

Scope: What cases (and claimants) are now covered?

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The old rules



- Previous rules: the costs protection applied to:
 - “a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject”
- So applied to:
 - (1) judicial reviews only not any other statutory reviews e.g. s. 288 claims: see **Venn v SSCLG** [2015] 1 W.L.R. 2328; and
 - (2) whether covered or not depended on “the nature, or claimed nature (see the last part of the rule), of the decision act or omission that is the subject of the claim” – if it was a decision that is, or said to be, subject to the Aarhus Convention the costs protection applied: see **R (HS2 Action Alliance Ltd) v SST** [2015] P.T.S.R. 1025 at para. 12.

The new rules



- New CPR 45.41:

“(a) “Aarhus Convention claim” means a claim brought by one or more members of the public—

(i) by judicial review 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) or 9(2) 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”); or

(ii) by judicial review which challenges the legality of any such decision, act or omission and which is within the scope of Article 9(3) of the Aarhus Convention...”

The differences – (1) claimants

- (1) Claim has to be brought by “*one or more members of the public*”;
- (2) “*references to a member or members of the public are to be construed in accordance with the Aarhus Convention*”: see CPR 45.41;
- (3) Article 2(4) defines “*the public*” as “*one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups*”;
- (4) In ACCC/C/2014/100 and 101 the ACCC ruled that a public authority – there the LB of Hillingdon was not a “*member of the public*” and so not able to make a communication and be protected by Convention;
- (5) Effect of the rule change is intended to reverse ***R (HS2 Action Alliance Ltd) v SST*** so that local authorities and other public bodies not now protected.
- (6) But still different for Parish Councils – see the ACCC in communication ACCC/C/2012/68 (on community councils) and also ***R (Halebank Parish Council) v Halton Borough Council*** (unreported, 30 April 2012)?

The differences – (2) types of case

- Protection extended to:
 - (i) judicial reviews;
 - (ii) “*review under statute*” e.g. statutory review (not appeals) such as s. 288;
 - (iii) “*does not apply to appeals other than appeals brought under section 289(1) of the Town and Country Planning Act 1990 or section 65(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, which are for the purposes of this Section to be treated as reviews under statute*”.
- But NB protection only extends beyond judicial review to (ii) and (iii) above if the claim 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) or 9(2)*”.
- For other cases outside Articles 9(1) and (2), e.g. those within Article 9(3) protection still only applies to judicial reviews, not statutory reviews or appeals.
- Scope of costs protection invites much closer attention to Article 9 of the Convention and nature of the decision under challenge.

Article 9 – scope (1)

- 3 broad categories of case within Article 9:
 - (i) Challenges to decisions on requests for environmental information (Art. 9(1));
 - (ii) Challenges to decisions, acts, or omissions subject to Art. 6 of the Convention (Art. 9(2));
 - For (i) and (ii) costs protection extends beyond judicial review in new CPR
 - (iii) Challenges to other acts or omissions “by private persons and public authorities which contravene provisions of its national law relating to the environment” (Art. 9(3)).
 - For (iii) costs protection is still limited in CPR to judicial review.
- Art 9(1) self explanatory: focus on Arts. 9(2) and (3)

Article 9(2) –scope (1)



- Art. 9(2) is said to apply to “*any decision, act or omission subject to the provisions of article 6*” and “*where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention*”.
- (1) Article 6(1)(a) of the Convention applies to “*decisions on whether to permit proposed activities listed in annex I*”.
 - Annex I lists a number of major projects types and is broadly modelled on Annex I to the EIA Directive.
- (2) Article 6(1)(b) provides that it also applies “*in accordance with its national law*” to “*decisions on proposed activities not listed in annex I which may have a significant effect on the environment*”.
 - This would it seems include other projects determined under national law giving effect to the EIAD to be “*likely to have a significant effect on the environment*” .

Article 9(2) – scope (2)



- Art. 9(2) also refers to any decision, act or omission subject to “*other relevant provisions of this Convention*” i.e. other than Art. 6 but only “*where so provided for under national law*”.
 - The Guide explains, at p. 202, that the effect of this is that “*Parties are free to extend the review procedures prescribed in article 9, paragraph 2, to cover other provisions in the Convention*” and gives Arts. 3, 5 7 and 8 as examples.
 - The application of Art. 9(2) to cases outside Art. 6 is thus voluntary and this means it can be critical in establishing whether Art. 9(2) applies to determine whether the decision etc. under challenge is governed by Art. 6 or is within the scope of some other Article, e.g. Arts. 7 or 8: see e.g. ACCC/C/2004/8 at para. 35; ACCC/C/2008/26 at para. 58 and ACCC/2005/11 at paras. 31 and 32.
 - Where what is under challenge does not fall within the scope of Art. 9(2) but nonetheless concerns other provisions of the Convention it is likely instead to fall within the scope of Art. 9(3) (see below).

Article 9(3) – scope



- Widest category of case
- Concerned with “*administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*”
- (1) Art. 9(3) applies to challenges to “*acts and omissions*” but not (like Art. 9(2)) “*decisions*” but the CA in **Venn v SSCLG** [2015] 1 W.L.R. 2328 (see para. 13) suggest that “*acts and omissions*” covers “*administrative decisions*”.
- (2) beyond that the scope of Art. 9(3) turns on the scope of “*environmental law*” (not defined in the Convention).
- (3) **Venn** reference made to definition of “*environmental information*” in Art. 2(3) and said “*since administrative matters likely to affect “the state of the land” are classed as “environmental” under Aarhus the definition of “environmental” in the Convention is arguably broad enough to catch most, if not all, planning matters*” (see para. 10).

So where are we:



- If bringing a s. 288 or other statutory review:
 - If concerns EIA development: Aarhus costs rules apply as an Art 9(2) case;
 - If not an EIA case then Aarhus costs rules not apply, such a case not within Art 9(2) only Art 9(3) and under revised CPR rules the costs protection only applies to judicial reviews;
 - What about EU environmental law cases beyond EIA?
 - Industrial Emissions Directive 2010/75/EU where Art. 9 of Aarhus part-implemented: see Art. 25
 - Other EU environmental cases e.g. habitats: see in C-240/09 **Lesoochránárske Zoskupenie VLK** [2011] 2 C.M.L.R. 43 while Art. 9(3) did not have direct effect, it was for the national court “*to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention*”.

From Government response on the consultation:



<https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/results/costs-protection-in-environmental-claims-govt-response.pdf>

- *“The government has considered whether to extend the scope of the ECPR even further so that it would apply to reviews under statute which engage Article 9(3) of the Aarhus Convention or more widely. The government notes the support amongst the majority of respondents for extending costs protection further than proposed. We are also aware of the UK’s wider obligations under Article 9(3) of the Aarhus Convention and of the Court of Appeal judgment in the case of Secretary of State for Communities and Local Government v. Venn. This case considered an Article 9(3) challenge and the Court of Appeal stated that the ECPR is not Aarhus Convention compliant insofar as it is confined to applications for judicial review, and does not apply to reviews under statute. Notwithstanding this judgment, however, the government does not propose to extend the ECPR to Article 9(3) reviews under statute at this stage because it wishes to consider more fully how best to address these cases, including whether there might be an alternative way of ensuring that the costs of these cases are not prohibitively expensive for claimants”.*