Legal Challenges To The Aarhus Rules: The Role Of The ACCC, VENN, and FOE, Client Earth And RSPB

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THE ROLE OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE (ACCC)

The Aarhus Convention Compliance Committee

- Established in 2002 to fulfil the requirement of Article 15 of the Convention which requires the Meeting of the Parties to:

- **"...establish, on a consensus basis, optional arrangements of a non- confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention."**

The Aarhus Convention Compliance Committee

- Compliance review mechanism can be triggered in four main ways:

1. a **Party** makes a submission concerning its **own** compliance,
2. a **Party** makes a submission concerning **another** Party's compliance,
3. the **Convention Secretariat** makes a referral to the Committee, or
4. a **member of the public** makes a communication concerning the compliance of a Party.

- Meets a minimum of once per year (usually 4-5 times)

- Compliance Committee cannot issue binding decisions. Makes recommendations to the full Meeting of the Parties who decides whether to endorse them. However, they do have persuasive force: see *Walton v. Scottish Ministers* [2012] UKSC 44, decisions “deserve respect”.

The Aarhus Convention Compliance Committee

- Been monitoring UK compliance since Port of Tyne complaint in 2008 - Complainants had sought JR of a government licence issued to the Port of Tyne that authorised the disposal of highly contaminated materials at an existing marine disposal site four miles off the coast.

- Committee found that UK cost rules violated Article 9(4) that proceedings be "**not prohibitively expensive"**

- Recent progress review report on UK considered new costs rules:

- ***As for the 2015 proposals to amend the CPR, the Committee finds that, with the exception of the proposal to broaden the scope of "Aarhus claims" to include statutory appeals falling within article 9, paragraph 2, of the Convention, all proposed amendments would increase rather than decrease uncertainty and risk of prohibitive costs for claimants. With respect to the proposal to broaden the scope of "Aarhus claims" to include statutory appeals subject to article 9, paragraph 2, the Committee reiterates that the requirement that procedures not be prohibitively expensive applies to all procedures within the scope of paragraphs 1, 2 and 3 of article 9, and not only paragraph 2. Therefore, while a step forward, the proposed amendment would not be sufficient to meet paragraph 8 (a), (b) and (d) of decision V/9n (see para. 77 above).***

VENN

Venn v SSCLG [2014] EWCA Civ 1539

- Key facts:
- Ms Venn sought to challenge the Inspector's grant of permission for the construction of a new house in the garden of a Victorian terrace in south-east London under s.288 TCPA 1990.
- She lived next door to the property and was concerned by the loss of green space and contended that the Inspector failed to have regard to emerging local plan policy.
- She applied for a protective costs order. The application was heard by Lang J.
- The court heard that she had about £180,000 of equity in her property, a loan of £60,000 from her parents, but that as her only income was £71.70 through the Job Seekers Allowance she would be unlikely to obtain a substantial loan against her collateral. She was ineligible for legal aid and her counsel was acting pro bono.

Venn in the High Court

- Lang J's principle findings were:

  a) The claimant's challenge fell within the scope of the Aarhus Convention (§24)

  b) However, CPR 45.41 did not apply to s.288 challenges. (§§27-32)

  c) Although the Convention did not have direct effect (i.e. through EU implementation) UK law should be interpreted and applied in harmony with its provisions where possible (Walton [2012] UKSC 44 at [100] applied); in this case that meant the adoption of the approach in R(Garner) v Elmbridge BC [2010] EWCA Civ 107 (modifying the Cornerhouse criteria). (§36)

  d) Accordingly, she should exercise the Court's discretion to make a PCO (§36)

- Lang J made an order that the Claimant's costs be limited to £3,500.

Venn v SSCLG [2013] EWHC 354

- On appeal, Sullivan LJ giving the judgment of the Court held that:

- The scope of the Aarhus Convention is very wide and includes most if not all planning challenges, including the Claimant's Section 288 application. The claim therefore fell within the scope of art. 9(3) of the Convention.

- The CPR amendments were confined to applications for judicial review, **excluding statutory appeals and applications** (and therefore Ms Venn's Section 288 application).

- The proposal was not EIA development and therefore the principles in Garner did not apply. The rules expressly excluded cost protection in statutory appeals, and therefore the Court could not bring in this protection by the back door by reference to an unincorporated treaty. Lang J's PCO was therefore overturned.
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- The Court also noted that the judicial review limitation within the CPR was not compliant with the UK's obligations under Aarhus ("**systematically flawed in terms of Aarhus compliance"**); however, the court felt it would be inappropriate to "remedy that flaw by the exercise of a judicial discretion." .

Venn (CO/2996/2016)

- Venn: latest claim: CO/2996/2016
- JR of MoJ on basis **acted unreasonably** in not having amended Aarhus Costs rules to cover statutory reviews following what was said in Venn in CA.
- Ouseley J (15 August 2016) refused permission on papers and marked **totally without merit**: International Conventions if unincorporated not justiciable and reliance on Article 6 ECHR misconceived.
- CA refused permission to appeal (15 November 2016):
- Again, essence of claim is based on breach of Aarhus Convention - agreed with Mr Justice Ouseley that the claim not justiciable in domestic courts.
- Likewise, Article 6 ECHR not engaged
- Amounts to a collateral attack on the decision of the Court of Appeal and an abuse of process

FOE, CLIENT EARTH AND RSPB

The challenge

- This is a challenge to the new costs rules brought by ClientEarth, Friends of the Earth and RSPB.

- Claimants argue that the rules are not compatible with article 3(7) of the Public Participation Directive (2003) (incorporates Convention, in part, into EU law)

- Pre-emptive challenge to the rules, rather than being tied to a particular case.

- The High Court is currently considering whether the Claimants should be granted permission to bring the claim.

The Grounds of Challenge

- The Claimants rely on two grounds of challenge:

- Ground One: Incompatibility with Article 3(7) of the PPD – varying the limits on recoverable costs (the hybrid model)

- This ground is focused on the fact that the new rules fail to provide **certainty** to claimants as to their costs exposure at the earliest opportunity

- Ground Two: Incompatibility with Article 3(7) of the PPD – Failure to provide for mandatory private hearings into a Claimant's finances.

- This ground is made on the basis that the new rules fail to make it mandatory for any hearing into finances to be **confidential**. Claimants argue that prospective claimants are likely to be dissuaded from challenging decisions because recourse to a private hearing is not guaranteed at the point of issuing the claim.

Relief sought

- The Claimants seek an order that Rule 8(5) of the new rules be declared unlawful and be quashed.

- In addition, Claimants seek a declaration that the Court may take into account consideration of the claimant's **<u>own</u> legal costs** in assessing whether the likely costs of the proceedings will exceed the financial resources of the Claimant at all stages of the court proceedings.