Landmark Chambers

Public participation and Aarhus protections: an update

Jacqueline Lean

Introduction

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- Topics today
  - Access to Environmental Information
  - Standing
  - ‘Effective’ public participation
  - Costs

But first….

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Warm-up quiz

Get ready to compete!

How many countries are signatories to the Aarhus Convention?

How many countries are signatories to the Aarhus Convention?

46

42

38

How many countries are signatories to the Aarhus Convention?

Leaderboard

Which of the following is NOT a signatory to the Convention?

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North Macedonia

Tajikistan

Turkey

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Leaderboard

According to Tripadvisor, what is most popular attraction in Aarhus?

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- The Aarhus Musikuset
- The Moesgaard Museum
- The Latin Quarter
- The Marselisborg Deer Park

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Leaderboard

Access to environmental information

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- Who is a public authority?
- Mixed information
- Exemptions

Access to environmental information

Who is a public authority?

- ***E.ON UK plc v (1) Information Commissioner (2)Fish Legal*** **[2019] UKUT 132 (AAC)**
  - Appeal against an Information Notice under s.51 FOIA
  - Was it open to ICO to serve information notice in order to establish whether a body was a public authority, with right of appeal to the FTT even where status as public authority not established where E.ON asserted it did not hold the information?
  - UT: Yes

- **ICO decision FER0678164 – 29 January 2020**
  - E.ON is a public authority

Access to environmental information

- **ICO decision FER0844872 – Heathrow Airport Ltd**
  - Heathrow Airport Ltd = owner/occupier of Heathrow Airport
  - Q: (1) does HAL have functions of public administration (reg 2(2)(c)) or (2) is it under the control of a public authority (reg 2(2)(d))?
  - ***Fish Legal*** [2015] UKUT 0052 & ***Cross v ICO*** [2016] UKUT

Access to environmental information

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- Functions of public administration (reg 2(2)(c))
  - Empowered with a relevant function under statute?
    - Yes – Airport Act 1986. *"…based on HAL's explanation, there appears to be a direct and continuing link between the original transfer of functions, powers and responsibilities from the British Airport Authority in 1986 to HAL."* [22]
  - Are (at least some) of the functions it is entrusted with related to the environment?
    - Yes – *"[the ICO] considers that for a function to relate to the environment it is only necessary that the delivery of the service or function has to have an impact on the environment. The function or service does not have to be one which is granted specifically to manage the environment….. The operation of an airport, particularly a major international airport such as Heathrow, undoubtedly has an impact on the environment…"* [24-25]

Access to environmental information

- Functions of public administration (reg 2(2)(c))
  - Special powers?
    - Yes. A number of powers as an ‘airport operator’ and ‘statutory undertaker’ under the Civil Aviation Act 1986 [30-31] and a number of other powers, including power to make byelaws, power to charge for use of the airport, and power to levy financial penalties for breach of noise abatement requirements imposed by the SoS [32].
  - Cross check
    - “When considering whether HAL’s function as an airport operator was the performance of a service of public interest the Commissioner took account of the importance the efficient provision of operation of Heathrow Airport had to the economy and citizens of the UK. It is also notable that up until 1986 the operation of the airport was directly under the state control of the British Airport Authority. The Commissioner therefore considers that given the continuing significance of Heathrow airport to the UK’s transport network, there is a sufficient connection between its operation and the functions performed by the state.” [35]

Access to environmental information

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- Under the control of a public authority? (reg 2(2)(d))
  - ICO did not consider, given conclusions on reg 2(2)(c)

- **NB – ICO decision is currently under appeal**

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- ‘Mixed’ information & exemptions

  - ***Department for Transport v Information Commissioner*** **[2019] EWCA Civ 2241**
    - Confirmed that the approach to be applied to “mixed information” was that articulated by CA in ***Department for Business, Energy and Industrial Strategy v Information Commissioner and Henney*** **[2017] EWCA Civ 844**

  - ***Brookshank v Information Commissioner*** **EA/2018/0226**
    - LPA ordered to disclose instructions to counsel – public interest in disclosure outweighed public interest in LAP

Access to Environmental Information

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Standing

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Article 9(2) of the Aarhus Convention

"*Each Party shall, within the framework of its national legislation, ensure that members of the public concerned*

(a) having sufficient interest or,

(b) maintaining impairment of the right, where the administrative procedural law of a Part requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of 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."

Standing

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- "Sufficient interest" = to be determined in accordance with national law, "*and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.*" (Article 9(2))

- NGOs – expressly included (Article 9(2))
- Individuals / companies – if they are "persons aggrieved" (statutory challenges) or have "sufficient interest in the matter to which the claim relates" (judicial review)

- What about unincorporated associations?

Standing

- ***Aireborough Neighbourhood Development Forum v Leeds City Council*** [2020] EWHC 45 (Admin) – Lieven J

  - Did the Neighbourhood Development Forum (an unincorporated association previously designated under s.61F TCPA 1990) have standing to bring a s.113 challenge to a Site Allocations Plan?
  - D argued (inter alia) the Forum was not a “person” (and thus not a “person aggrieved” for the purposes of s.113)
  - IP2 argued (in addition) that there was a distinction between judicial review and statutory review proceedings

Standing

- ***Aireborough Neighbourhood Development Forum v Leeds City Council*** [2020] EWHC 45 (Admin)
- Lieven J concluded:
  - Unincorporated associations did have legal capacity to bring both judicial review and statutory review proceedings
  - There was a distinction between private and public law proceedings: "*the critical question in judicial review or statutory challenge is whether the claimant is a person aggrieved or has standing to challenge, which is not a test of legal capacity but rather one of sufficient interest in the decision not to be a mere busybody*" [29]

Standing

- ***Aireborough Neighbourhood Development Forum v Leeds City Council*** [2020] EWHC 45 (Admin)

> "[31] *I also take into account the wider public policy issues which have over time led to a more flexible approach to the issue of standing. Groups of residents or interested people, may choose to group together to make representations, or attend inquiries, on a matter of interest and importance to them. This is particularly the case in matters concerning planning or the local environment, where the nature of the impact may often fall most directly on a group of people living in a particular area. It would be unfortunate if the law prevented them challenging the decision which they had participated in, in the same grouping as they had made the representations.* ***I accept that the Aarhus Convention is not an overwhelming factor, because challenges can still be brought by individuals, but it and the general policy position would support a finding that a claim can be brought by an unincorporated association****."*

Standing

- **C-197/18 *Proceedings brought by Wasserleitungsverband Nordliches Burgenland & ors*** [2020] 1 CMLR 39
  - Did (1) the Water Association (public law body legally required to carry out the task of public supply of water in a specifically defined territory) (2) Mr Prandl (who owned a domestic well) and (3) Municipality of Zillingdorf (which operates a municipal well with water that is deemed unfit for drinking due to high nitrate levels) have standing to require the competent national authorities to amend an existing action programme or adopt additional measures or reinforced actions, provided for in article 5(5) of the Directive, in order to attain a maximum nitrate level of 50mg/l at each intake point.

Standing

30. According to settled case law of the Court, it would be incompatible with the binding effect conferred by art.288 TFEU on a directive to exclude, in principle, the possibility that the obligations which it imposes may be relied on by the persons concerned …..

31. In particular, where the EU legislature has, by directive, imposed on Member States the obligation to pursue a particular course of action, the effectiveness of such action would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of EU law in deciding whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out therein ….

32. It follows, as the Advocate General observed in AG41 of her Opinion, that at least the natural or legal persons directly concerned by an infringement of provisions of a directive must be in a position to require the competent authorities to observe such obligations, if necessary by pursuing their claims by judicial process."

Standing

"33. In addition, "where they meet the criteria, if any, laid down in [the] national law, members of the public" have the rights provided for in art.9(3) of the Aarhus Convention . That provision, read in conjunction with art.47 of the Charter of Fundamental Rights of the European Union, imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law (see, to that effect, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation EU:C:2017:987 at [45]).

34. The right to bring proceedings set out in art.9(3) of the Aarhus Convention would be deprived of all useful effect, and even of its very substance, if it had to be conceded that, by imposing those conditions, certain categories of "members of the public", a fortiori "the public concerned", such as environmental organisations that satisfy the requirements laid down in art.2(5) of the Aarhus Convention , were to be denied of any right to bring proceedings (Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation EU:C:2017:987 at [46])."

Standing

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Just for interest!

- Administrative court decision in Montreuil, in case brought by individuals, finding that the state had failed to fulfil its air protection plan intended to counter pollution
- https://www.theguardian.com/world/2019/jun/25/france-loses-landmark-court-case-over-air-pollution?CMP=share_btn_tw

“Effective” public participation

- **C280-18 *Flausch & ors v Ypourgos Perivallontos kai Energeias*** [2020] 2 CMLR 7
  - Proposed hotel & spa on Ios, subject to EIA. Notice published in the local newspaper circulating on Syros. EIA file kept on Syros. Decision approving the project published (1) in the local newspaper (2) at the regional headquarters in Syros; & (3) on Minister’s website.
  - Cs challenged decision outside the national timescales for such proceedings.
  - A number of questions referred to CJEU on interpretation of the EIA Directive
  - The Court stressed that arrangements to implement public participation under EIAD were for the member state to determine (and effectiveness for the national reviewing court in the first instance)

“Effective” public participation

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However:

“*29. As regards the principle of effectiveness, on the other hand, the referring court wonders about three aspects of the procedure at issue in the main proceedings.*

30. It mentions, first, the way in which the public was informed of the project’s existence and of the consultation that was to take place on it.

31. In that regard, it should be pointed out that, under art.6(4) of the EIA Directive , the opportunities that the public concerned is granted to participate early in the environmental decision-making procedure must be effective.

32. Consequently, as the Advocate General has observed at AG53 of her Opinion, any communication on the matter is not in itself sufficient. The competent authorities must ensure that the information channels used may reasonably be regarded as appropriate for reaching the members of the public concerned, in order to give them adequate opportunity to be kept informed of the activities proposed, the decision-making process and their opportunities to participate early in the procedure.

33. It is for the referring court to determine whether such requirements were complied with in the procedure prior to the main proceedings.

Aarhus - post Brexit

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Costs

- ***Campaign to Protect Rural England – Kent Branch v Secretary of State for Communities and Local Government* [2019] EWCA Civ 1230**

  - CA confirmed that the approach in *Mount Cook* (costs of acknowledgment of service where permission refused) applies to both of Defendant and Interested Party (*Bolton* approach that there should only be more than one set of costs in "exceptional circumstances" does not apply)
  - Approach to awarding costs is the same in cases where there is an Aarhus cap as where there is no Aarhus cap. The CPR does not provide for staged caps.
  - Permission to appeal to SCt granted. Appeal listed January 2020

Costs: Interested Parties

- ***Q Unintended consequences?***
  - ***CPRE Kent para 47:***
  - *“"47. I am in no doubt that the absence of any express reference to interested parties in CPR Pt 45 is of no consequence. It was probably deemed unnecessary by the draftsmen to refer to "and/or interested parties" after the reference to "defendant" every time the latter was mentioned. But in any event the omission makes no difference to the application of the Aarhus cap. That is because, as Ms Lean pointed out, rule 45.4.3 limits the costs exposure to the claimant; it is the claimant who "may not be ordered to pay more than …" It does not spell out to whom the claimant might be paying the costs up to the limit of the cap. The obvious answer is: any defendant or interested party who is otherwise entitled to their costs.*
  - ***R (on the application of Kent) v Teeside Magistrates Court*** [2020] EWHC 304 (Admin)

Costs: Interested Parties

- ***Q Unintended consequences?***

  - ***R (on the application of Kent) v Teeside Magistrates Court*** [2020] EWHC 304 (Admin)
    - IP disputed that claim was an Aarhus Convention Claim. IP ordered to pay costs of determining the point – CPR r.45.43(b)

  - **IP applications to vary default costs caps**

Aarhus costs caps and Interested Parties

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Thank you for listening

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