthy environment for ‘present and future generations’ and set up the rights introduced in the three pillars as a means for all members of the public to assert or achieve this.⁹ As such, the Aarhus Convention brought to the forefront the space for public interaction with public authorities to contribute to environmental protection and government accountability within a democratic context.

The subject of the Aarhus Convention goes to the heart of the relationship between people and governments. The Convention is not only an environmental agreement, it is also an agreement about government accountability, transparency and responsiveness.¹⁰

One of the most important legal mechanisms for ‘citizens concerned’ and encompassing the dynamic of public participation, access to information and accountable governments, is JR. JR represents almost the sole mechanism for civil society to challenge the decisions, acts and inactions of public bodies affecting the environment in the courts, and as such, it is imperative that it operates effectively.¹¹ If the process of checking the abuse of power is weakened, the

⁶ UNECE (n 1).

⁷ United Nations, Rio Declaration on Environment and Development (13 June 1992), 31 I.L.M. 874 (1992).

⁸ United Nations Treaty Collection, Depository: Status of Treaties [Online]. Available [here](#).

⁹ Maguelonne Dejeant-Pons et al. ‘Human Rights and the Environment: Compendium of Instruments and Other International Texts on Individual and Collective Rights Relating to the Environment in the International and European Framework’ (Council of Europe, 2002) 18.

¹⁰ UNECE ‘The Aarhus Convention: An implementation guide’ Second Edition (UNECE, 2014) 15. Available [here](#).

¹¹ Although it is by no means the only form of legal action related to the environment or only form covered by the Convention.

impacts are significant and disproportionate, for example it has been shown that deficits in access to justice have the most impact on the poorest and most vulnerable in society.¹²

Both the UK, and the EU as a Party in its own right, signed the Aarhus Convention in 1998 and ratified it in 2005. In preparation for ratification, the EU adopted two new Directives on access to environmental information¹³ and public participation in decision-making.¹⁴ The UK duly amended its statutory regime to ensure compliance with the new requirements in relation to pillars one and two of the Convention.

In terms of compliance with the third pillar concerning access to environmental justice,¹⁵ the UK government relied on the existing process of JR, alongside the statutory review process.¹⁶ At that point, assuming these processes were Aarhus compliant.¹⁷

Article 9(4) of the Aarhus Convention requires the provision for claimants of '*adequate and effective remedies, including injunctive relief as appropriate*'. It also requires that those legal review mechanisms '*be fair, equitable, timely and not prohibitively expensive*'. Since ratifying the Convention, a number of NGOs, charities and members of the public have raised concerns about the UK's ability to meet the requirements of Article 9(4) and made submissions to the Aarhus Convention Compliance Committee.

In response to three particular Communications, the Compliance Committee found the UK to be in non-compliance with Article 9(4) of the Convention in 2011.¹⁸ These findings were endorsed by the Meeting of the Parties to the Convention later in 2011 (Decision IV/9i¹⁹) and continuing non-compliance was confirmed by Meetings of the Parties in 2014 (Decision V/9n²⁰) and 2017 (Decision VI/8k²¹). Most regrettably, Decision VI/8k in 2017 concluded that amendments made to the Aarhus cost regime earlier that year had overall moved the UK further away from a costs regime that is *fair, equitable and not prohibitively expensive* (as required by Article 9(4)) and that operates within a framework that is clear, consistent and transparent.

Ongoing concerns about the prohibitively expensive nature of legal action in the UK were also echoed in infraction proceedings against the UK originating from a complaint to the European Commission submitted in 2005. In 2013, the Court of Justice of the European Union (CJEU) held the UK in breach of the relevant provisions of the EC Public Participation Directive.²²

In addition to concerns regarding costs, on-going communications raise further questions about the UK's compliance with other provisions of the Convention. A Communication submitted in 2017 by the RSPB, Friends of the Earth, Friends of the Earth Scotland and Leigh

¹² Environmental Law Foundation, 'Civil law aspects of environmental justice' (ELF, 2003) 98. Available [here](#).

¹³ See, Directive 2003/4/2003 of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.

¹⁴ See, Directive 2003/35/EC of the European Parliament and Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment

¹⁵ UNECE (n 1) art 9.

¹⁶ Report of the Working Group on Access to Environmental Justice 'Ensuring access to environmental justice in England and Wales' (May 2008) (the "Sullivan Report 2008") 108. Available [here](#).

¹⁷ Paul Stookes, '*A Practical Approach to Environmental Law*' (OUP, 2005) 2.32.

¹⁸ See Communications C23, C27 and C33, the findings for which can be found [here](#).

¹⁹ Decision IV/9i on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention, available [here](#).

²⁰ Decision V/9n on compliance by the United Kingdom of Great Britain and Northern Ireland (2014). Available [here](#).

²¹ Decision VI/8k Compliance by United Kingdom with its obligations under the Convention (2017) – confirmed by the MoPs in Montenegro. Available [here](#).

²² *Commission v UK*, Case C-530/11, ECLI:EU:C:2014:67. Found [here](#).

Day²³ alleges the UK is in breach of provisions of the Convention in respect of the requirement to provide a review of both procedural and substantive legality. In essence, the point taken is that the threshold applied by the courts for the substantive review of decisions in JR is so high as to be effectively out of reach for claimants. A hearing is due to take place at the UN in Geneva in November 2019.

It is also noteworthy that Article 8 of the Convention (public participation in the formulation of new laws impacting the environment, before they are laid at Parliament) has never been formally transposed into domestic law²⁴. This failure has been raised by Friends of the Earth with the Compliance Committee too.

With these concerns in mind, the purpose of this report is to clarify, to the extent possible on available data, how the current legislative framework is enabling, or prohibiting, the UK from meeting the access to justice requirements of the Aarhus Convention.

It is concerning that the Ministry of Justice has yet to establish a transparent and consistent system for monitoring the impact of reforms over the last 6 years, given the context of ongoing non-compliance. This has presented the authors with some challenges. Nevertheless, our aim is to provide an informed evaluation, on the basis of available information, of the extent to which legislative changes and the apparent approach of the courts (on, for example, applying discretion) prevent England and Wales from providing a system that is '*fair, equitable, timely and not prohibitively expensive*'²⁵ for claimants.

The legislative framework

The legislative framework pre-2013

On ratifying the Aarhus Convention in 2005, the UK assumed that the existing process of JR would satisfy the requirements of the third pillar on access to environmental justice.²⁶

A key aspect of providing access to justice is ensuring proceedings are not prohibitively expensive. Cost allocation in JR is regulated by the Civil Procedure Rules (CPR). The Rules were established in 1998 following the Woolf reforms report²⁷ and were intended, among other things, to help reduce the cost and time spent by the courts on all civil proceedings generally.

In the 2004 case of *Burkett*,²⁸ the then Master of the Rolls, Lord Justice Brooke, first raised the problem of high legal costs in the context of the Aarhus Convention. Shortly afterwards, in 2005, the Court of Appeal case of *Corner House*²⁹ laid down a number of governing principles for awarding Protective Costs Orders (PCOs) in order to clarify the position on adverse costs at an early stage of the case. These principles included that:

- (i) the issues raised are of general public importance;
- (ii) the public interest requires that those issues should be resolved;
- (iii) the applicant has no private interest in the outcome of the case;

²³ Communication ACCC/C/2017/156 United Kingdom submitted by the RSPB, Friends of the Earth, Friends of the Earth Scotland and Leigh Day. Available [here](#).

²⁴ This is the subject of a Communication to the Aarhus Convention Compliance Committee by Friends of the Earth related to the EU Withdrawal Bill: ACCC/C/2017/150. Available [here](#).

²⁵ UNECE (n 1) art. 9(4).

²⁶ Sullivan Report 2008 (n 16) 108.

²⁷ Woolf H. 'Access to Justice — Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (HMSO, London 1996).

²⁸ *R (on the application of Sonia Burkett) v London Borough of Hammersmith & Fulham* [2004] EWCA Civ 1342, paras 74-80.

²⁹ *R (Corner House Research) v Secretary of State for Trade & Industry* [2005] 1 W.L.R. 2600.

- (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and
- (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

Although *Corner House* was not an environmental case, in the absence of an alternative regime for environmental cases, the principles established in the case were applied *de facto* to them.

As discussed above, a combination of a series of reports published between 2003 and 2010,³⁰ EU infraction proceedings, and the findings of the Aarhus Convention Compliance Committee, revealed serious deficiencies of the civil law system in England and painted a ‘chilling’ picture of the ability of the legal framework prior to 2013 to comply with Article 9(4) of the Convention. In particular, concerns were focused on the developing jurisprudence around PCOs following *Corner House*, and criticisms that the regime failed to provide prior certainty to environmental claimants about their financial exposure.³¹

The subsequent ‘Jackson Review’³² also concluded that the existing PCO regime was not able to protect claimants from prohibitive expense. The culmination of the widespread public concern was the introduction of bespoke costs regimes for environmental cases in all jurisdictions of the UK in 2013.

Civil Procedure Rules (CPR) Amendments 2013³³

The following provisions were introduced into the CPR in England and Wales from 1 April 2013, referred to (at that time) as an Environmental Costs Protection Regime (ECPR):

- ‘Aarhus Convention claims’ were defined to include JR claims within ‘the scope of the Convention’ and which related to access to environmental information and environmental justice. Statutory reviews were deliberately excluded from costs protection at this point.³⁴
- Claimants were required to identify an Aarhus Convention claim as such on the claim form. If the defendant chose not to challenge the status of the claim as an Aarhus claim in the Acknowledgement of Service, the cases proceeded as such. If the defendant unsuccessfully challenged the status of the claim, costs were normally awarded on an indemnity basis.³⁵
- Aarhus claims were *automatically* cost capped.³⁶ The claimant’s adverse costs were capped at £5,000 for individuals and £10,000 in all other cases. Where successful, the

³⁰ See Environmental Law Foundation (2003) *Civil law aspects of environmental justice* ([here](#)), Capacity Global (2003) *Using the Law: Environmental Justice – Barriers and Opportunities* ([here](#)), Environmental Justice Project (2004) *Environmental Justice* ([here](#)), Macrory, R. and Woods, M. (2003) *Modernising Environmental Justice – Regulation and the Role of an Environmental Tribunal* ([here](#)), de Sadeleer, N. (2002) *Access to Justice in Environmental Matters* ([here](#)), Milieu Ltd. (2006) *Measures on access to justice in environmental matters (Article 9(3)) Country report for United Kingdom* ([here](#)), Working Group on Access to Justice (2008) *Ensuring Access to Justice in England and Wales* (the Sullivan Report 2008) ([here](#)), Environmental Law Foundation and The Centre for Business Relationships Accountability, Sustainability & Society (2009) *Costs Barriers to Environmental Justice* ([here](#)) and Working Group on Access to Justice (2010) *Ensuring Access to Justice in England and Wales – Update Report* (Sullivan 2010 Report) ([here](#)).

³¹ Under art. 3 of The Aarhus Convention, each party is required to ‘establish and maintain a clear, transparent and consistent framework to implement the provision of this convention’.

³² Jackson R, ‘The review of civil litigation costs’ (“The Jackson Review”) (2010). Available [here](#).

³³ Civil Procedure (Amendment) Rules [2013] (“CPR 2013”). Found [here](#).

³⁴ CPR 2013 (n 33) Sch. CPR 45.41.

³⁵ CPR 2013 (n 33) Sch. CPR 45.44.

³⁶ CPR 2013 (n 33) Sch. CPR 45.43.

amount the claimant could recover from the defendant (the reciprocal or cross-cap) was capped at £35,000.³⁷

- Interim injunctions (and/or damages) could be awarded if necessary, to prevent significant environmental damage.³⁸

Criminal Justice and Courts Act 2015 (CJCA 2015)³⁹

The CJCA 2015 made several changes to the justice system, including changes to the Senior Courts Act 1981 concerning JR, two of which have particular significance for environmental claims:

- **Likelihood of substantially different outcome for applicant**

Section 84 of the Act reduced the threshold at which the court can refuse permission for JR, or if the JR is successful, any relief/remedy. It imposed a new duty on the court to refuse permission or withhold a remedy if it is 'highly likely' (rather than inevitable) that the outcome for the applicant would not have been substantially different if the legal error challenged were corrected. The court's discretion to waive that duty is preserved in cases only of "exceptional public interest". This section came into force on 13 April 2015 for any High Court proceedings started on or after this date.⁴⁰

- **Interveners and costs**

Section 87 of the Act introduced new costs rules for interveners, with two key features. First, the Act clarified that interveners are unable to recover their own costs except in exceptional circumstances. Second, where a party made an application to intervene, the Act imposed a new duty to order costs against interveners in any court lower than the Supreme Court if any of following four conditions were satisfied:

- i. The intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;
- ii. The intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court;
- iii. A significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings; or
- iv. The intervener has behaved unreasonably.

CPR Amendments 2017⁴¹

In September 2015, the Ministry of Justice consulted on amendments to the ECPR on the basis that the existing regime had led to a proliferation of 'unmeritorious' environmental litigation.⁴² The proposals were opposed by an overwhelming majority of consultees,⁴³ not least due to the lack of any tangible evidence that the 2013 changes had led to any negative - and unwarranted - impacts in terms of delays in the court or to key infrastructure projects, or

³⁷ To note that the Aarhus Convention does not require costs protection for public body defendants/the state.

³⁸ CPR Practice Direction 25A.

³⁹ Criminal Justice and Courts Act [2015] ("CJCA 2015"). Found [here](#).

⁴⁰ Ministry of Justice Circular No. 2015/01 241. Available [here](#).

⁴¹ Civil Procedure (Amendment) Rules [2017] ("CPR 2017"). Found [here](#).

⁴² See, Ministry of Justice Government Response, 'Cost Protection in Environmental Claims' (2016) 10. Available [here](#).

⁴³ Ministry of Justice Government Response (n 42) 14 onwards.

that significant numbers of claims were ‘unmeritorious’. Indeed, it would seem to the authors that any court delays would be predominantly down to court funding and staffing.

Despite this widespread concern, the Civil Procedure (Amendment) Rules 2017 (CPR 2017) entered into force on 28 February 2017. The main changes introduced were:

- The inclusion of statutory review within the definition of Aarhus claims if brought under s.289 of the Town and Country Planning Act 1990 or s.65 of the Planning Act 1990.⁴⁴
- The claimant must be a ‘member of the public’. The term was not defined, but CPR 45.41(1)(b) stated that ‘references to a member or members of the public are to be construed in accordance with the Aarhus Convention’.⁴⁵
- The claimant must file and serve with the claim form a schedule of their financial resources, which includes any financial support a person has provided or is likely to provide to the claimant. This must be verified by a statement of truth.⁴⁶
- The claimant must state in the claim form that the claim is an ‘Aarhus Convention Claim’.⁴⁷
- The sanction for defendants unsuccessfully challenging the status of a claim as an Aarhus Convention claim was relaxed from an indemnity costs assessment basis to the less strict standard costs assessment.⁴⁸

Although the existing cost caps levels still apply, the SI introduced a power for the court to vary the caps, or to remove them completely, if it was satisfied that to do so would not make the costs of the proceedings prohibitively expensive for the claimant. For the purpose of this new rule, proceedings are considered ‘prohibitively expensive’ if their likely costs (including any court fees which are payable by the claimant) either “exceed the financial resources of the claimant” (having regard to any financial support provided) or are “objectively unreasonable” having regard to “the situation of the parties, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant, the importance of what is at stake for the environment, the complexity of the relevant law and procedure, and whether the claim is frivolous”.⁴⁹ Given all the factors in play there is a significant element of discretion and judgement applied by the court in each case that goes beyond simply the financial means of the claimant.

Certain aspects of the 2017 regime were successfully challenged by Friends of the Earth, the RSPB and ClientEarth in the High Court. The case achieved important clarification as to how the new costs regime should operate, and increased certainty for claimants.⁵⁰

CPR Amendments 2018⁵¹

As part of the above legal challenge, the Hon. Mr Justice Dove clarified that any variation to the costs cap should be done at the earliest possible time, and that a claimant’s own legal costs should be included in the calculation as to what is ‘prohibitively expensive’. A rule change was required to ensure the privacy of claimants’ financial information. This issue was

⁴⁴ CPR 2017 (n 41) s.8(5), CPR 45.41(3).

⁴⁵ CPR 2017 (n 341) s.8(5), CPR 45.41(2).

⁴⁶ CPR 2017 (n 41) s.8(5), CPR 45.42(1)(b).

⁴⁷ CPR 2017 (n 41) s.8(5), CPR 45.42(1)(a).

⁴⁸ CPR 2017 (n 41) s.8(5), CPR 45.45(3)(b).

⁴⁹ CPR 2017 (n 41) s.8(5), CPR 45.44.

⁵⁰ *RSPB, Friends of the Earth Ltd and ClientEarth v SofS for Justice and Lord Chancellor* [2017] EWHC 2309.

⁵¹ Civil Procedure (Amendment) Rules [2018] (“CPR 2018”). Available [here](#).

subsequently considered by the Civil Procedure Rules Committee (CPRC) as part of a review of 'open justice' and an amendment effected to CPR 39 the following year - see section immediately below.

The 2018 CPR amendments clarified the following issues:

- The claimant must provide financial information in order to benefit from the costs cap. In the case of third-party financial support, the information required extends to the aggregate amount available (or expected to be made available) and does not include the identity of those providing donations and/or a breakdown of donations.⁵²
- The court may vary the costs cap only on an application made by the claimant or defendant (rather than on its own motion as originally proposed).⁵³
- An application to vary the costs cap must be made at the outset of the proceedings – either in the claim form (if made by a claimant) or in the Acknowledgment of Service (if made by a defendant). It must be determined by the court at the earliest opportunity and an application to vary the cap may only be made at a later stage in the process if there has been a significant change in the claimant's circumstances, or it can be shown that the claimant materially misled the court as to their financial position.⁵⁴

CPR Amendments 2019

- In April 2019, amendments were finally made to CPR 39 in light of Dove J's judgment.⁵⁵ The changes made reinforced the fundamental principle of 'open justice' as a priority such that private hearings will be had only if one or more of certain criteria were fulfilled. The premise that conditions must be met for hearings in private fails to make private hearings the default position for environmental claimants. This could have a chilling effect on claimants by adding an extra procedural hurdle in order to prove a private hearing is required. Additionally, the focus on 'damage to confidentiality' is not necessarily the same concern that a claimant will have on what is, or is not, private to them. The way in which the rule has been drafted creates unwelcome ambiguity.
- In October 2019, the UK announced further amendments to the definition of an Aarhus Convention claim.⁵⁶ It is now defined as 'a claim brought by one or more members of the public by JR or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1), 9(2) or 9(3) 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 ("the Aarhus Convention")'.

⁵² CPR 2018 (n 51) s.3, CPR 45.42(1)(b)

⁵³ CPR 2018 (n 51) s.3, CPR 45.44

⁵⁴ CPR 2018 (n 51) s.3, CPR 45.44.

⁵⁵ Civil Procedure (Amendment) Rules 2019 [April 2019] s.8, CPR 39.2. Available [here](#).

⁵⁶ Civil Procedure (Amendment) Rules 2019 [October 2019] s.3 CPR 45.41(2). Available [here](#).

Data and analysis

Methodology

The purpose of this report is to assess the extent to which the regime of judicial and statutory review in England and Wales complies with the requirements of Article 9(4) of the Aarhus Convention. Particular emphasis is placed on the impact of recent legislative changes and how any barriers that may become evident can be addressed.

The report has been compiled using data provided by the Ministry of Justice under the Environmental Information Regulations 2004, published Ministry of Justice statistics and published anecdotal data between 2003 and 2013. In order to understand how well the Aarhus costs regimes are operating, where possible and appropriate, these environmental statistics have been compared to JR statistics.

For transparency, and in case useful to other research, the correspondence with the Ministry of Justice can, in appropriate instances, be made available upon request to the authors.

Definitions

For the purpose of this report, 'success' is defined as cases where the 'claim was allowed at the substantive hearing'. This definition was confirmed as that used by the Ministry of Justice when responding to our data requests dated 10th July 2019 and so has been adopted by the authors throughout.⁵⁷

Anecdotal data from pre-2013 used varying definitions. In the 2003 Environmental Law Foundation Report, 'successful' cases were defined as those in which the environmental concern had been resolved.⁵⁸ Whilst pragmatic this is more subjective. For example, it may be a higher threshold than a case being allowed at court, as it could depend on the actual (discretionary) remedy given; or, depending on the view-point, it could be interpreted as a lower threshold, as a successful JR does not necessarily mean that the judgment reflects the real world outcome (such as in clarifying the law (which can be achieved even if you 'lose') or in stimulating wider change, awareness or reform, if those are also the objectives of the litigation – 'win' or 'lose').

In contrast, the Sullivan Report 2008⁵⁹, defines 'substantially successful' as situations in which the court decided that the decision was unlawful (but does not necessarily have to provide relief).⁶⁰ While all these terms are based on success for the claimant, it is important to recognise that as a quirk of how JR operates the practical outcome may differ to the legal result. For the purposes of our report, and for consistency of conclusions, the success criterion is limited to the main legal outcome, which we recognise may exhibit itself in positive, but variable, real-world impacts. This can be considered a conservative approach to 'success' for claimants.

Information requests

The questions asked in the Environmental Information Requests (EIR) were:

1. The number of applications for JR in England and Wales identified on Form N461⁶¹ as Aarhus Convention claims made between x and y dates.
2. The number of applications in question (1) that were challenged, regardless of the outcome, by the defendant as Aarhus Convention claims.

⁵⁷ Ministry of Justice response to EIR, dated 10 July 2019. Available upon request.

⁵⁸ ELF (n 12) 5.

⁵⁹ Sullivan Report 2008 (n 16).

⁶⁰ Sullivan Report 2008 (n 16) 36.

⁶¹ The form used to start a JR application at court.

3. The number of applications in question (1) that were successfully challenged by the defendant as Aarhus Convention claims.
4. The number of applications in question (1) in which permission to JR was granted (either on the papers or on oral renewal).
5. The number of applications in question (4) progressing to a substantive hearing.
6. The number of applications in question (5) that were ultimately successful for the claimant.

The original EIR data we received was separated into the following time periods:

- **Dataset 8:** 1 June 2018 – 14 May 2019
- **Dataset 7:** 28 February 2017 – 31 May 2018
- **Dataset 6:** 1 June 2016 - 27 February 2017
- **Dataset 5:** 1 April 2016 – 31 May 2016
- **Dataset 4:** 1 May 2015 – 31 March 2016
- **Dataset 3:** 1 April 2015 – 31 May 2015
- **Dataset 2:** 1 April 2014 - 31 March 2015
- **Dataset 1:** 1 April 2013 - 31 March 2014
- **Pre 2013:** this is largely anecdotal data from 1999-2008

Pre 1st April 2013 data

Data prior to 1st April 2013 is not available in the same format. Analysis is therefore largely anecdotal and based on the following five reports:

- Ministry of Justice, '[Emerging Findings: An Early Evaluation of the Civil Justice Reforms](#)' (2001)
- Macrory & Woods, '[Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal](#)' (2003)
- Environmental Law Foundation, '[Civil law aspects of environmental justice](#)' (2003)
- Sullivan Report, '[Ensuring access to environmental justice in England and Wales - A Report of the Working Group on Access to Environmental Justice](#)' (2008)
- Environmental Law Foundation, '[Costs Barriers to Environmental Justice](#)' (2009)

Standardising post-2013 data

Upon receiving the requested data, some preliminary concerns were brought to our attention. The data was presented to us as a single total value for a given time period; however, these time periods were of different lengths in addition to other anomalies such as open cases being excluded from the statistics, and differences in the format of the data. In order to analyse the data accurately and ensure data periods were comparable, differences in the length of each dataset were addressed by calculating percentage changes and averages per month. This removed discrepancies in the unequal length of the datasets when plotting graphs and assessing trends. For clarity, points on the graph represent the average for that whole time period and do not show continuous data. For further explanation on how the data was used, please see [Annex 1](#).

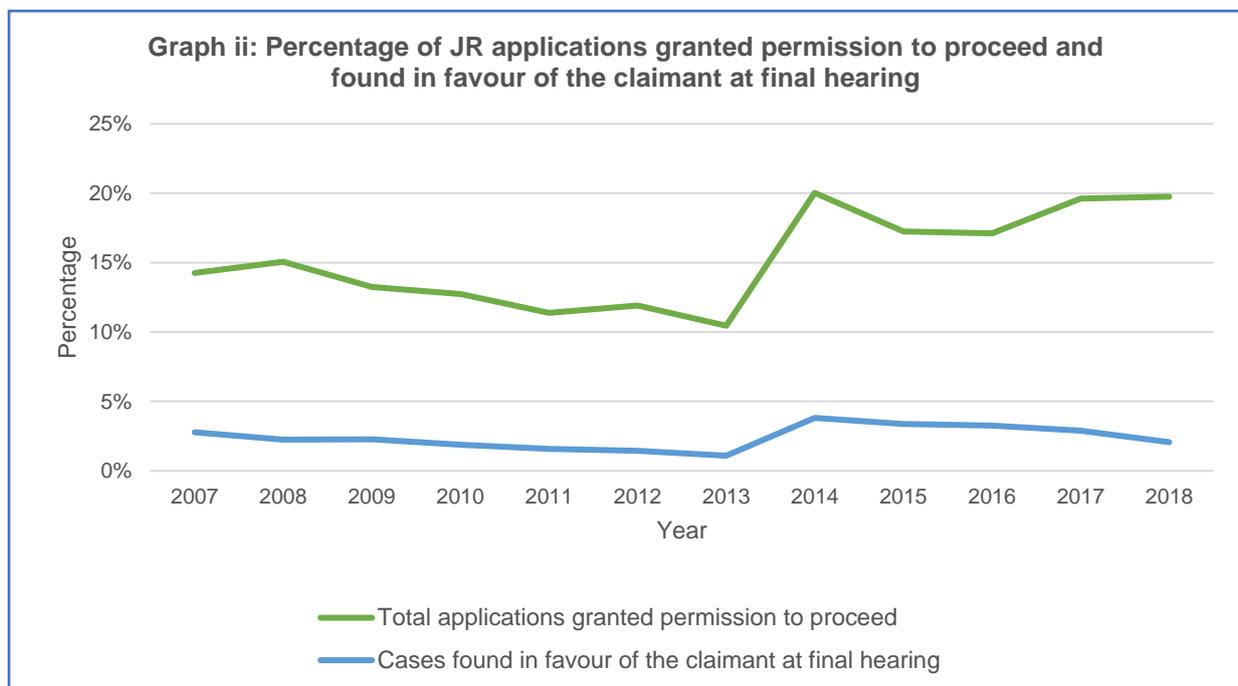
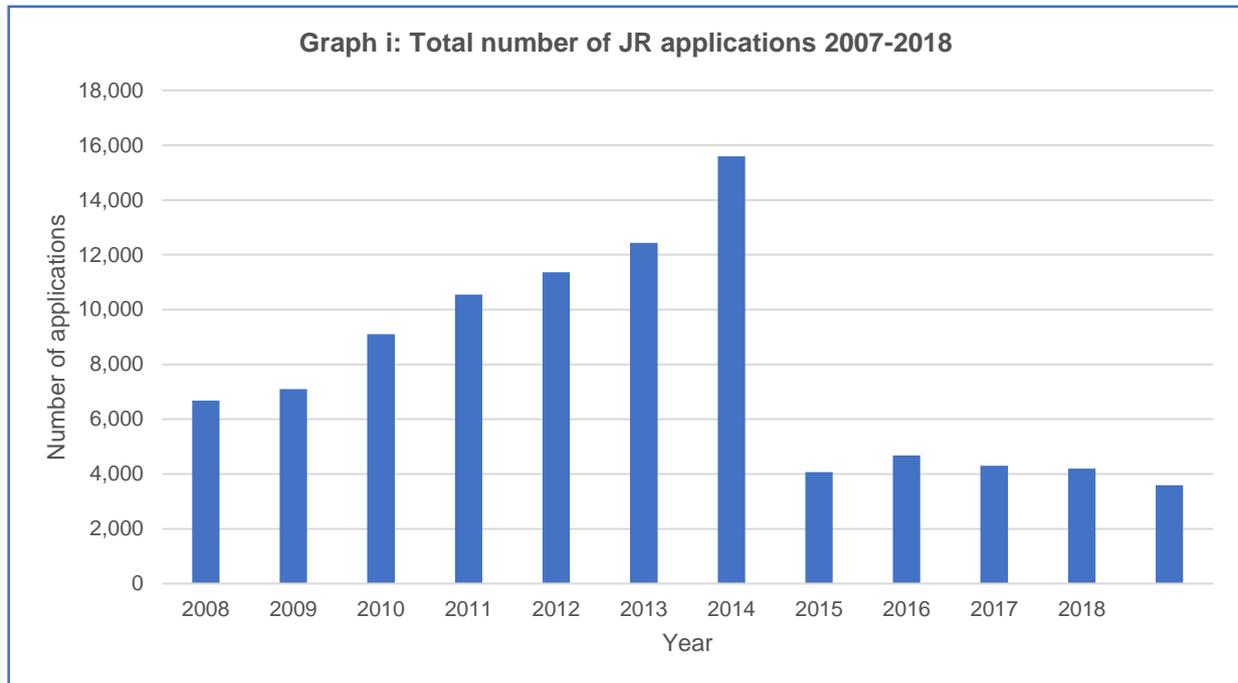
Final datasets

Following these adjustments, the datasets analysed below are as follows:

- **Dataset 6:** 1 June 2018 – 14 May 2019 (0.5 months shorter)
- **Dataset 5:** 28 February 2017 – 31 May 2018 (2 months longer)
- **Dataset 4:** 1 April 2016 - 27 February 2017 (1 month shorter)
- **Dataset 3:** 1 April 2015 – 31 March 2016
- **Dataset 2:** 1 April 2014 - 31 March 2015
- **Dataset 1:** 1 April 2013 - 31 March 2014
- **Pre 2013:** this is largely anecdotal data from 1999-2008

Total JR data

For the purpose of highlighting the impact of the Aarhus regime on access to justice, some of our collected data has been compared to data collected by the Ministry of Justice of total JR statistics (environmental and other). The statistics are published quarterly by the Ministry of Justice on the 'Civil Justice Statistics Quarterly' site, which we have plotted onto graphs below.⁶² JR figures are taken from the Administrative Court Office Crown Office Information Network COINS⁶³ database and figures post-2007 are refreshed quarterly.



⁶² Ministry of Justice 'Civil Justice Statistics Quarterly: January to March 2019 Tables' (2019) [Online] 10-11. Available [here](#).

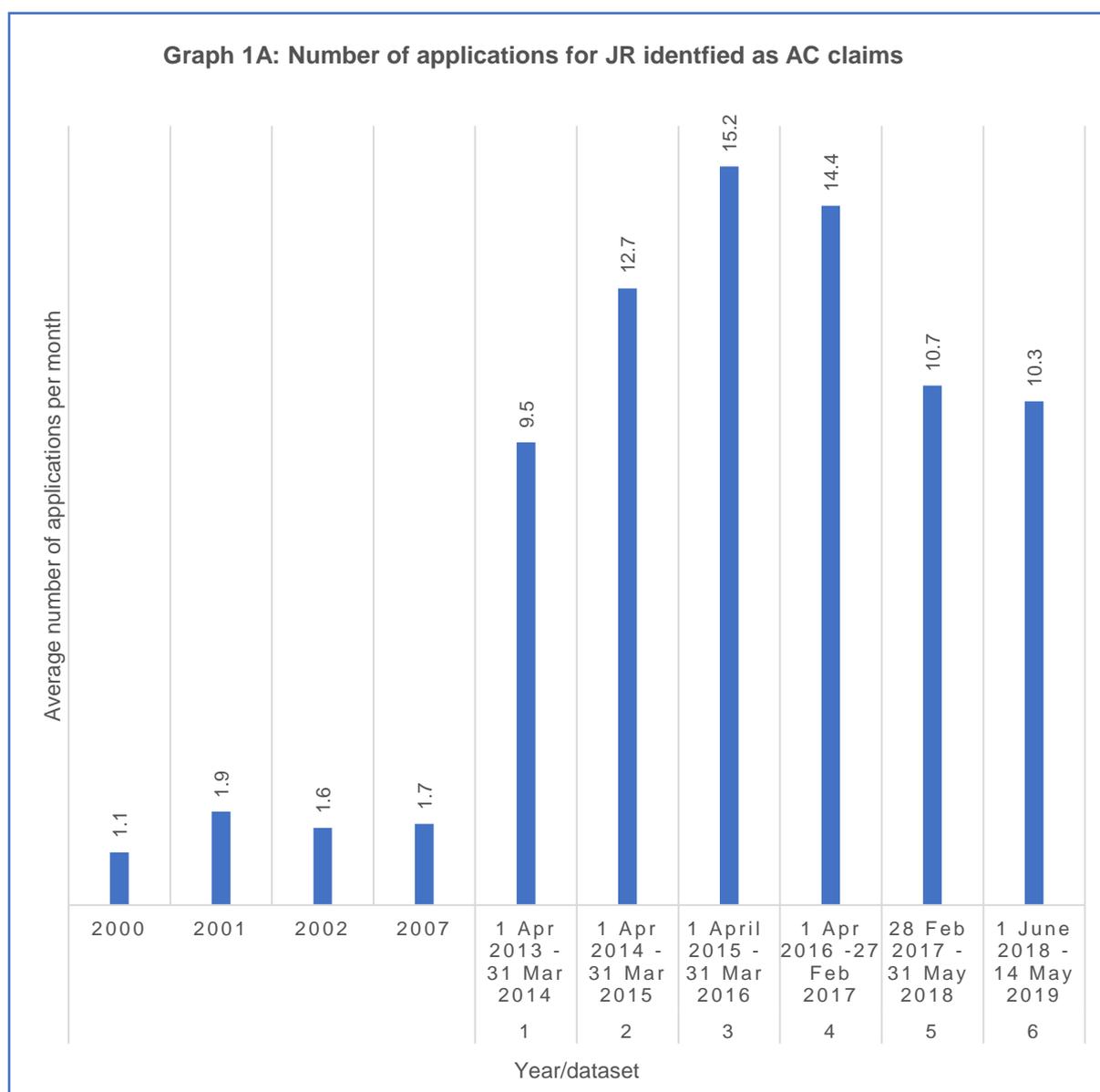
⁶³ As the database explains, "To aid with the presentation of the data four JR case types have been created in the processing of the COINS data; Criminal, Civil (Immigration and Asylum), Civil (other) and Unknown" p12. Available [here](#).

Understanding the data

1. The number of environmental Judicial Review applications between 2013 and 2019

The number of applications for JR identified on form N461 as Aarhus Convention (AC) claims peaked in 2015-16 and has fallen significantly back to 2013-14 levels.

Dataset	Dataset 1: 1 Apr 2013- 31 Mar 2014	Dataset 2: 1 Apr 2014 – 31 Mar 2015	Dataset 3: 1 Apr 2015 – 31 Mar 2016	Dataset 4: 1 Apr 2016 – 27 Feb 2017	Dataset 5: 28 Feb 2017 – 31 May 2018	Dataset 6: 1 June 2018 – 14 May 2019
No of applications for JR identified on Form N461 as AC claims	114	152	182	158	160	119



Graph 1A displays pre-2013 data extracted from the aforementioned reports showing a low rate of applications for Aarhus Convention claims, below 2 per month on average.⁶⁴ Ministry of Justice statistics then reveal a significant increase in the number of Aarhus Convention claims from April 2013. Until April 2016 (dataset 4) these rates increase annually, reaching a maximum average of over 15 applications per month. This is followed by a large cumulative decline in overall numbers between April 2016 and May 2019 (dataset 4 to dataset 6), ultimately back to 2013 levels of around just 10 applications per month.

Impact of CPR Amendments 2013

The increase in applications for environmental JR, illustrated in Graph 1A, almost certainly reflects the positive impact of increased financial certainty guaranteed to claimants following CPR amendments in 2013 (i.e. automatic and fixed costs protection at the start of a claim).

However, it is important to note that data post 2013 was much more thoroughly recorded and available. While the apparent increase in JRs post 2013 may be to some extent a result of this, it was widely acknowledged there was restricted access to justice before 2013.

Notwithstanding the above, the data clearly reflects the importance of the Aarhus regime. The introduction of the CPR amendments in 2013 came about in response to the UK's inadequate implementation of the high standards for broad access to justice required by the Aarhus Convention. The increase in applications following the introduction of the 2013 regime shows that moving *towards* implementing these standards fully and limiting financial risk/uncertainty creates a positive space for accessing environmental justice.

However, it should be emphasised that relative to JR applications as a whole (which exceed the number of environmental JRs by around thirty times) the number of environmental claims being issued annually remains very modest throughout this period (see Graph 1B, below).

Impact of Criminal Justice and Courts Act 2015

From April 2016, Graph 1A shows a significant fall in the number of environmental JR cases. This is plausibly due to the passage of the Criminal Justice and Courts Act 2015 (CJCA 2015), which came into effect for High Court proceedings that were started on or after 13 April 2015.⁶⁵

The CJCA 2015 introduced a “substantially different outcome test” to be applied by the High Court at permission stage for cases starting on or after 13 April 2015, it could also operate to deny a remedy even though a claim were substantiated. The Ministry of Justice’s Civil Justice Statistics Quarterly (October to December 2015) confirms the mean time taken from lodging a case to the permission stage decision remained relatively stable between 2006 and 2013, where the number was 118 and 120 days respectively (i.e. approx. four months).⁶⁶ The mean time taken from lodging a case to the oral renewal stage decision rose to an average of 227 days from 2009 to 2013 (approximately 7-8 months). This suggests that the new test would have had practical impact for post 13 April 2015 cases in August – November 2015 and may have been expected to exhibit an impact statistically (and on claimant practice) after that. Indeed, with the increase in cases between 2013 and 2015, it is entirely possible that the average time-period increases further and increases the delay.

A dissuasive effect on applications can be perceived due to these reforms where – notwithstanding a legitimate challenge to a potentially unlawful decision – the claimant predicts there to be a significant or real risk that the court may (rightly or wrongly) determine the outcome would highly likely make no difference. As such they would predict that there would

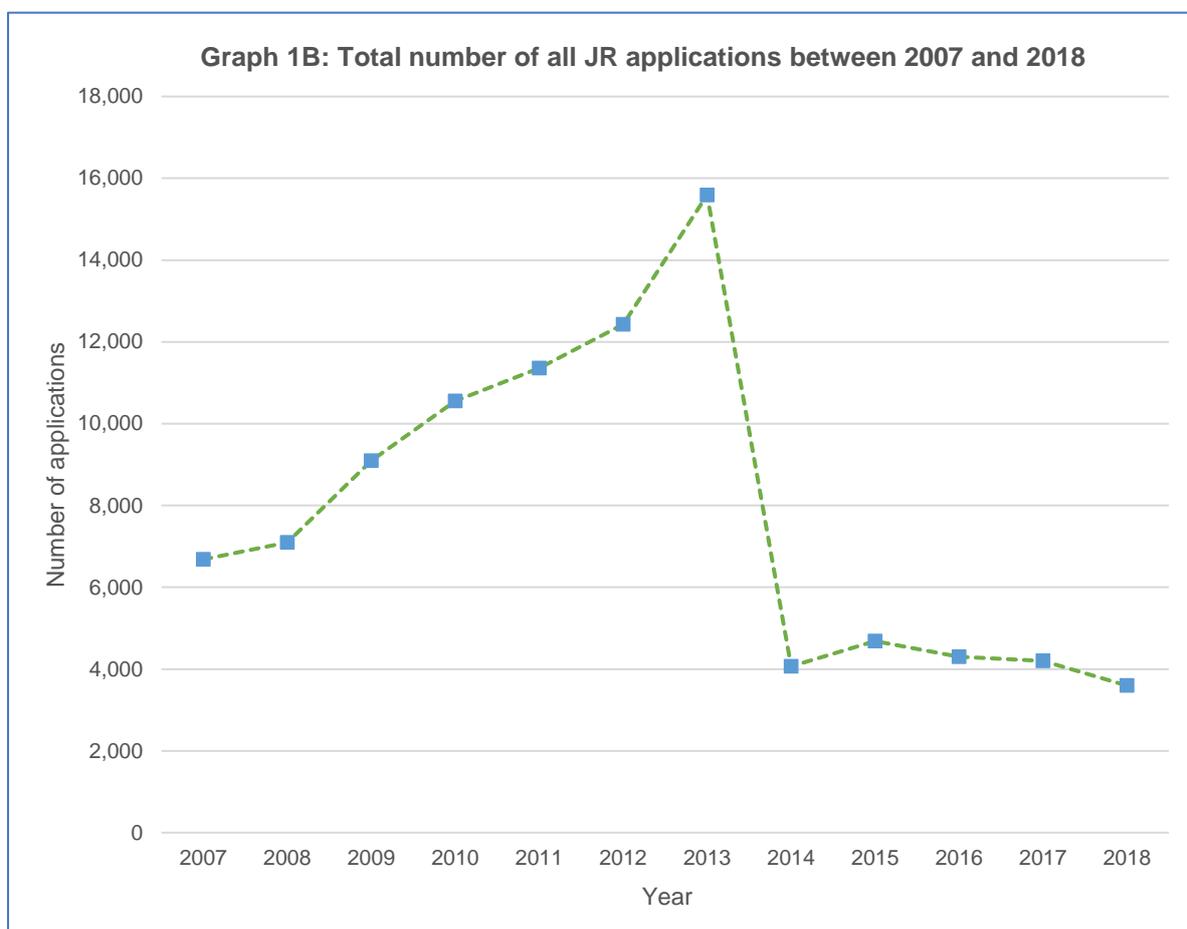
⁶⁴ Macrory, R. and Woods, M. ‘Modernising Environmental Justice – Regulation and the Role of an Environmental Tribunal’ (UCL, 2003) 60. Available [here](#).

⁶⁵ Ministry of Justice Circular 2015/01, paras 241-242. Available [here](#).

⁶⁶ Civil Justice Statistics Quarterly October to December 2015, 18. Available [here](#).

be no remedy or perhaps even no permission granted to proceed. Taken in combination with other factors such as a claimant's total costs (including adverse costs risks), resources required, and/or the 'inequality of arms' between claimant and defendant public authorities, this could be a decisive factor in applying for JR or continuing with a case.

The conclusion that the CJCA has an impact on the number of applications for Aarhus Convention claims is supported to some extent by a parallel fall in the number of applications made for JR generally following the introduction in 2015, as reported in the Ministry of Justice Quarterly Review and shown on Graph 1B. The data shows a very large drop in the total number of JR applications after 2014, due to the transfer of Immigration and Asylum JRs to Upper Tribunal (Immigration and Asylum Chamber) in 2014.⁶⁷ However, a smaller but clear decrease can be seen from 2015 suggesting some impact from the CJCA across the board.⁶⁸ Whilst appearing to be small in the graph this drop equates to 380 applications from 2015 to 2016. This is part of a continuing gradual decreasing trend from 2015 until 2018.



Impact of CPR Amendments 2017

Graph 1A also demonstrates that the February 2017 amendments led to a further substantial decrease in the number of environmental JR applications being made. In the period from the 2017 amendments, the number of applications were 26% down from the preceding period: between datasets 4 (1 April 2016 – 27 Feb 2017) and dataset 5 (28 Feb 2017 – 31 May 2018). There could be a variety of reasons behind this, but from our own experience of the CPR 2013 reforms we know that financial risk/exposure clearly influences Aarhus Convention claims.

⁶⁷ Ministry of Justice (n 62).

⁶⁸ Ministry of Justice (n 62).

We suggest that this decrease could arise from an increase in uncertainty regarding costs protection for claimants and the cumulative impact of this with the 2015 changes. It is considered likely that the increased financial uncertainty will be a part of the reason for this change.

The introduction of the power for the court to vary (or remove) cost caps increases the risk of proceedings becoming prohibitively expensive (or at least more expensive than expected). Data obtained from the Ministry of Justice also shows that where variations to the caps are made, they are almost always (i.e. in six out of seven cases) being increased.⁶⁹ We recognise this data does not yet demonstrate a trend. However, if this emerging pattern continues and parties perceive as common judicial practice a propensity for accepting variation applications by defendants, we anticipate that defendants will be encouraged to more routinely challenge the level of the default caps, and claimants will be deterred from issuing claims. This could be taking the UK in the opposite direction to compliance with Decision VI/8k generally speaking.

It is also possible there could be a delay in the resolution of a claimant's costs protection as proceedings progress, which adds to uncertainty and financial risk. Considering that prospect *in advance* may act as a deterrent to some claimants or, at the least, unfairly increase pressure (and leverage) on claimants within litigation.⁷⁰

The adverse effect of the uncertainty posed by the *possibility* of varying the caps is compounded by the requirement on claimants to provide financial information when applying for JR as a pre-requisite for costs protection, and by relaxing the costs consequences for defendants of unsuccessfully challenging cost caps eligibility for claimants (all of which make cost protection challenges by defendants more likely - see section two for further analysis). It is considered that the increased threat of greater financial risk (raised cost cap), and of more expense caused by aggressive satellite litigation on costs capping itself, appears to be deterring potential claimants – as anticipated by the Aarhus Convention Compliance Committee.⁷¹ Indeed, the authors of this report have direct experience of government departments seeking to vary costs caps well after acknowledgment of service, and even after embargoed judgments have been handed down. An aggressive, and at times unprincipled, approach to costs by defendants is unlikely to be an isolated occurrence in such an adversarial system. These 2017 amendments contribute to creating financial uncertainty for claimants at a pressured time of deciding whether to launch litigation (or to continue it). They increase the threat of proceedings being prohibitively expensive (or at least unexpectedly more expensive), and the risk of increasing costs over eligibility for costs protection at all. Cumulatively, these factors may dissuade claimants from pursuing Aarhus Convention claims.

Some corroboration of our results can be seen in the significant impact of these changes to environmental JR compared to the lesser impact on total JR data, as seen in Graph 1B. The 2017 CPR Amendments were targeted towards environmental JRs (and it is worth repeating that these make up a small but significant proportion of the number of JRs overall). Specifically, following the 2017 amendments (between datasets 4 and 5) there was a 25% decrease in the number of applications for Aarhus Convention claims. In comparison, for JRs generally, between 2017 and 2018, the decrease was just 14% (and likely not all of which will be attributable to environmental JR claims). Notwithstanding, it is likely that the reduction in

⁶⁹ Ministry of Justice Response to EIR dated 2nd October 2019.

⁷⁰ For example, if there is a 'rolled-up' hearing and an ongoing dispute raised by defendants as to whether they have enough information to decide to challenge the level of caps, reserve their position, and then do so later after protracted correspondence and once costs are greatly increased closer to trial.

⁷¹ See, Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention (2014) paras 83-84. Available [here](#).

the availability of legal aid is a contributing factor in terms of the number of cases being brought for both environmental and other JRs.

Notwithstanding the above, since 2018 the fall in the number of applications for Aarhus Convention claims has flattened-out slightly (but continued). This may reflect the impact of further amendments to the CPR in 2018 that aimed to clarify some of the uncertainty following legal proceedings by Friends of the Earth, the RSPB and ClientEarth (and indeed the judgment itself).⁷² The judgment provided some welcome clarity regarding what is to be included in the schedule of financial resources, improved privacy requirements (though the efficacy of the new rule remains to be seen), and the limited points at which cost caps can be varied. If this is correct, it tends to support our observations above.

Nonetheless, it is concerning to note that overall the number of applications has continued to fall - and certainly has not risen – given the accepted public interest nature of environmental JR cases (an important premise of the Convention).

Conclusion

The data shows a concerning trend of decreasing applications for both JRs generally and environmental JRs. In the absence of a Ministry of Justice monitoring programme or further information to the contrary, there appear to be some clearly discernible adverse trends for environmental claimants. The introduction of CPR amendments in 2013 positively influenced the number of applications for Aarhus Convention claims. However, legislative reforms since then, namely the introduction of the Criminal Justice and Courts Act in 2015 and the CPR Amendments in 2017 appear to have had the opposite effect.

In particular, we would highlight that the disproportionate impact of these changes on the much smaller number of Aarhus Convention claims being brought is of wider concern. As a remedy of last resort, JR can be the final mechanism for individuals, community groups and environmental NGOs to raise and resolve issues that are also of broad public interest. The point being that it is not just about 'one less case for the government or court to deal with' but there is an important wider societal and negative impact from an environmental case not being heard. The declining applications could also be reflective of a growing lack of faith by civil society in the legal system as an effective check on public authorities and government departments in the environmental field.

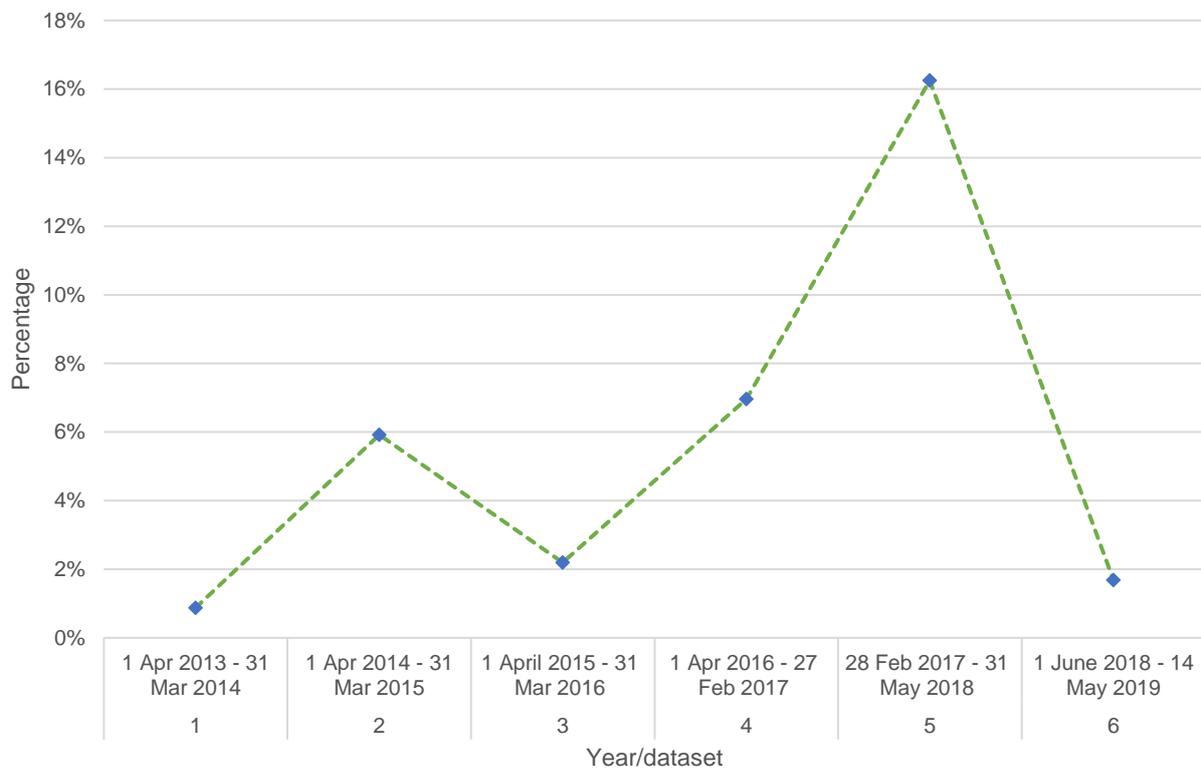
⁷² *RSPB, Friends of the Earth Ltd and ClientEarth v SofS for Justice and Lord Chancellor* (n 50).

2. The number of applications successfully challenged by defendants as Aarhus Convention claims

There has been an increase in the number of challenges by defendants to the status of claims as Aarhus Convention claims, followed by a steep fall

Dataset	Dataset 1: 1 Apr 2013- 31 Mar 2014	Dataset 2: 1 Apr 2014 – 31 Mar 2015	Dataset 3: 1 Apr 2015 – 31 Mar 2016	Dataset 4: 1 Apr 2016 – 27 Feb 2017	Dataset 5: 28 Feb 2017 – 31 May 2018	Dataset 6: 1 June 2018 – 14 May 2019
No of applications for JR identified on Form N461 as AC claims	114	152	182	158	160	119
No of applications successfully challenged by defendant as AC claims	1	9	4	11	26	2
% of applications successfully challenged by defendant out of applications identified as AC claims	1%	6%	2%	7%	16%	2%

Graph 2A: % of the total applications identified as AC claims that were successfully challenged by defendant



Overall, the number of claims successfully challenged by the defendant as not being Aarhus Convention claims has risen significantly, initially from data set 3 (April 2015 – March 2016), and then even more so since April 2016. In particular, the number of successful challenges increased by 58% between dataset 4 (1 April 2016 – 27 February 2017) and dataset 5 (28 February 2017 – 31 May 2018).

Graph 2A shows the percentage of applications for JR identified as Aarhus Convention claims where the status was successfully challenged by the defendant out of total numbers of claims made (not as a proportion out of total *challenges* made). On that basis the number of successful challenges to the status of these claims more than doubled between February 2017 and May 2018 from 7% in dataset 4 to 16% in dataset 5.

However, we await data from the Ministry of Justice concerning the number of *total challenges* made annually, and therefore what the actual success rate is. Even so, it is clear the number of successful challenges has increased, and then (inexplicably) dropped off. This dropping off in dataset 6 (1 June 2018 – 13 May 2019) may well be an anomaly in the data provided.

Impact of CPR Amendments 2013

Graph 2A shows that while there are variations in the number of applications successfully challenged by defendants as Aarhus Convention claims between datasets 1 and 4, the general trend is a modest and continuing increase. An initial increase in challenges is unsurprising given that the ECPR, and the possibility of challenging the status of claims as Aarhus Convention claims, did not exist before 2013. Furthermore, a new system will always be tested by the new cases coming through.

Impact of CPR Amendments 2017

The 2017 CPR amendments relaxed the sanction for defendants unsuccessfully challenging the status of Aarhus claims from indemnity costs to a standard cost assessment. In its report on decision V/9n to the sixth session,⁷³ the Aarhus Convention Compliance Committee expressed concern that, following the February 2017 amendments, defendants who unsuccessfully challenged the status of the claim as an Aarhus claim would now normally be ordered to pay the costs of those satellite proceedings on the standard basis only. The Committee had observed that by decreasing defendants' potential costs exposure, this amendment would increase the likelihood of such challenges and, as a result, increase rather than decrease the potential costs and uncertainty for claimants in proceedings subject to Article 9 of the Convention.⁷⁴

Graph 2A supports this prediction as it shows a very significant increase of 58% in the number of successful challenges after dataset 4 (i.e. 27 February 2017, the date from which the CPR Amendments take effect). We await further data to confirm any trend regarding the proportion of total challenges made to the status of Aarhus Convention claims that were successful.

We would also like to emphasise two additional concerns. Firstly, in cases where the claimant faces arguing the status of their claim, the dissuasive force of these challenges is heightened by the introduction of cost cap variations, as mentioned above. This additional uncertainty and potential financial risk is likely having a negative impact on the number of cases being brought. Secondly, the costs associated with defeating such an application are not recoverable in full by claimants, thus unfairly increasing the overall cost burden for claimants and providing the opportunity for challenges to be used tactically against claimants of lesser means.

⁷³ Decision V/9n (n 20).

⁷⁴ Decision V/9n (n 20) 68.

Changes since June 2018

There is a significant fall in challenges in dataset 6 (1 June 2018 – 14 May 2019) which requires further consideration. We await further data from the Ministry of Justice to confirm whether this is a data anomaly or indicative of a wider change. Again, we would urge the Ministry of Justice to put a system in place to enable the public to access and evaluate reliable data in a timely manner.

Conclusion

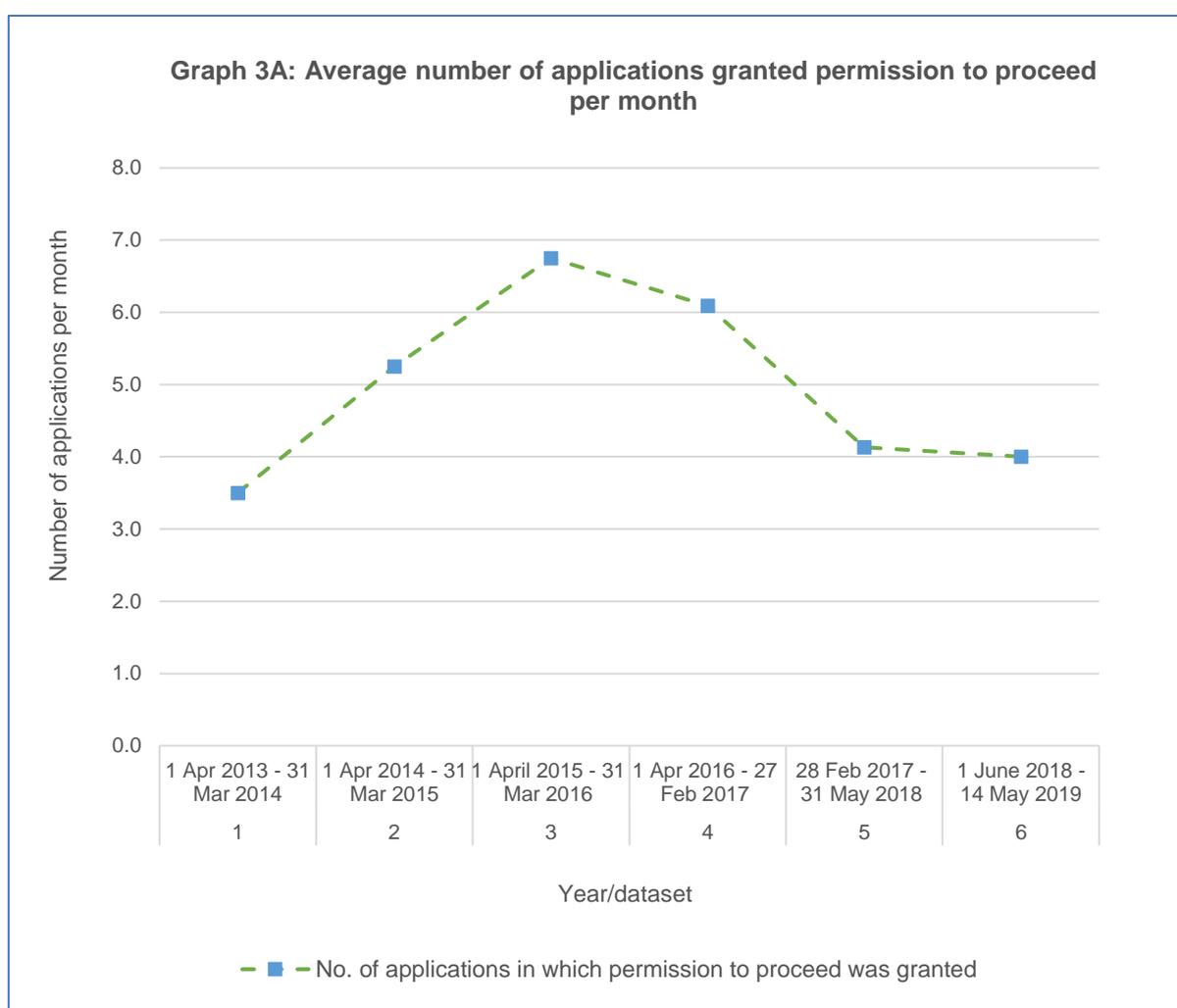
For now, the data shows that the proportion of total applications successfully challenged as Aarhus Convention claims increased between 2013 and February 2017 and then increased substantially between datasets 4 and 6. It is likely that the substantial increase in challenges from and including dataset 4 is the result of decreasing cost exposure for defendants unsuccessfully challenging the status of Aarhus Convention claims as a result of the 2017 CPR amendments. As we know the total number of Aarhus Convention claims was in decline during this period, it suggests a concerning picture of increasingly aggressive behaviour in defendants.

Notwithstanding the above, we accept that some claimants who would not otherwise benefit from costs protection may also be pushing the boundaries (and there have been some successive changes to the definition of what qualifies as an Aarhus Convention claim in the CPR). The true picture of total challenges made, and the actual success rate, is needed to draw further conclusions.

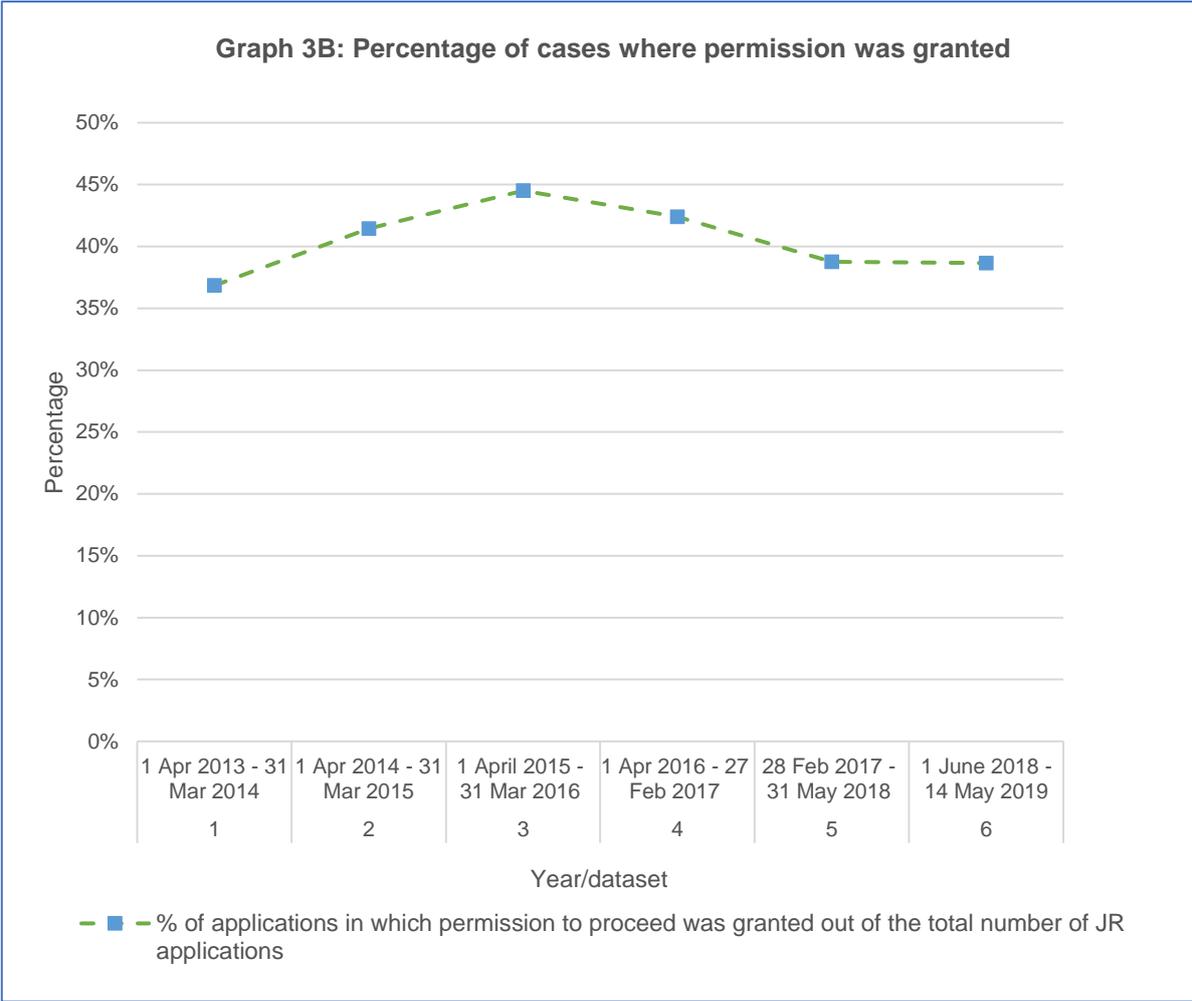
3. The number of cases in which permission is granted

The number of cases granted permission to proceed has decreased since April 2016.

Dataset	Dataset 1: 1 Apr 2013-31 Mar 2014	Dataset 2: 1 Apr 2014 – 31 Mar 2015	Dataset 3: 1 Apr 2015 – 31 Mar 2016	Dataset 4: 1 Apr 2016 – 27 Feb 2017	Dataset 5: 28 Feb 2017 – 31 May 2018	Dataset 6: 1 June 2018 – 14 May 2019
Total no. of applications in which permission to proceed was granted	42	63	81	67	62	46
% of applications granted permission out of total number of Aarhus JR applications	37%	41%	45%	42%	39%	39%



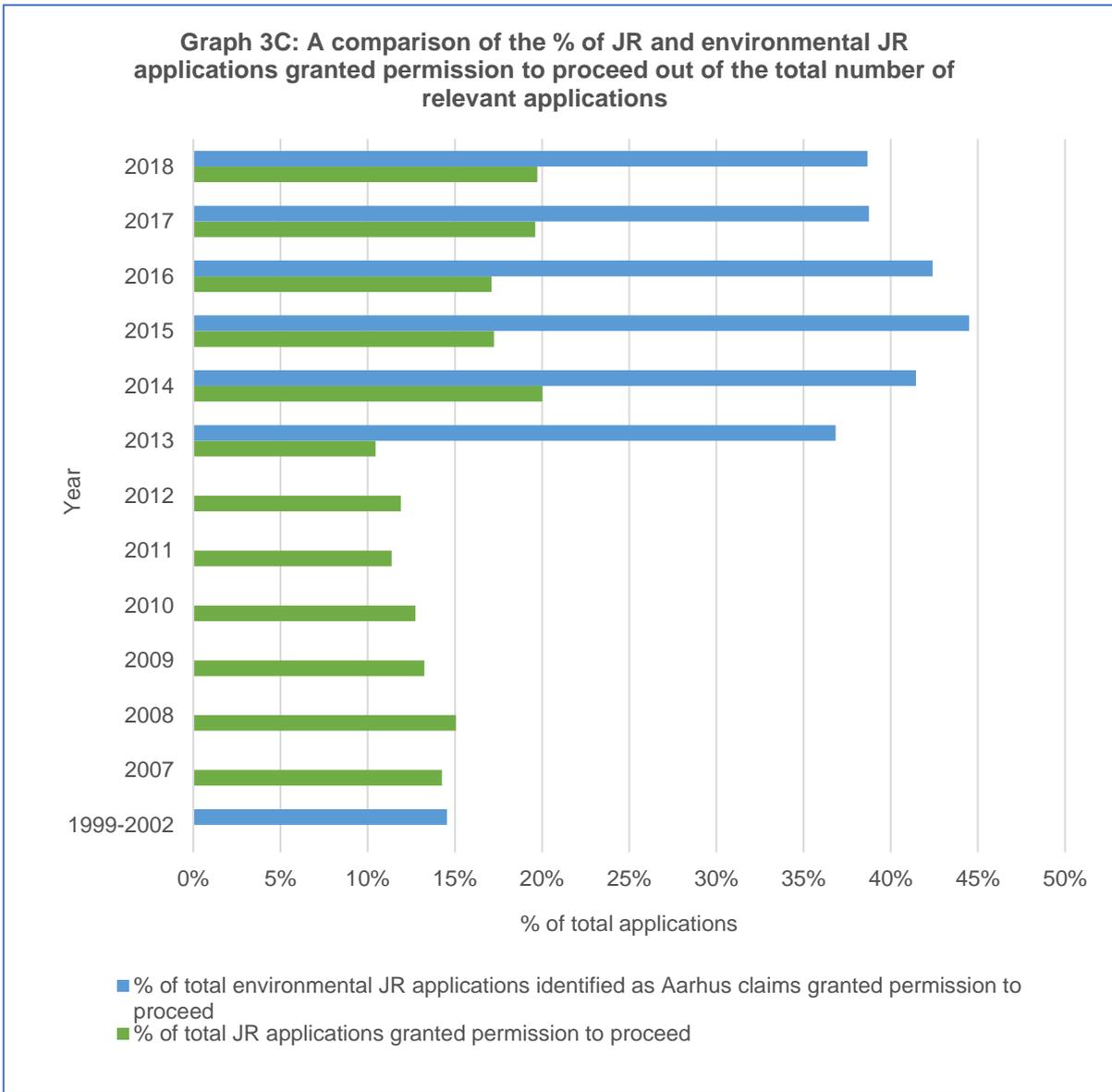
Graph 3A shows a significant decrease in the number of applications for which permission was granted after dataset 3 (1 April 2015 – 31 March 2016), before plateauing at around 4 per month in dataset 5 (28 Feb 2017 – 31 May 2018) and dataset 6 (1 June 2018 – 14 May 2019). Similarly, and taking the changes in the number of applications into account, Graph 3B shows the percentage of total applications where permission to proceed was granted follows a parallel trend.



Impact of CJCA 2015

The fall in the number of cases being granted permission to proceed after dataset 3 appears to correlate with the introduction of the Criminal Justice and Courts Act 2015, taking into account a time lag between a reform becoming effective and cases coming through the system (as noted on p20). The new “test” lowers the threshold at which the court can refuse permission (or relief) from inevitability to a high degree of likelihood that the outcome of the challenged decision would be the same even if the illegality complained of were corrected. The mandatory nature of the requirement requires judges to dispose of cases at an earlier stage when it is engaged. This gives defendants an additional argument to deploy (and one they can be in significant control of being the decision-taker with all the information to hand) even though the illegality alleged could be obvious, likely or probable. If defendants raise these issues at permission, the court is under a statutory duty to consider it.

This drop in permissions, when considered in context with the decreasing number of Aarhus Convention claims being brought in the first place, adds to the picture of a chilling effect from legislative reforms in this area.



Comparison to total JRs

Graph 3C shows the proportion of JR applications and environmental JR applications that are granted permission to proceed out of the total number of applications made. The data indicates that environmental JRs are more likely to be granted permission to proceed than JR applications overall. This shows that there are meritorious cases being brought by environmental claimants as they pass this key procedural hurdle of whether or not they are arguable (and so have a real prospect of success) much more frequently than other JR claimants (more than twice as much) – in contrast to the Government’s stated basis for the 2017 reforms.⁷⁵

However, current trends show that the percentage of total environmental JRs being granted permission has fallen since April 2016, as discussed above, whilst the percent for general JRs is slowly starting to increase. Given that the legislative reforms impacting on permission apply

⁷⁵ See, Ministry of Justice, Government Response, ‘Cost Protection in Environmental Claims’ (2016) para 10: “10. The government believes that the changes will not prevent or discourage individuals or organisations from bringing meritorious challenges.....Other changes should, however, deter unmeritorious claims which cause delay and frustrate proper decision making, without undermining the crucial role which judicial reviews and reviews under statute can have as a check on public authorities.” Available [here](#).

across the board, this could be reflective of other factors outside the environmental law field (or outside the limits of current data). For now, there remains a difference in favour of environmental JRs over other JRs being granted permission, of around 50%.

Conclusion

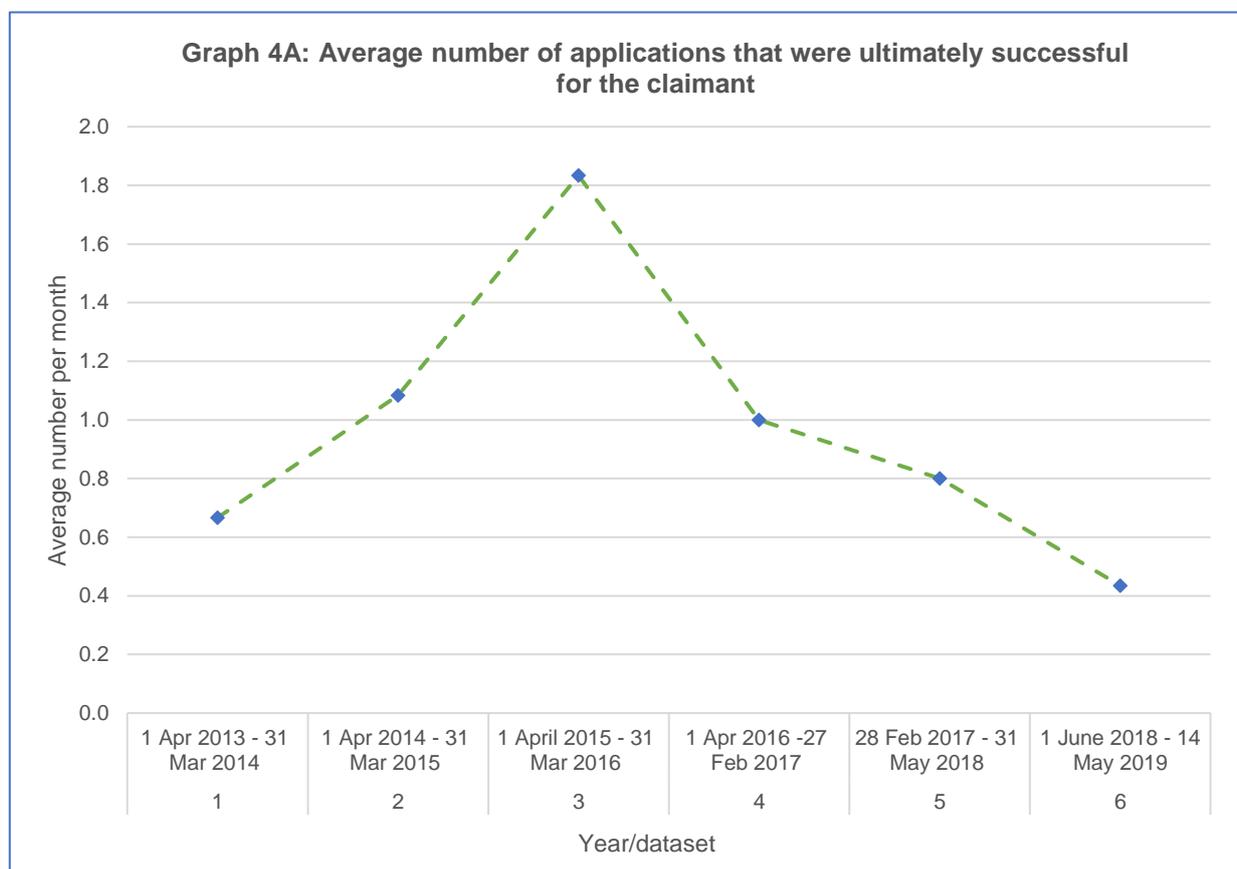
It is reasonable to assume that a significant factor in the reduction of Aarhus Convention claims being granted permission to proceed is the passage of the Criminal Justice and Courts Act in 2015 and the introduction of the “substantially different outcome” test in s.84. This mandatory requirement requires the court to dispose of cases at an early stage in proceedings and provides defendants with an opportunity to deploy arguments that must be considered. The fall in permission rate is concerning as, when combined with the falling number of applications (as shown in section 1), it suggests deteriorating levels of access to justice.

Finally, the number of Aarhus Convention claims granted permission remains higher than that for JRs generally, demonstrating that environmental cases are meritorious in comparison. It also emphasises the importance of having a robust system of JR in place to regulate the environmental decisions, acts and/or omissions of public bodies.

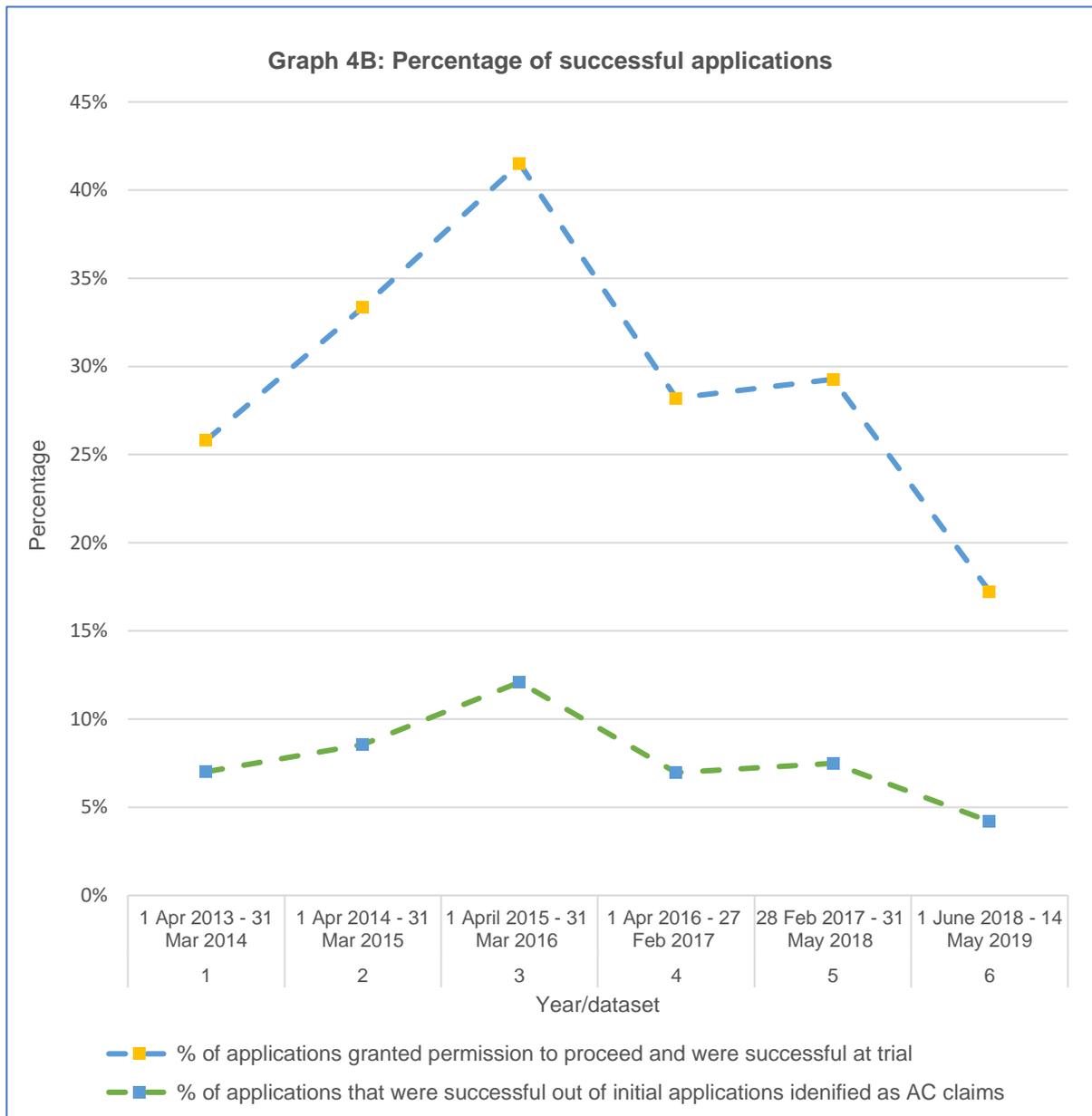
4. The number of cases ultimately successful for the claimant

Success rates are low; the average number of cases per month that are ultimately successful for the claimant at final hearing has fallen by nearly 35% since 31 March 2016; but, environmental success rates are higher than for JRs generally.

Dataset	Dataset 1: 1 Apr 2013- 31 Mar 2014	Dataset 2: 1 Apr 2014 – 31 Mar 2015	Dataset 3: 1 Apr 2015 – 31 Mar 2016	Dataset 4: 1 Apr 2016 – 27 Feb 2017	Dataset 5: 28 Feb 2017 – 31 May 2018	Dataset 6: 1 June 2018 – 14 May 2019
No of applications for JR identified on Form N461 as AC claims	114	152	182	158	160	119
No. of applications that were ultimately successful for the claimant	8	13	22	11	12	5
% of applications successful out of initial applications identified as AC claims	7%	9%	12%	7%	8%	4%



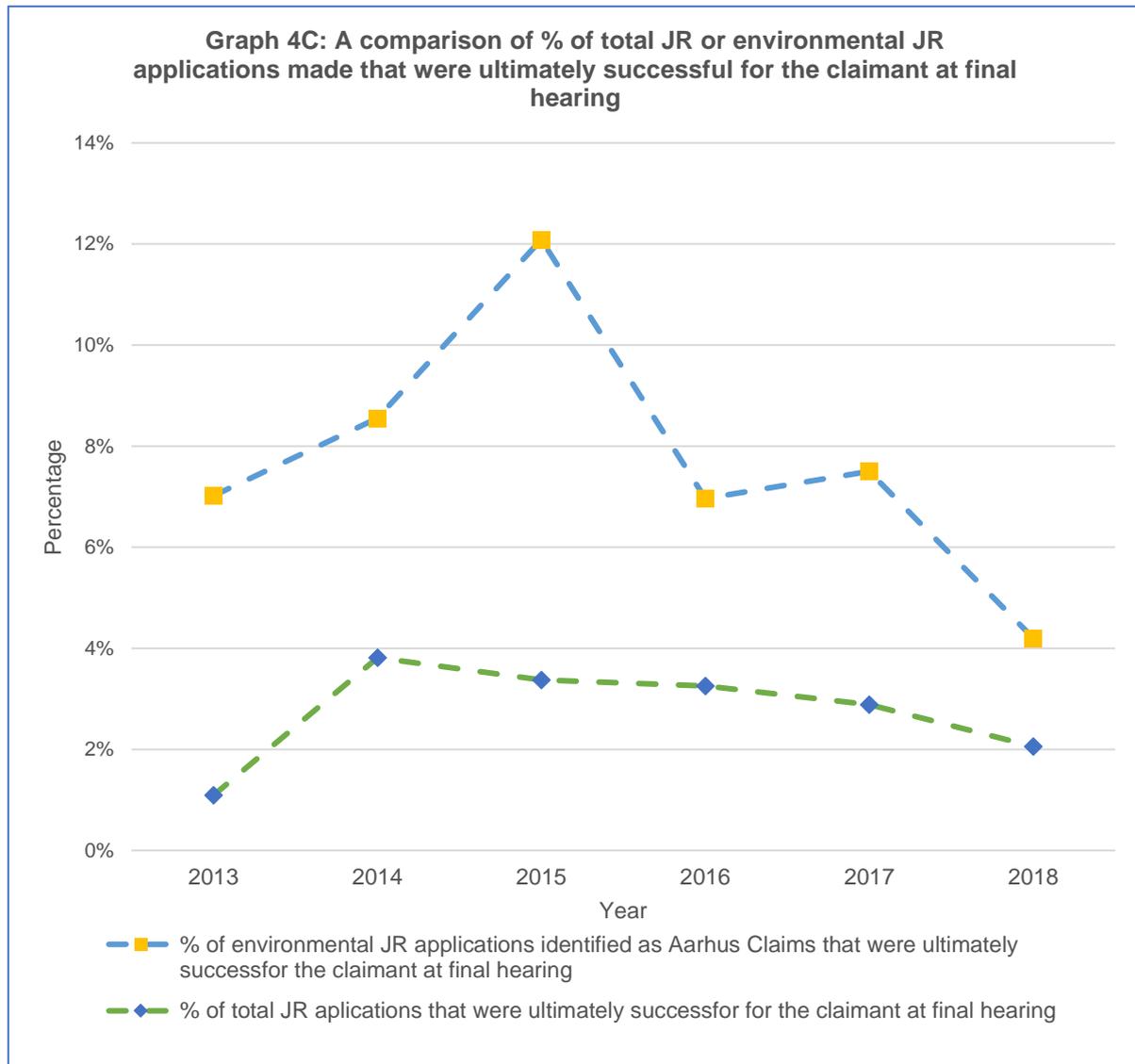
This data shows that between dataset 1 (April 2013 – March 2014) and dataset 3 (April 2015 – March 2016), the number of applications that were ultimately successful for the claimant was increasing. However, the success rate fell significantly between dataset 3 and dataset 4 (April 2016 - February 2017) and has continued to decrease thereafter.



Graph 4B shows two datasets. The green line shows the percentage of applications that were ultimately successful out of the total number of applications identified as Aarhus Convention claims. The data shows that only a very small percentage of total applications are ultimately successful for the claimant at final hearing. After dataset 3 this falls by two-thirds from 12% to 4% being ultimately successful (in real terms this represents a fall from 22 successful cases in dataset 3 to only 5 in dataset 6). This, by any means, is a very substantial drop and a significant cause for concern. Since June 2018 alone, success rates have halved again from 8% to 4%, which is again very concerning.

The blue line shows the percentage of applications that were ultimately successful out of those granted permission and proceeding to a substantive hearing, i.e. the success rate of cases

deemed arguable. Similarly, this shows a significant decrease from dataset 3 (1 April 2015 – 31 March 2016), resulting in a fall of over 50%. As we have seen above, the number of cases being granted permission is already less than half of the total number of original applications (see section 3). This fact, combined with increasingly low success rates at final hearing, reveals a deteriorating picture.



Comparison to overall JRs and the impact of the Aarhus regime

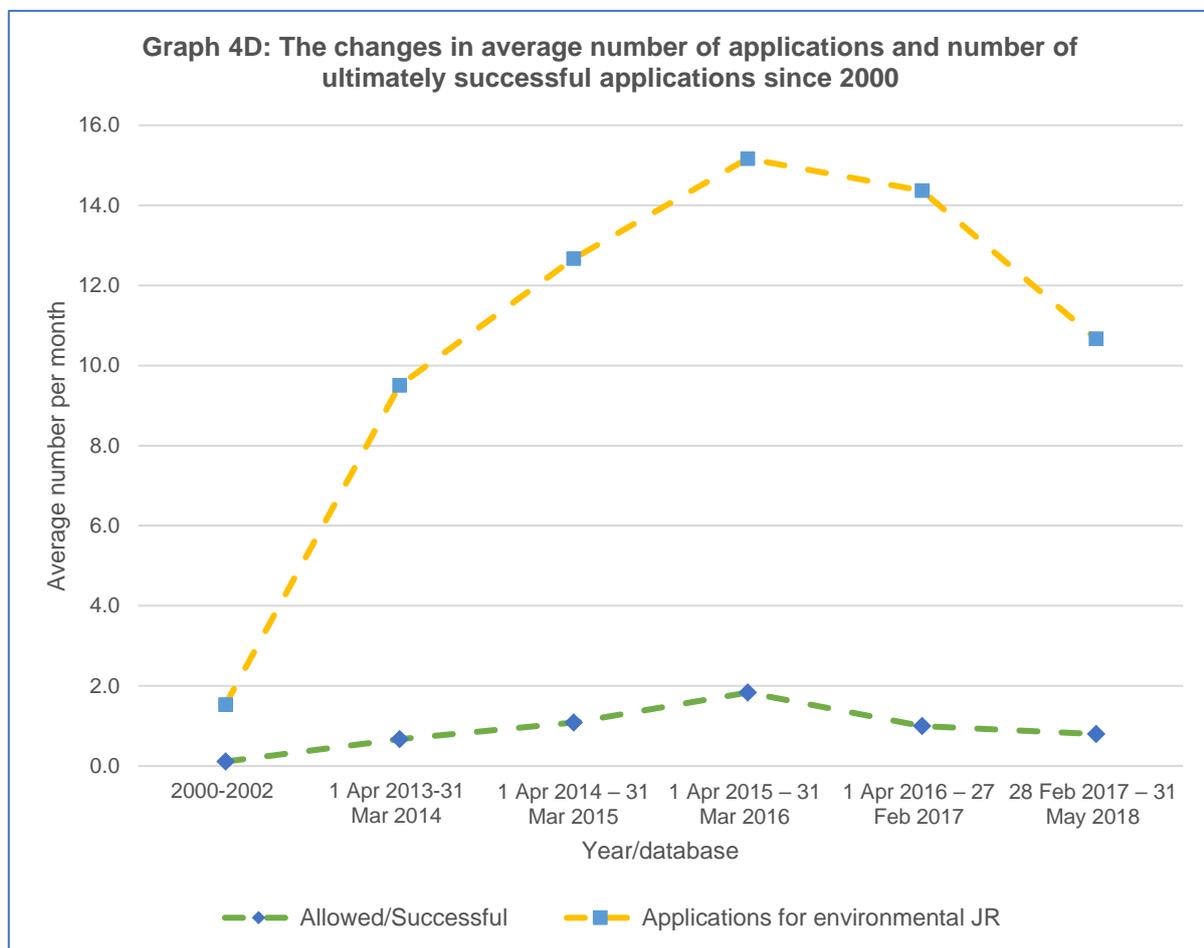
Nonetheless, Graph 4C demonstrates that environmental JRs have a proportionately higher success rate when compared to other JR claims.

For other JR claims (green line), success rates have not increased beyond 4% between the period of 2007 and 2017, and thus sit significantly below the success rates for environmental JRs, the latter of which peaked at 12% in the period from April 2015-March 2016 (dataset 3). Following 2013, there was an initial increase in the percentage of successful applications for claimants for all types of JR, including environmental. For non-environmental JRs, this rise is likely to be due to the removal of immigration statistics from JR data in 2014. These enjoyed a very low success rate but were large in number.⁷⁶ However, after 2014 the proportion of

⁷⁶ Ministry of Justice (n 62) 10.

successful cases out of the total number of JR applications, steadily falls to between 2-4%. Despite the parallel decrease in success rate of environmental JRs since 2016 to just 8% in 2017, this remains double that of the highest success rates for JRs generally at the time. All the same, since 2018, for both environmental and normal JRs, success rates have been around or below 4%.

Though this could be a positive story for how environmental cases fare in comparison to other types of JR, the success rate is still worryingly low considering the low starting point, small number of Aarhus Convention claims generally, and that the overall number of such cases are declining. In real terms, this means that in dataset 6 (1 June 2018 – 14 May) there were 114 unsuccessful cases (out of 119) - the same amount as the total number of Aarhus Convention claims in 2013. It is entirely possible that an important number of these could represent significant and strategically important failures in environmental protection. Obviously, the converse argument is that the decisions taken were found to be lawful and challenges should not have been brought, but that would be overly simplistic in light of the real-world implications, established problems with standards of review, and findings in this report.



Graph 4D shows the changes in the number of applications for environmental JR and the number of successful cases since 2000. Between 1999 and 2002, the likelihood of success for environmental JR was 7%,⁷⁷ however today it is nearly half that figure. When combined with the fact that there are over *twice* as many cases issued today than in 2002, the impact of this falling success rate is much more significant.

⁷⁷ Macrory and Woods (n 64) 60.

Possible reasons for declining success rates

The steep fall in success rates from dataset 3 (1 Apr 2015 – 31 March 2016) cannot be readily explained by legislative reforms immediately prior to, or during, the relevant period. The effect of the CJA 2015 was, amongst other things, to introduce a lower threshold at which the court can refuse permission or remedy and would not be expected to impact hugely on success rates at first instance, especially given we have defined success as the claim being allowed only. We briefly consider other issues that may be in play here. Although there is no statistical basis for these suppositions in the data, they are based on considerable practical experience.

One possibility is that public bodies, operating in an increasingly litigious society, have got better at making lawful decisions. This is not to say that they are always decisions that claimants would welcome, or represent good environmental governance, but they may be decisions that are more difficult to challenge. Another possibility is that the nature of the applications has changed in recent years. A higher than average number of claims premised on substantive issues around the merits of the decision may be expected to perform less well than those predicated on largely procedural grounds (due to harder legal thresholds to reach to be successful). However, while that may explain short-term fluctuations, it does not readily explain a trend that inexplicably starts in 2015 and continues to persist after four years. Indeed, from the 2013 reforms we see increased numbers of claims and increasing success too. There are two further factors that support that conclusion. Firstly, if claimants were encouraged to “chance their arm”, i.e. to bring cases with lower prospects of success, we may have expected to see this change following the introduction of the new costs regime in 2013, which restricted the claimant’s liability for adverse costs. However, as above, success rates as a % of total (but increasing numbers) of Aarhus Convention claims continued to rise. Secondly, the environmental claimant legal market is quite small and so, broadly speaking, one could expect a very significant proportion of the relatively small number of cases to be taken by the same experienced legal teams (in-house or firms) and representatives exhibiting similar approaches. It therefore doesn’t seem likely that the decline in success rate is resulting from a higher proportion of “poor” cases.

Another possibility is a change in the judiciary as High Court judges either retire or are promoted to the Court of Appeal and new judges join ‘the Bench’. However, there is no obvious reason why small changes in personnel would lead to any significant, ongoing change in outcomes, unless environmental and planning cases are being regularly passed to a subset of judges who then exhibit discernible bias or a particular approach.

One final possibility is a change in judicial culture more broadly. While the judiciary remains wholly independent of Government, changes in political leadership signal societal changes and, possibly, subtle differences in judicial approach in response to this. This could particularly be so where successive Ministry of Justice reforms are presented as dealing with ‘nuisance’ claimants or ‘unmeritorious’ claims, to correct the system, or are otherwise not claimant friendly. It is therefore possible that Government initiatives designed to reduce the number of environmental cases being brought (heralded by Ministerial statements that the process of JR, is being “abused” by claimants⁷⁸) have shifted the judiciary to a more ‘establishment’ approach

⁷⁸ See Ministry of Justice (2012) *Judicial Review: Proposals for Reform* ([here](#)) and the Ministerial Foreword in the Government’s response to a separate public consultation in 2013 on JR (Judicial Review – proposals for further reform: the Government response) (2014) in which the Lord Chancellor and Secretary of State for Justice Chris Grayling MP said: “I believe in protecting judicial review as a check on unlawful executive action, but I am equally clear that it should not be abused, to act as a brake on growth. In my view judicial review has extended far beyond its original concept, and too often cases are pursued as a campaigning tool, or simply to delay legitimate proposals. That is bad for the economy and the taxpayer, and also bad for public confidence in the justice system”.

in recent years (notwithstanding the lack of evidence for the reforms). This could tie in with apparent and specific drops in success rates following on from the 2015 and 2017 reforms.

As highlighted previously, we cannot be sure that any of these possible explanations are correct although they are plausible and chime with direct practical experience. However, we can say with certainty that the legislative reforms noted in this report do not appear to offer a full rational explanation for the ongoing, and concerning, decline in success rates at first instance as demonstrated post March 2016 (dataset 3). This is an area that deserves further attention.

Conclusion

Not only is the fall in success rates of concern in and of itself, it is possible that declining success could play a further negative role in discouraging potential claimants with legitimate cases to bring environmental claims in the first place. This is clearly not in the public interest. If the courts are not providing (and are not seen to be providing) an effective and fair mechanism to deal with legitimate grievances, then this poses a systemic threat to environmental governance and our democratic society.

It is important to consider that these conclusions are based on a conservative definition of success as where the 'claim was allowed at the substantive hearing', as opposed to the real-world impact/implications or of the legal remedy provided. Neither does it allow detailed consideration to be given to the restrictive standard of substantive review currently applied by the courts (and being scrutinised by the Aarhus Convention Compliance Committee at the UN in November), or other more detailed case outcomes (such as those claims that settle before trial – although it is considered this number will be small).

Key conclusions and recommendations: the effect of legislative reforms on access to justice in England and Wales

The data suggests that legislative reforms have made access to justice less accessible. A combination of the fall in the number of cases, an increase in challenges by defendants to the status of Aarhus Convention claims (thus potentially removing costs protection), a fall in cases being granted permission, and, an overall fall in success rate all creates a concerning picture of an uninviting and challenging system that can (and does) deter claimants. Indeed, we would suggest the findings in (1) could already be indicative of a loss of public faith in JR as an effective (or even fair) means of redress due to declining numbers of claims.

In light of accelerating environmental degradation, and the continuing rise in public concern for environmental issues, especially climate change, it is imperative that the UK maintains a clear, transparent and accessible system of review that provides citizens with an effective and affordable means of holding decision-takers to account when the need arises. In order to facilitate the broad access to justice required by the Convention, the administration of justice in environmental matters must be better adjusted towards claimants' needs, and less about managing the numbers of claims down and/or evading the provision of effective remedies. Ultimately, that will depend on credible and more confident governance, that is not afraid of public challenge on controversial environmental decisions within a democratic system.

The number of Aarhus claims has fallen significantly since April 2016

The fall in the number of Aarhus Convention claims post 2015 could result from numerous factors. However, the Ministry of Justice data suggests that the combination of the CJCA 2015 and CPR 2017 reforms (and most particularly the requirement to file a financial statement when applying for JR, the lack of certainty over financial exposure and changes to the costs rules for challenging the status of Aarhus Convention claims) are strong contributing factors.

In order to address this change, the system as a whole needs to work well for claimants, which means it is clear, consistent, not prohibitively expensive and with advance certainty over exposure as far as possible. It also needs to allow for effective redress (strong standards of review and effective remedies). We acknowledge that some of this is beyond the analysis of this report, but it is important to emphasise that the system as a whole must work for claimants if it is to work at all, and the balance currently struck is too far the other way. Even though claimants may lose their case they should still feel like they have had a fair hearing and a fair opportunity, and the public interest is served by environmental cases coming forwards.

Recommendations:

- We recommend the reinstatement of a slightly modified version of the 2013 Aarhus fixed cost caps regime.

Despite minor imperfections, the 2013 regime worked and significantly improved access to justice by providing advance clarity and certainty with regards to adverse costs exposure. The caps should be set at a maximum of £5,000 for individuals and £10,000 in all other cases and apply throughout the duration of the first instance proceedings. The level of these caps should be reduced where it can be shown that figures are prohibitively expensive for a claimant. This cap should also remain throughout all other stages of proceedings. The imposition of a new additional cap (at the same levels) upon any appeal should be granted exceptionally and only where this can be proven to be not be

prohibitively expensive for the claimant, taking into account all costs incurred up to that point. The default position should be the same cap remains in place for all appeals, because it represents the limit already set above which it is 'prohibitively expensive'. We also recommend the removal of the reciprocal cap of £35,000 on the costs recoverable by successful claimants. There is no basis for a reciprocal cap in the Aarhus Convention and it can render complex environmental cases "too expensive to win".

- This would negate the requirement for claimants to provide a statement of financial information when submitting the claim form (unless applying for a reduction in the cap). It would also address the emerging tendency for defendant public bodies to request intrusive and detailed information (which can act as a deterrent for claimants) and challenge the level of the cap, even at late stages of the proceedings.
- Clearer and more tightly drawn provisions are required in any event to manage the costs position on appeal up to the Supreme Court.
- This should then be monitored and followed by an evidence-based consultation that explores how best to ensure all Aarhus Convention claims under Article 9 of the Convention are not 'prohibitively expensive' for claimants, such as: reducing court fees, instigating 'qualified one-way costs shifting',⁷⁹ payment of costs from central funds; and/or, as the case may be, on retaining the above system.

The number of challenges to the status of Aarhus Convention claims is rising; further data is required to verify success rate trends

The data shows that the number of successful challenges has increased and, as would be expected, the proportion of total applications that this represents has increased as well. We await further data to establish if this is because there are increasingly more challenges overall (we consider this likely given current data) and to discern the success rate of those challenges.

There are several reasons why the number of challenges could be rising including more aggressive defendants and a diminished cost exposure from bringing such applications. There may also be an element of 'boundary testing' of definitional concepts as new changes bed in. Ultimately, until we receive further data, we cannot conclude whether the majority of these are well-founded challenges or whether the system facilitates defendants in challenging the status of Aarhus Convention claims to exert leverage.

Recommendation:

- We recommend the 2013 indemnity basis for costs awards for unsuccessful challenges to Aarhus Convention claims be reinstated. This would mitigate aggressive behaviour by some defendant public bodies by reversing the cost exposure and – crucially - avoid an amount of unrecoverable costs for claimants who successfully defend such challenges to their eligibility to costs protection.
- We also recommend clearer rules and guidance to ensure challenges are made on an informed basis and environmental claimants receive the full benefit of Aarhus protection, to which they are entitled.

The number of cases granted permission has fallen since early 2016

⁷⁹ i.e. that unsuccessful claimants do not have to pay adverse costs, but can recover own costs when they win, thereby not being 'prohibitively expensive' in either case.

The fall in permissions being granted following April 2016 is likely reflective of the passage of the Criminal Justice and Courts Act 2015 and the introduction of the “substantially different outcome test”. The mandatory nature of the requirement will mean judges dispose of cases at an earlier stage notwithstanding the likelihood that the unlawfulness alleged is realistic or likely, whilst also affording defendants an additional argument to deploy to this effect. If defendants raise these issues at permission, the court is under a statutory duty to consider it. The chilling effect of this legislative reform further decreases the number of cases being heard and thus those that have the opportunity for a successful outcome.

Recommendation:

- We recommend that Aarhus Convention claims are exempt from the requirements of section 84 of the Criminal Justice and Courts Act 2015, namely that permission to JR is refused where it appears “*highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*”. We would suggest this should be considered for other non-environmental JRs too.
- Alternatively regarding section 84, while it is conceptually undesirable in principle to allow defendants to ‘get away’ with unlawful behaviour due to the claimant being declined permission or a remedy (on the basis that the Judge agrees the same decision would have been made even if lawfully conducted) there are practical arguments for this. However, the authors recommend that this should not prevent a case being given permission, if it is to apply at all. Unlawful conduct should be judged and exposed at court in any event. There are sound public policy reasons for doing so, not least in the wider benefit of stating the law, and that claimants feel they are fairly treated within an effective legal process, and that justice be seen to be done (at least to some extent). That said, the Aarhus Convention does require access to an effective remedy too, so this approach may not lead to full compliance.

The success rate of environmental JRs has fallen substantially since April 2016

The data shows that a small percentage of cases are ultimately successful for the claimant and that the percentage has fallen since 2015. The CJCA 2015 could be partly responsible for this but that would not necessarily explain the continuing decline in success rates today (or the extent of it overall). It is possible that some other factor(s) are in play here, including the approach within the judiciary for environmental JRs. Whilst ultimate success rates remain higher than for non-environmental JRs, this difference is decreasing and increasingly marginal.

Recommendation:

- We recommend conducting a full review to identify why Aarhus Convention claims’ success rates at permission and first instance are falling. This should extend beyond cost considerations to encompass other issues such as judicial attitudes and the standard or intensity of review by the courts.

Other recommendations

This report does not evaluate other aspects of the Aarhus costs regime (or JR more generally) that impact on the number of cases brought and/or their eventual success rate. The authors of this report have raised concerns about surrounding issues in correspondence with the Government and the Aarhus Convention Compliance Committee and we would recommend that further analysis is undertaken on these issues. They include, for example:

Costs

- **Reciprocal cap** - there is anecdotal evidence to suggest that the reciprocal or cross-cap of £35,000 continues to be a problem in complex environmental cases. For example, whilst successful in their challenge to the lawfulness of certain aspects of amendments to the Aarhus costs regime in 2017,⁸⁰ the claimants were unable to recover their full legal costs because of the impact of the cross-cap. There is no basis for the cross-cap in the Convention and in light of the Compliance Committee's clarification that fairness in Article 9(4) of the Convention refers to what is fair for the *claimant*, not the defendant public body⁸¹, we recommend that it is removed from the CPR.
- **Own Costs** - similarly, 'costs neutrality' or where each party bears their own costs, as is currently operating in the Tribunal system of England and Wales, can have the same deterrent effect – making cases 'too expensive to win' as you cannot recover the cost of doing so.
- **Multiple caps** - the UK maintains that the basis for separate costs caps for each claimant is to provide fairness and proportionality to all the parties while ensuring the costs of the claim are not prohibitively expensive. Once again, there is no basis for this rationale - the concept of "fairness" in Article 9(4) of the Convention refers to what is fair for the *claimant*. Moreover, this feature of the present system results in unnecessary practical difficulties for claimants.
- **Cross-undertakings in damages** – CPR Practice Direction 25A provides the court with discretion to award interim injunctive relief without requiring a cross-undertaking in damages in Aarhus cases. This should be made clearer and more certain: that once a fixed costs cap is set, beyond which prohibitive expense would be experienced, then no cross-undertaking should be awarded. Where a costs cap has not yet been set, then due regard should be had to the default caps and the likely total costs liability of the claimant in the proceedings, such that an additional costs burden is not created. The overall outcome for the claimant should be broadly the same, with or without the possibility of a cross undertaking.
- **Public funding** – Both the preambles to the Aarhus Convention and Article 9(5) expressly recognise that members of the public may need assistance in order to secure their rights of access to environmental justice. However, legal aid is not available unless permission is granted to bring JR proceedings⁸². This may have the effect of dissuading claimants from bringing proceedings in the first place (which links to the decreasing numbers of cases being granted permission to proceed). Moreover, a local community may often have to find a considerable "community contribution" to benefit from public funding and, in any event, it is not available for environmental NGOs. Legal aid provision should be expanded.
- **Intervener's costs** – Indicative data received from the London Administrative Court Office shows that there has only been one application to intervene in the High Court between

⁸⁰ *RSPB, Friends of the Earth Ltd and ClientEarth v SofS for Justice and Lord Chancellor* (n 50).

⁸¹ See, Findings and recommendations in Communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland (2011) 135. Available [here](#).

⁸² Civil Legal Aid (Remuneration) (Amendment) Regulations 2015/898 s.2(3).

July 2016 and May 2019, which was refused.⁸³ Similarly at the Court of Appeal there has only been one intervention in this time.⁸⁴ We consider it likely that the introduction of new cost rules for interveners through the CJCA 2015 is a strong reason for the reluctance to intervene, but we are seeking further information on this point.

Timeliness

- **Time limits** - The introduction of the very short (six week) time limit for applying for permission to JR in planning cases can make it very challenging for claimants to find lawyers, fundraise and secure legal opinion in sufficient time to issue proceedings. In addition, there is an increasing tendency for defendants to delay responding to Pre-Action Protocol correspondence until after the limitation deadline. This is causing claimants to have to issue proceedings “blind” (i.e. without any response from the defendant on their likely defence) and then apply to the court to stay the proceedings to avoid any risk of costs. There have been cases in which defendants have opposed a stay. Moreover, for non-planning cases a claim form must be filed “promptly” and, in any event, not later than 3 months after the grounds to make the claim first arose (CPR 54.5(1)). The uncertainty around the meaning of promptly is unhelpful and an added burden on claimants at the crucial stage of the proceedings. The promptly requirement should be removed, and a more reasonable timeframe for the issuing of claims in planning cases specified.

Standard of review in JR

- Concerns have been raised about a general failure by the UK to provide an adequate review of the “substantive legality” of certain decisions, acts and omissions in accordance with Articles 3(1) and 9(2), (3) and (4) of the Aarhus Convention. Communication 156 challenges the restrictive nature of JR, including the focus principally being on procedural issues and the very high threshold for irrationality or *Wednesbury* unreasonableness.⁸⁵ The Communication was declared admissible in 2018 and a Hearing will be held at the UN in Geneva on 5th November 2019.

⁸³ CO/4922/2017.

⁸⁴ C1/2016/2662.

⁸⁵ Communication ACCC/C/2017/156 (n 23). Available [here](#).

Annex 1

Standardising the EIR data

1. May 2015 data is repeated in two of the datasets (dataset 3 and 4)

The total number of applications for JR identified on form n461 as AC claims between 1 April 2015 and 31 May 2015 = 20 cases

So, 20 cases over 61 days = $20/61 = 0.3279$ cases per day on average

So, for April alone, the amount of cases per month would be $0.3279 \times 30 \text{ days} = 9.836$ cases per month

And for May would be $0.3279 \times 31 \text{ days} = 10.164$ cases per month

We could then add the April amount to dataset 4 to make dataset 4 of an equal length to the previous 3 datasets (namely 365 days) so, the amount of applications for JR identified on form N461 as AC claims between 1 April 2015 and 31 March 2016 = $173 + 9.836 = 182$ (rounded down).

As a result, May 2015 only appears once in data (edited dataset 3).

2. Pre-2013 data differs in format and accuracy. Data regarding access to justice in environmental cases was not recorded completely. Although some surveys have been done to collate this information, it remains fragmented and incomplete.

Due to limited empirical data held by the Ministry of Justice and time constraints, we have relied purely on anecdotal data for gaining a picture from before 2013. The incomplete nature of it has not been an obstacle to this process but has limited the statistical comparisons we can do.

3. Datasets are of a different length (e.g. dataset 3 is 61 days but dataset 4 is 334 days)

We reorganised the data by calculating the average amount of cases per day for each period and calculating monthly averages in order to shift the time periods, so they were all of 365 days or as close as possible.

We added together datasets 5 and 6 to create a dataset that was as close to 365 days as possible (though in this cases, dataset 6 ends on February 27 so this is one month shorter than the previous ones). We have not edited this to make them more even to separate from 28 February where the 2017 CPR amendments came into force.

When plotting this data on graphs to see trends, we calculated the average per month. This removed any discrepancies due to unequal length of the datasets. Thus for dataset 1, 2 and 3 which were all twelve months in length we divided the total numbers by 12, for dataset 4 which was eleven months in length we divided the total amount by 11, for dataset 5 which was fifteen months in length, we divided the total amount by 15 and for dataset 6, we divided by 11.5.

4. Between 28 Feb 2017 and 31 May 2018, 14 cases with hearings listed not taken place and 'curia advisari vult' (CAV) cases⁸⁶. As of Dec 2016, there were 3 open cases in data between 1 Apr 2013 and 31 May 2015⁸⁷

All open cases have been universally excluded from data analysis and our conclusions.

⁸⁶ Ministry of Justice Response to EIR, dated 16 October 2018

⁸⁷ Ministry of Justice Response to EIR, dated 3 July 2017