

# Coalition for Access to Justice for the Environment

## Briefing

### Access to environmental justice

In 1998 the UK Government signed the Aarhus Convention,<sup>1</sup> which guarantees the rights of access to information, public participation in decision-making and access to justice in environmental matters. With regard to access to justice, it provides that procedures for securing access to justice shall be ‘fair, equitable, timely and not prohibitively expensive.’ Yet, recent research by the Environmental Justice Project<sup>2</sup> (EJP) found that 97% of leading environmental practitioners and NGOs believed that the civil law system failed to provide environmental justice.<sup>3</sup>

This Briefing outlines the main barriers identified by the Coalition for Access to Justice for the Environment (CAJE) and calls for urgent reforms in the civil justice system to enable the UK Government to effectively ratify the Aarhus Convention.



Environmental  
Law Foundation



Friends of  
the Earth

### What is environmental justice?

Environmental justice can mean two things. In a broad sense it means ensuring that everyone has an equal right to a clean and healthy environment regardless of his or her means, where they live or their background. Environmental justice also means being able to secure access to the law in resolving environmental concerns.

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### Barriers to environmental justice

The most significant barrier to environmental justice is the cost of legal action. There are also concerns about a lack of judicial understanding of, and sympathy with, environmental issues; the limited scope of judicial review; an inability to obtain injunctive relief and, finally, the question of standing before the Courts.

#### Cost

Litigation remains only a remote possibility for most communities and individuals due to the cost of taking action and, perhaps more importantly, the risk of being held liable for the opposing side's costs. In 1999 in an article about environmental litigation, Sir Robert Carnwath remarked “*Litigation through the courts is prohibitively expensive for most people, unless they are either poor enough to qualify for legal aid, or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds.*”<sup>4</sup>



<sup>1</sup> UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

<sup>2</sup> Castle, P., Day, M., Hatton, C. and Stookes, P. (2004) *Environmental Justice*. The Environmental Justice Project. London. The research was part-funded by DEFRA

<sup>3</sup> Respondents include those responsible for the majority of environmental cases in the last decade, including private claims (such as the Sellafeld compensation claims and the Camelford aluminium poisoning claims) and public claims such as the recent ‘Ghost Ships’ case taken by Friends of the Earth.

<sup>4</sup> Sir Robert Carnwath (1999) *Environmental Litigation – A way through the Maze?* Journal of Environmental Law Vol 11 No. 1 Oxford University Press

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The problem is of *exposure* and *uncertainty*; i.e. the risk of paying the legal costs of the other party/parties combined with the fact that it is impossible to know at the outset of a legal challenge how much those costs might be. In December 2003, the day before the hearing on the ‘Ghost Ships’ case in the High Court<sup>5</sup> Able UK, the company hoping to scrap the contaminated US ships, served Friends of the Earth with a Schedule of Costs which were slightly over £100,000 for a one-day hearing on a preliminary issue. Similarly, Greenpeace experienced a recent case in which the Defendant served a costs estimate for a half-day hearing of £70,000.

In a report published last year, the Environmental Law Foundation (ELF) analysed hundreds of potential claims referred to their members to try and understand why so many cases never made it to Court. They found that a large proportion of cases that had reasonable prospects of success never got off the starting blocks for fear of having to pay the other side’s costs if they lost. ELF commented that ‘too often, legal action that had reasonable prospects of success has not been pursued because it has been prohibitively expensive to do so.’<sup>6</sup>

The bulk of environmental cases affect a large number of people and raise important issues of public interest, yet those seeking to progress them pay must risk having to pay a high price to protect the ‘public good’.

## Understanding of environmental issues

The EJP research also confirmed that 66% of the respondents were not satisfied with the courts’ understanding of environmental issues. A number of practitioners found a lack of comprehension of or sympathy with key principles of environmental law such as sustainable development and the precautionary principle as well as the relationship between EC and domestic law.

## Treatment of environmental cases

A recent report by UCL examined 55 environmental judicial review cases and found that only four of these were successful.<sup>7</sup> Similarly, the ELF study found that over two thirds of environmental cases referred to ELF members, including a large proportion of judicial review cases, were not concluded satisfactorily. These concerns were shared by a large number of respondents to the EJP, who did not accept that many of their cases were simply poor cases.

## Injunctions

Applicants are entitled to seek an interim injunction to prevent a respondent from causing environmental damage until a full hearing takes place. This is important in order to avoid a pyrrhic victory where a case is won but the damage already (and irreversibly) done. The main problem with such measures is that they require the applicant to give a “cross undertaking in damages” – a form of insurance policy whereby the applicant undertakes to reimburse any commercial loss in the event of losing the challenge. The potential liability can run into several hundred thousand pounds – with the effect that most individuals and NGOs cannot contemplate it. Yet the consequences of not doing so can be disastrous and irreversible. The RSPB cited Lappel Bank in Kent, which resulted in a landmark legal victory for nature conservation, but during which an important part of the Medway Estuary and Marshes was turned into a car park.

The Aarhus Convention requires contracting parties to provide a review procedure with adequate and effective remedies, including injunctive relief as appropriate.

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<sup>5</sup> [2003] EWHC 3193 (Admin)

<sup>6</sup> Stookes, P (2003). Civil law aspects of environmental justice. ELF: London.

<sup>7</sup> 18 cases were dismissed, 13 withdrawn, and leave for JR refused in 12 cases. The remaining cases were still outstanding at the time of examination, see Macrory, R. and Woods, M. (2003) *Modernising Environmental Justice – Regulation and the Role of an Environmental Tribunal*. UCL, London

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## Limited scope of judicial review

In judicial review proceedings, the court does not consider the merits of any public decision, act or omission. Instead, it considers whether the decision or action is lawful. The quality of environmental decision-making varies enormously between different regulators and over time. The problem is that there are no systems in place to allow regulators to be held account for ‘bad’ environmental decisions that are not actually unlawful. In the absence of appropriate structures then bad environmental decisions will continue to be made to the detriment of the environment and good administration and undermining the primary purpose of much environmental law (namely protection of the environment).

The EJP research found that over a quarter of practitioners responding to the study were concerned about the limited scope of judicial review. Many environmental cases concern the interpretation of scientific facts and are essentially merits based. As such, they are currently outside the scope of judicial review. As the court is reluctant to quash a decision unless it is wholly unreasonable, there seems to be no middle ground for decisions that are simply poor decisions.

## Standing

The Aarhus Convention recognises that organisations promoting environmental protection have a right of access to a review procedure before the Courts<sup>8</sup>. Although recent case law has been relatively sympathetic to public interest groups and NGOs there is still no clearly established right of standing for such groups. The rules on standing in environmental cases need to be modified to reflect the distinctive role of citizen groups and NGOs in upholding environmental law and the UK’s international obligations under the Aarhus Convention.

## Recommendations

### Costs

CAJE recommends the introduction of an ‘Aarhus Certificate’ for cases falling within the Aarhus Convention and other public interest cases. The certificate would enable judges to apply modified rules at an early stage in the legal proceedings, reducing undue uncertainty and risk for concerned individuals and public interest groups.

It further recommends, prioritising funds within the Community Legal Services towards public interest environmental cases.

### Understanding of environmental issues

CAJE recommends that a programme of judicial training and guidance on environmental matters be implemented. Internationally, training is underway on the with the UN producing extensive judicial guidance in environmental matters.

### Injunctions

CAJE recommends removing the general assumption that the applicant has to provide a cross undertaking in damages in environmental cases.

### Scope of Judicial Review

The Government must consider ways to address the variability of environmental decision-making and to allow members of the public to challenge bad environmental decisions whether by administrative or judicial means.

### Standing

CAJE recommends changes to the law to ensure that NGOs and citizen groups actively promoting environmental protection have an automatic right of standing in environmental cases.

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<sup>8</sup> Art. 9(2)

# Coalition for Access to Justice for the Environment

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