

COSTS IN ENVIRONMENTAL CASES: THE NEW AARHUS FIXED COSTS RULES AND BEYOND

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Environmental Cost Protection Rules (“ECPR”)



- Issues about access to justice in Environmental Cases has been a hot topic in recent years. Range of litigants in environmental law cases (public bodies, major companies, NGOs, local campaign groups and individuals) means that there is often a major disparity of financial resources in environmental cases.
 - Takes place in a wider debate about access to justice in public law.
 - Aarhus Convention requirement that environmental litigation should not be “prohibitively expensive” hangs over all.
 - Much of the field is now occupied by the Environmental Costs Protection Rules in CPR 46. Leaves no real room for new “Costs Capping Orders” Regime which applies in other public law contexts . CCO regime limited to judicial review only.
 - However, fact that ECPR only applies to “judicial review” and a limited number of statutory review processes means that it is still necessary to be aware of pre-ECPR case law on Protective Costs Orders and EU and common law rules about reliance on Aarhus.
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Environmental Cost Protection Rules (“ECPR”)



- The Government initially introduced a fixed costs environmental cost-protection regime (“ECPR”) into Part 45 of the CPR on 1 April 2013 as part of the discharge of its obligations under both the *United Nations Economic Commission for Europe (UNECE) Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1988* (“the Aarhus Convention”) and Directive 2003/35/EC (‘the Public Participation Directive’).
- While recognising the costs protection afforded under the system of protective cost orders (“PCOs”), the Government introduced the fixed costs regime so as to provide greater clarity for about the level of costs for claimants. *The Government has accepted for some time that it would be in the interests of applicants in environmental judicial review cases to provide greater clarity about the level of costs through a codification of the rules on PCOs which sets out the circumstances in which a PCO will be granted and the level at which it will be made.* (Cost Protection for Litigants in Environmental Judicial Review Claims Outline proposals for a cost capping scheme for cases which fall within the Aarhus Convention, 28 August 2012, at p.5)
- Following a consultation which ran from September to December 2015, the new rules were substituted by r.8(5) of the Civil Procedure (Amendment) Rules 2017 (2017/95). The new provisions apply only to claims commencing on or after 28 February 2017, and not to claims existing before that date: see the transitional provision in rule 13(3) of the Civil Procedure (Amendment) Rules 2017.

The old ECPR in CPR Part 45



- The old ECPR defined an ‘Aarhus Convention Claim’ :
A claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the [Aarhus Convention], including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.
- The old ECPR was limited to “judicial review” only.
- In that context, provided invariable fixed costs limits (£5,000 or £10,000 for claimants, £35,000 reciprocal), imposed on claimant’s election when filing claim (opt-out).
- Set out procedure for dealing with disputes about whether claim falls within Aarhus. Otherwise little scope for dispute.

What is an “environmental” claim within Aarhus?

- Prohibition on “prohibitively expensive” litigation in Aarhus Art 9(4) applies to cases which falls within:
 - Art 9(1), environmental information cases
 - Art 9(2), essentially “environmental impact assessment” cases
 - Art 9(3), “acts or omissions ... which contravene ... national law relating to the environment”. By far the broadest category. Two notable cases:
 - *Venn v SSCLG* [2015] 1 WLR 2328
 - *Austin v Miller Argent (South Wales) Limited* [2015] 1 WLR 62

Venn v SSCLG



- Planning case relating to backland (garden) development. High Court held that this was an environmental case within Art 9(2) and expressed itself in a way which implied that most or all planning cases are environmental cases.
 - Court of Appeal upheld that approach to meaning of “environmental case” within Art 9(3) of Aarhus. Difficult to think of planning case which is not environmental. Supports reliance on definition of “environmental information” in Convention as implying very broad approach.
 - Court held that old ECPR rules nevertheless did not apply because this was a stat review under section 288 TCPA and hence not “judicial review”. Concluded that old ECPR did not comply with Aarhus Convention (as to which see below).

Austin v Miller-Argent



Private law nuisance. Court distinguished “obvious” cases of “law relating to environment” such as EIA or, presumably, planning. For other cases, where “law” in question has potential environmental role, two stage approach:

First, the nature of the complaint must have a close link with the particular environmental matters regulated by the Convention ...

Secondly, the claim must, if successful, confer significant public environmental benefits. In our judgment, if on the particular facts the court were to conclude that the purpose of the claim was principally to protect private property interests and any public benefit was limited and incidental, it ought not to attract the procedural costs protections afforded by article 9(4).

Changes to the ECPR



The main changes can be summarised as:

- a) public authorities no longer benefit from the ECPR;
- b) the new scheme provides for *certain* statutory reviews falling within the ECPR depending on the nature of the decision being challenged;
- c) the new rules create a power to vary the costs cap, and a connected requirement for claimants to file and serve a schedule of their financial resources;
- d) multiple parties are treated individually for cost reciprocity purposes, in line with the case law;
- e) where a defendant unsuccessfully challenges Aarhus Convention costs protection, their costs liability is now to be assessed on the standard, rather than indemnity basis;
- f) costs protection extends to appeals arising out of Aarhus Convention Claims.

The new ECPR in CPR Part 45



The new **CPR r.45.41** defines an ‘Aarhus Convention Claim’ as follows:

(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;

(b) references to a member or members of the public are to be construed in accordance with the Aarhus Convention.

(a) Public authorities no longer benefit from the ECPR



- A claim now has to be brought by **‘one or more members of the public’**. References to a member or members of the public are to be construed in accordance with the Aarhus Convention.
- Article 2(4) of the Aarhus Convention defines ‘the public’ as:

‘one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups’

(a) Public authorities no longer benefit from the ECPR



- In ACCC/C/2014/100 and 101 the ACCC ruled that a public authority, the London Borough of Hillingdon was not a 'member of the public' for the purposes of Art.2(4), and so not able to make a communication and be protected by Convention:

'...the Committee considered that, since the London Borough of Hillingdon exercised administrative decision-making powers, it was a public authority within the definition of article 2, paragraph 2(a) of the Convention. While under domestic law of the Parties, municipalities might exercise their right to self-government and other subjective rights, even before courts, in the context of the Convention and international law in general, a "public authority" under article 2, paragraph 2(a) of the Convention was an emanation of the Party concerned. Hence, an allegation brought to the Committee by the communicant would give rise to an internal dispute between authorities of a Party concerned which was not within the remit of the Committee'
- This change effectively reverses decision of Court of Appeal in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2015] EWCA Civ 203; CA had rejected the Government's argument that a limitation excluding public authorities should be inferred into the cost rules.


(a) Public authorities no longer benefit from the ECPR



- The Court of Appeal in *HS2* considered that an argument that public authorities were excluded from the old ECPR might extend to parish councils: per Lindblom J at [15]. Analogy may be drawn from other statutory contexts in which it would appear unusual to exclude parish councils from the definition of a public authority (for example, under the Human Rights Act 1998).
- However, the ACCC took the view in ACCC/C/2012/68 that community councils in Scotland did fall within the definition of 'the public' in the Aarhus Convention:

'81. In order to define the nature of the complaint, the Committee examines the role of community councils in Scotland. Although community councils have statutory duties in terms of licensing and planning, they have no regulatory decision-making functions and are essentially voluntary bodies established within a statutory framework. They mainly act to further the interests of the community and take action in the interest of the community as appears to be expedient and practicable, including representing the view of the community regarding planning applications. In addition, community councils rely on grants from local authorities and voluntary donations. Community Council members furthermore operate on a voluntary basis and do not receive payment for their services. (...)


83. Based on the above, in particular the role of the council in representing the interests of the community in planning matters and the fact that council members provide their services on a voluntary basis and have no regulatory decision-making functions, the Committee concludes that community councils in Scotland qualify as "the public" within the definition of article 2, paragraph 4, of the Convention. It thus decides to consider the present complaint as a communication under paragraph 18 of the annex to decision I/7, as submitted by Ms. Metcalfe on behalf of the Avich and Kilchrenan Community Council.'

(b) Some statutory reviews fall within the ECPR depending on the nature of the decision being challenged 


There are two categories of claims which are 'Aarhus Convention claims':

- i. a 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 Aarhus Convention: r.45.41(2)(a)(i); the definition of a review under statute excludes appeals, with the exception of appeals under s.289 of the TCPA 1990 or s.65(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.
- ii. a 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

NB STILL NOTHING FOR CASES OUTSIDE THE ADMINISTRATIVE COURT, WHETHER PRIVATE LAW, STATUTORY APPEAL OR OTHERWISE.

(b) Some statutory reviews fall within the ECPR depending on the nature of the decision being challenged 




(b) Some statutory reviews fall within the ECPR depending on the nature of the decision being challenged 

Environmental lawyers will need to get very familiar with the **Aarhus Convention**, as the extent of costs protection now depends on which provision of the Convention applies to the decision under challenge.

The respective Aarhus Convention provisions cited in CPR r.45.41 deal with:

- challenges to decisions relating to requests for environmental information, covered by Art.4 of the Aarhus Convention: **Art.9(1)**;
- challenges to decisions, acts or omissions subject to Art.6 of the Aarhus Convention: **Art.9(2)**;
- 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)**

(b) Some statutory reviews fall within the ECPR depending on the nature of the decision being challenged 


- Thus:
 - in respect of claims falling within Arts.9(1) and 9(2), costs protection now extends to statutory reviews as well as judicial reviews
 - In respect of claims falling within Art.9(3): only judicial reviews

(b) Some statutory reviews fall within the ECPR depending on the nature of the decision being challenged


- 9(1) claims, relating to environmental information should be relatively uncontroversial to identify
- Article 9(2) claims likely to generate more debate.
- Article 6 of the Aarhus Convention: 'Public Participation in Decisions on Specific Activities':
 - 6(1) provides, so far as is relevant for present purposes, that:
 - Each Party:*
 - (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;*
 - (b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment.*
- Art.6(1)(a): Annex I of the Aarhus Convention lists a number of major project types and is broadly modelled on Annex I to the EIA Directive.
- Art.6(1)(b): this would appear to cover projects determined under national law giving effect to the EIA directive as being 'likely to have a significant effect on the environment'.
- Thus, where a claim relates to environmental information, or relates to a project falling within the EIA Directive, costs protection will be available whether the claim a judicial review claim or a statutory review.

(b) Some statutory reviews fall within the ECPR depending on the nature of the decision being challenged


- In respect of **Art.9(3)**, however, costs protection only arises where the claim is a judicial review claim.
- Art. 9(3) is **the broadest category**:
 - wording says that it applies to challenges to 'acts and omissions' but not, like Art. 9(2), 'decisions'. In *Venn v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539, the Court of Appeal suggested (and the Secretary of State agreed) that 'acts and omissions' would include administrative decisions at [13]
 - wide definition of 'environmental information' in Art.2(3) of the Aarhus Convention was an indication of the ambit of the scope of Art.9(3): *Venn*

(b) Some statutory reviews fall within the ECPR depending on the nature of the decision being challenged 


- But...didn't Court of Appeal in *Venn* conclude that the previous ECPR regime was not Aarhus Convention compliant because it excluded claims falling within Art. 9(3) from costs protection?
- Per Sullivan LJ at [34]:
'In the light of my conclusion on Article 9(3), and the decisions of the Aarhus Compliance Committee and the CJEU in Commission v UK referred to in paragraph 24 above, it is now clear that the costs protection regime introduced by CPR 45.41 is not Aarhus compliant insofar as it is confined to applications for judicial review, and excludes statutory appeals and applications.'

(b) Some statutory reviews fall within the ECPR depending on the nature of the decision being challenged 

- The Government's response to the non-compliance identified in *Venn* is recorded in its response to the consultation on the changes to the ECPR:
'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. (...) 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.'
[§13, Costs Protection in Environmental Claims: The government response to the consultation on proposals to revise the costs capping scheme for eligible environmental challenges, November 2016.]


(b) Some statutory reviews fall within the ECPR depending on the nature of the decision being challenged 

- Art 9(2) also provides that the obligation to provide access to a review procedure to challenge the legality of any decisions/acts/ omissions extends to the decisions/acts/omissions subject to other provisions of the Aarhus Convention (i.e. other than Article 6) *‘where so provided for under national law’*.
- A further route in Art. 9(2) and costs protection for statutory review. But what does it mean?

(b) Some statutory reviews fall within the ECPR depending on the nature of the decision being challenged 

- The Aarhus Convention Implementation Guide explains, at p.193, that:

‘This means that Parties are free to extend the review procedures prescribed in article 9, paragraph 2, to cover other provisions in the Convention. Parties might view the general provisions of article 3 and the provisions concerning the collection and dissemination of information in article 5 as examples of provisions that would qualify as “other relevant provisions”, as they lay the groundwork for many of the obligations set out in article 6 and are relevant to its implementation. In addition, the provisions of article 7 on public participation concerning plans, programmes and policies relating to the environment (especially the provisions incorporated from article 6) and the provisions of article 8 concerning public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments, describe additional processes that require public participation. Implementation of those procedures could also be reviewable under article 9, paragraph 2.’

(b) Some statutory reviews fall within the ECPR depending on the nature of the decision being challenged 

- Do words mean:
 - i. a contracting state has to specifically provide for an Aarhus Convention-compliant procedure for reviewing decisions/acts/omissions subject to other provisions for Art.9(2) to extent to such decisions etc.?; or
 - ii. whether the provision of any review procedure in respect of such decisions etc. suffices.?

(c) Court's power to vary the cost caps and the financial disclosure requirement 

- The cost cap is set out at CPR r.45.43:
 - (1) *Subject to rules 45.42 and 45.45, a claimant or defendant in an Aarhus Convention claim may not be ordered to pay costs exceeding the amounts in paragraph (2) or (3) or as varied in accordance with rule 45.44.*
 - (2) *For a claimant the amount is—*
 - (a) *£5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;*
 - (b) *£10,000 in all other cases.*
 - (3) *For a defendant the amount is £35,000.*
- CPR r.45.42(1) provides that:

Subject to paragraph (2), rules 45.43 to 45.45 apply where a claimant who is a member of the public has—

 - (a) *stated in the claim form that the claim is an Aarhus Convention claim; and*
 - (b) *filed and served with the claim form a schedule of the claimant's financial resources which takes into account any financial support which any person has provided or is likely to provide to the claimant and which is verified by a statement of truth*
- Therefore, a claimant may not obtain the benefit of a costs cap unless they have filed and served a schedule of their financial resources as specified.

(c) Court's power to vary the cost caps and the financial disclosure requirement



Requirement for claimant to provide a financial schedule:

- Is 'schedule' different from 'summary of the applicant's financial resources' required for a cost-capping order under CPR r.46.17(1)(b)(ii)?
- The required schedule should take into account any financial support which any person has provided or is likely to provide to the claimant;
 - Presumably, this is only intended to catch financial support *in relation to the claim*;
 - it is not clear whether assistance in the form of, for example, services provided by solicitors under a conditional fee arrangement would need to be included;
 - the requirement is narrower than that contained in s.89(1)(a) of the Criminal Justice and Courts Act 2015 which requires the Court to have regard to 'the financial resources of any person who provides, or may provide, financial support to the parties' in deciding whether to grant a CCO;
- the schedule must be verified by a statement of truth (see CPR 22);
- the schedule must be filed and served with the claim form; therefore, prima facie, the same time limits apply for filing and service; in practice, this is likely to prove a short timeframe in which to provide detailed financial information; a 'claim form' includes any application to commence proceedings: CPR r.6.2(c).

(c) Court's power to vary the cost caps and the financial disclosure requirement



- proceedings will be considered 'prohibitively expensive' if their likely costs, including court fees, fail either the subjective or objective tests:
 - subjective test: do the likely costs exceed the financial resources of the claimant?
 - objective test: are the likely costs objectively unreasonable having regard to the factors at r.45.44(3)(b)?
- 45.44 implements approach set out by ECJ in *R (Edwards and another) v Environment Agency and others (No.2)* [2013] 1 WLR 2914, both as to need for subjective and objective test, and list of criteria at r.45.44(3)(b).

(c) Court's power to vary the cost caps and the financial disclosure requirement



How will criteria be interpreted and applied?

- Per Lord Carnwath's judgment in *R (on the application of Edwards) v Environment Agency* [2013] UKSC 78 at [28]:
 - frivolity and lack of reasonable prospects: 'frivolity' was likely to be resolved in favour of the claimant at the permission stage; but 'lack of reasonable prospects', being a separate heading from frivolity, suggested something more demanding than, for example, the threshold test of reasonable arguability;
 - importance of what was at stake: Lord Carnwath in *Edwards* also referred to A-G Kokott's comment that the importance of the matter for the claimant is likely to be a factor increasing the proportion of costs fairly recoverable: 'a person with "extensive individual economic interests" at stake in the proceedings may reasonably be expected to bear higher risks in terms of costs';
 - importance to the environment is likely to be a factor *reducing* the proportion of costs recoverable, or eliminating recovery altogether. Lord Carnwath cited the comments of AG Kokott to the effect that 'the environment cannot defend itself, but needs to be represented by concerned citizens or organisations acting in the public interest.';
 - the relevance of complexity of law and procedure 'seems to be' that a complex case is likely to require higher expenditure by the defendants, and thus, objectively, to justify a higher award of costs; Lord Carnwath also noted that the same should apply to technical or factual complexity.

(c) Court's power to vary the cost caps and the financial disclosure requirement



How will criteria be interpreted and applied?

- Court of Inner Session decision in *Gibson v Scottish Ministers* [2016] CSIH 10.
- The Lord Ordinary at first instance had carried out an intrusive analysis of the petitioner's finances, including income, pension provisions, net value of estate, and past capacity to borrow money. The judge concluded that 'there exists the potential to expend large sums of money and to dispose of parts of the estate when required', refused to ring fence the petitioner's pension fund, and concluded the petitioner had not satisfactorily made out that he could not reasonably proceed in the absence of a protective costs order.
- The petitioner was successful on appeal. The Court of Inner Session:
 - highlighted that the test was not the petitioner's ability to pay, but whether it was reasonable, in all the circumstances, that he should be required to pay: [54]. Applying this test, the appellate court found that, on the subjective test, proceedings would be prohibitively expensive for the petitioner;
 - found that the issues in the claim relating to landscape and impact on a 'Dark Sky Park' and observatory were enough to show that petitioner was acting to defend the environment;
 - the prospects of success were in relation to the claim, and the court should not look at the possible consequences of that success (it was said that success would make no difference as the wind farm would be up and running in any event).
 - expressed concern about length of time spent on the inquiry into the petitioner's finances, and suggested that that be dealt with by motion, with a limited amount of documentary material. The Court emphasised that it was not an opportunity to subject the petitioner to intrusive and detailed investigation, and that it was not normally necessary to look behind material submitted.
 - This is to be contrasted with *Edwards* where the likelihood that the court would exercise discretion against the claimant was considered relevant: per Lord Carnwath at [36].

(d) Multiple parties



(d) Multiple parties



- CPR r. 45.43:

(1) Subject to rules 45.42 and 45.45, a claimant or defendant in an Aarhus Convention claim may not be ordered to pay costs exceeding the amounts in paragraph (2) or (3) or as varied in accordance with rule 45.44.

(2) For a claimant the amount is—


(a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;

(b) £10,000 in all other cases.

(3) For a defendant the amount is £35,000.

(4) In an Aarhus Convention claim with multiple claimants or multiple defendants, the amounts in paragraphs (2) and (3) (subject to any direction of the court under rule 45.44) apply in relation to each such claimant or defendant individually and may not be exceeded, irrespective of the number of receiving parties.

- New provision reflects the position as per the case law: see for example *R (Botley Parish Action Group) v Eastleigh BC* [2014] EWHC 4388 (Admin), where Collins J held that defendant was entitled to claim up to the cost cap for each claimant.

(e) Where a defendant unsuccessfully challenges Aarhus Convention costs protection, their costs liability is now to be assessed on the standard, rather than indemnity basis 

- Costs when Aarhus Convention protection is challenged - r.45.45(3):

In any proceedings to determine whether the claim is an Aarhus Convention claim—

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

(b) if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant to pay the claimant's costs of those proceedings to be assessed on the standard basis, and that order may be enforced even if this would increase the costs payable by the defendant beyond the amount stated in rule 45.43(3) or any variation of that amount

- In its response to the consultation on cost capping in environmental claims, the Government described the old provision, which required the award of indemnity costs Aarhus Convention costs protection was challenged, as creating 'an uneven playing field'.

(f) APPEALS



- By r.9 of the Civil Procedure (Amendment) Rules 2017 (2017/95), the Government inserted a new r.52.19A into the CPR. Whereas the previous wording of Part 52 provided only that 'in any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies', this is now subject to the provisions of r.52.19A:

r. 52.19A. — Orders to limit the recoverable costs of an appeal – appeals in Aarhus Convention claims

(1) In this rule, "Aarhus Convention claim" and "prohibitively expensive" have the same meanings as in Section VII of Part 45, and "claimant" means a claimant to whom rules 45.43 to 45.45 apply.

(2) In an appeal against a decision made in an Aarhus Convention claim to which rules 45.43 to 45.45 apply, the court must—

(a) consider whether the costs of the proceedings will be prohibitively expensive for a party who was a claimant; and

(b) if they will be, make an order limiting the recoverable costs to the extent necessary to prevent this.

(3) When the court considers the financial resources of a party for the purposes of this rule, it must have regard to any financial support which any person has provided or is likely to provide to that party.
- The effect of the new ECPR is to in effect extend the costs protection to appeal proceedings arising from an Aarhus Convention claim. This more closely reflects the jurisprudence of the CJEU, according to which the task of the court on appeal is to ensure again that costs are not prohibitively expensive, taking into account costs already incurred.
- Government indicated in response to consultation that it will encourage Supreme Court to adopt similar amendment to Supreme Court's procedure rules.

Cost-capping orders



- Since 8 August 2016, costs protection rules in judicial review have been codified in sections 88-90 of the Criminal Justice and Courts Act 2015
- Costs Capping Order (“CCO”)
- Critical limitation – applies only to “judicial review”. Therefore:
 - In any “environmental case”, ECPR will be available for any case to which the CCO regime might otherwise apply
 - No application to statutory review, so no ability to fill in gaps left by ECPR approach to statutory review.
 - No application to other public law appeals, nor to private law.
- In short, irrelevant to environmental cases!

OTHER CASES?



ECPR therefore still appears to leave some caps:

- (a) Statutory review not covered by Art 9(2) (including most planning challenges under section 288 and 289 TCPA)
- (b) Non-admin court public law (for example appeals from Environmental Chamber of First-tier Tribunal)
- (c) Private law cases (for example in nuisance).

Neither (a) ECPR nor (b) CCO regimes apply.

Statutory review cases not covered by ECPR?



Answer seems to be fall back on pre-ECPR and pre-CCA case law and judge made rules. Three categories:

- (a) Cases where EU law makes Aarhus directly effective, apply Art 9(4) directly to avoid prohibitively expense: *R (Garner) v Elmbridge DC* [2011] 3 All ER 418. Only possible cases relate to Industrial Emissions Directive 2010/75/EU because the main category of case where EU law is directly effective is EIA cases and they fall within Art 9(2) and hence ECPR
- (b) Cases where EU law in play but no reference to Aarhus, e.g. Habitats, Strategic EIA: 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”.
- (c) Cases where no EU law element, fall back on judge made *Corner House* principles. Similar to CCAs but no hard-edged rules, query need for financial information, generally more favourable to claimants or more room for judicial discretion. But (see *Venn*) courts cannot give effect to Aarhus by back door of judicial discretion.

Final thoughts



- What a mess! So much depends on the apparently arbitrary distinction between JR and statutory review
- Much more scope for litigation on environmental costs! Perhaps ironic in that the (initial) justification for introducing fixed costs regime was to bring clarity to cost position of claimants in environmental proceedings.
- Due to the way in which the new rules exclude costs protection for a certain category of statutory reviews based on criteria contained in the Aarhus Convention itself, can expect to see much greater citation of Aarhus Convention in litigation.
- Overall chilling effect on claims? Or redressing the balance?



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