Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?

Evidence submitted by Wildlife & Countryside Link

Introduction

1. Wildlife and Countryside Link (Link) is a coalition of 57 organisations concerned with the conservation and protection of wildlife and the countryside. Its members practice and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together its members have the support of over 8 million people in the UK and manage over 750,000 hectares of land.

2. The Legal Strategy Group (LSG) provides a forum for Link's members to collaborate on legal issues. A long-established area of our work concerns the importance and application of environmental rights, with particular emphasis on access to environmental justice and Judicial Review (JR). The LSG is a regular commentator on the UK's compliance with the access to justice provisions of the UNECE Aarhus Convention,[1] working with our sister Links in Scotland, Wales and Northern Ireland to submit regular compliance summaries to the Aarhus Convention Compliance Committee. We also respond to relevant national and international consultation exercises[2] and our members have, on occasion, taken joint legal action to protect the environmental rights in the Aarhus Convention (see later).

3. On 7th September 2020, the Secretariat of the Independent Review of Administrative Law Panel (IRAL) issued a call for evidence to "all listed parties" to address the following question: *Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?*[3]

4. The call for evidence confirms that IRAL is considering public law control of all UK-Wide and England and Wales powers only. As such, the Panel is therefore interested in receiving evidence in relation to JR in its application to reserved, and not devolved, matters.[4]

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1 The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters – see here

2 A full list of Link's activities in this area can be accessed here

3 See here

4 The call for evidence confirms that the Panel of experts will not consider any changes to devolved policy. Instead, it will consider JR in relation to UK-wide policy, and England and Wales policy. In addition to recommending changes to UK-wide powers, the Panel may also recommend certain minor and technical changes to court procedure in the Devolved Administrations which may be needed as part of implementing changes to UK policies. The Lord Chancellor has asked the Panel of experts to look at these issues as part of a comprehensive look at JR.

5. Link has confined its evidence to the jurisdiction of England and Wales. We recognise that a member of the Panel has Scottish expertise, but civil law is entirely devolved and Scots law is distinct. Moreover, while many of the 'general principles' of JR are similar in Scots Law, much of the detail is different, especially when it comes to the implementation of the Aarhus Convention. We would respectfully suggest that if the Panel are to consider aspects of JR as they relate to Scotland and Northern Ireland, it should consult and seek evidence separately, and fully, in those jurisdictions.

6. Notwithstanding the above, Environment Links UK (ELUK) and Link members (which should not necessarily be taken to reflect Link's view as a whole) regularly submit information and views on certain aspects of the UK's implementation of the access to justice provisions of the Aarhus Convention (notably on costs, time limits and standard of review).[5] These may be a useful starting point in relation to environmental JRs in Scotland and Northern Ireland, but should not be taken as a comprehensive view.

Evidence and expertise

7. The Terms of Reference (ToR) confirm the Review will consider data and evidence concerning JR in order to put forward options for reforms. The IRAL call for evidence also confirms the Panel are interested in any notable trends in JR over the last thirty to forty years, how JR works in practice and the impact and effectiveness of judicial rulings in resolving the issues raised by JR.

8. As far as Link is aware, the Government has never published any official data on environmental cases. However, Link members have requested and analysed Ministry of Justice data since 2013 in order to understand the ramifications of proposed and implemented JR reforms in recent years and (as highlighted above) to inform bodies monitoring the UK's compliance with EU law and international Conventions (including the European Commission and the Aarhus Compliance Committee). We are pleased to make this body of evidence available for the purpose of this Review and would be pleased to provide any further clarification should the Panel welcome it.

9. Link members have also taken a number of landmark environmental cases, including the recent Heathrow case concerning the UK's obligations under the Paris Agreement,[6] the clean air cases[7] and a successful challenge to the most recent reforms to the costs rules for environmental cases.[8] We enclose, at Annex A, a representative sample of cases illustrating the breadth and strategic significance of some more recent environmental public interest litigation.

10. IRAL confirms that the panel would like to hear from people who have direct experience in JR, including "*those who provide services to claimants and defendants involved in such cases, from professionals who practice in this area of law; as well as from observers of, and commentators on,*

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5 We refer the Panel to the 2019 ELUK Statement on the UK's Second Progress Report on Decision VI/8k concerning compliance with the Aarhus Convention (here) and the ELUK Statement on Access to Justice in the UK in 2019 (here). The RSPB, Friends of the Earth and Friends of the Earth Scotland also regularly submit UK-wide information and views to the Aarhus Convention Compliance Committee on costs and time limits (see here) and standard of review (see here).

6 *Plan B Earth and Others v. Secretary of State for Transport* [2020] EWCA Civ 214

7 *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs*: (1) [2015] PTSR 909 (CJEU & SCt); (2) [2017] PTSR 203, Garnham J; (3) [2016] EWHC 3613 (Admin), Garnham J; and (4) [2017] EWHC 1966 (Admin), Garnham J

8 *RSPB and others v Secretary of State for Justice* [2017] EWHC 2309 (Admin)

the process". Link is concerned that the call for evidence does not extend to *claimants*, as those seeking to enforce the law as laid down by Parliament. We are unclear whether this is an oversight, but our concerns are exacerbated by the fact that the detailed questionnaire in the IRAL document is directed only to Government Departments. The questions posed to the executive concern reforms of constitutional significance, extending far beyond "codification and clarification", and are framed in such a way as to invite views supporting the case to narrow the scope, accessibility and remedies arising from JR. The failure to set the parameters for the Review in a suitably open and even-handed way is compounded by the short deadline (six weeks) for responses. The unfortunate result is that the Review feels like something of "a done deal". We therefore urge the Panel to ensure that the views of civil society (individuals, community groups and NGOs) are properly taken into account and considered in order to prevent the Review process from being fatally flawed.

The Importance of JR to Environmental Protection

11. Judicial Review is an essential foundation of the rule of law and the final mechanism for civil society to challenge potentially unlawful decisions affecting the environment and achieve a remedy in the courts. Any potential restrictions on JR are of constitutional importance and individuals and civil society groups should not be denied their fundamental constitutional right to check an abuse of power on the basis of costs-cutting or measures to reduce red tape.

12. In *R (on the application of UNISON) v Lord Chancellor,*[9] Lord Reed gave a powerful exposition as to why access to the courts was a core element of the rule of law, and why being able to bring a claim and have it determined was of a broader societal benefit than merely to the individual parties involves, holding:

> "*At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other… People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations*."

13. Aarhus cases are inherently in the public interest. The claimant rarely has any personal financial interest in the outcome of the case and does not stand to profit from winning – it is the environment and therefore society as a whole that stands to benefit (or lose) from the outcome of an environmental case, be that a clarification on a point of law, the protection of biodiversity or adherence to environmental standards.

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9 [2017] UKSC 51

14. There are special provisions relating to environmental cases arising from the UK's ratification of the Aarhus Convention, which obliges contracting Parties to provide for early public participation, when all options are open and effective public participation can take place. Given the extremely wide range of factors the Panel will have to consider, and the potentially major constitutional change that such reforms could bring about if adopted, we believe those options must be subject to full and proper consultation at a formative stage.

15. All of this must be seen in the context of the environmental crises in which we find ourselves. On 1st May 2019, the UK Parliament declared an Environment and Climate Change Emergency. In the following month, the Climate Change Act 2008 was amended to commit the UK government to a net zero emissions target by 2050. In terms of biodiversity, the UK will miss almost all the 2020 nature targets (the "Aichi targets") it signed up to in 2010 under the global Convention on Biological Diversity (CBD) according to a recent report published by the JNCC.[10] The inability to meet these targets is characterised by a continuing decline in environmental standards. For example, in September 2020, the Environment Agency reported that just 14% of English rivers are of good ecological standard (in 2016, 97% of rivers were judged to have good chemical status, though the standard of tests used this time was tougher).[11] Judicial Review has a critical role to play in ensuring that standards of environmental protection are met - the ClientEarth clean air cases and Friends of the Earth's current Heathrow case are just two salient examples. We would venture that there has never been a more important time for such cases to be heard by the courts.

The scale of previous reforms

16. Widespread concerns about the prohibitively high costs associated with undertaking environmental JRs culminated in two landmark judgments of the Court of Justice of the European Union (CJEU).[12] As a result of these cases, the Ministry of Justice and the devolved administrations of the UK introduced bespoke cost rules for environmental (Aarhus) cases in 2013. Generally, these schemes worked well and while they resulted in a modest increase in the number of cases, environmental cases represented (and still do represent) a very small proportion of the total number of cases issued annually.

17. However, the election of the Coalition Government in 2010 sparked a raft of reforms that, over the years, have served to cumulatively and significantly undermine the process of JR. On the whole, environmental cases have not been exempt from these changes. To summarise:

    - In **December 2012**, the Government consulted on proposals to address "the abuse of JR". In **April 2013**, the Government confirmed that it would proceed with: (i) a reduction in the time limit for bringing planning JRs from three months to six weeks in planning cases and thirty days in procurement cases (accepting that, in the procurement context at least, this would

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10 Parties to the Convention on CBD are required by Article 26 of the Convention to submit national reports to the Conference of the Parties on measures taken for the implementation of the Convention and their effectiveness in meeting the objectives of the Convention. The 6th National Report is focused on work by Parties to achieve the 20 Aichi Targets in the Strategic Plan for Biodiversity 2011-2020 and can be found here

11 See here

12 See Cases C-530/11, *Commission v United Kingdom* and C-260/11 *R (Edwards) & Another v Environment Agency & Others*

provide insufficient time for parties to fulfil the requirements of the Pre-Action Protocol); (ii) removing the right to oral renewal in any case where the application was certified as totally without merit by the Judge considering the application on the papers; and (iii) introducing a new fee for oral renewal hearings.

- In **September 2013**, the Government consulted on further reforms to JR. In the absence of any evidential basis for the need for reform and widespread opposition to the proposals as offending the rule of law, the Government proceeded with the following reforms (some of which were subsequently promulgated through the Criminal Justice and Courts Act 2015): (i) the introduction of a lower threshold for when a defect in procedure would have made no difference to the original outcome; (ii) allowing appeals to 'leapfrog' directly to the Supreme Court in a wider range of circumstances; (iii) the introduction of a permission filter for challenges under s.288 of the Town and Country Planning Act 1990; (iv) a package of financial reforms to limit the pursuit of "weak claims" including the introduction of costs exposure for interveners and the abolition of the *Mount Cook* principles (as a result of which unsuccessful claimants in non-environmental JRs are required to pay the costs of the oral renewal hearing). These reforms were progressed against a backdrop of significantly reduced public funding for JR generally and a doubling of Court fees across the board (including fees in the region of £7,000 in relation to the Supreme Court alone).

- In **August 2015**, the Government announced a further consultation in respect of the provision and use of financial information when applying for JR. This was followed by a targeted consultation for environmental claims later in 2015. The latter consultation generated 325 responses from NGOs, civil society groups, legal practitioners and their professional bodies, many of whom "had difficulty with the proposals". However, in light of a "body of support" for the proposals from businesses and public authorities, the Government confirmed that it would proceed with a package of costs reforms including: (i) a restriction on eligibility for costs protection, generating uncertainty for groups such as Unincorporated Associations in terms of costs protection; (ii) a 'hybrid' cap regime enabling the default adverse caps of £5,000 (individuals) and £10,000 (all other cases) to be varied on application by the defendant[13] on the basis of financial information to be provided by the claimant on making an application for JR; (iii) attaching the default cap to each claimant in cases where there are multiple claimants; (iv) revising the basis on which costs can be awarded to a defendant public body when unsuccessfully challenging the status of an Aarhus Convention claim from an indemnity basis to a standard basis; and (v) amending Practice Direction 25 to direct the court to apply the *Edwards* principles (regarding prohibitive expense) when considering the quantum of cross-undertaking in damages required to secure interim relief.

18. The costs reforms referred to above were largely promulgated by the Civil Procedure (Amendment) Rules 2017,[14] despite widespread condemnation. For example, on 13th September 2017, Lord Marks of Henley on Thames moved a Motion that the House of Lords regret that the 2017 Rules had been laid with insufficient regard to the overwhelmingly negative response to the proposed Rules during the consultation and to the lack of evidence that significant numbers of

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13 It has recently been held that interested parties can apply for the cap to be varied. In *R (Bertoncini) v London Borough of Hammersmith and Fulham,* the judge upheld an application on the part of the interested party to increase the claimant's cap from 10k to 20k

14 See here

unmeritorious environmental claims are currently brought; that they may escalate claimants' legal costs and act against the intention of the Aarhus Convention that the cost of environmental litigation should not be prohibitive; and that they are likely to have the effect of deterring claimants from bringing meritorious environmental cases (SI 2017/95 (L. 1)). After debate, the motion was agreed (142 content and 97 not content).

19. Some amelioration of these proposals, to secure early certainty with regard to costs exposure and provision of private hearings for the consideration of financial information, were achieved as a result a case brought by three Link members in 2017[15] (see Annex A).

The effect of previous reforms – the UK's failure to comply with international commitments

20. In October 2019, the RSPB and Friends of the Earth published *A Pillar of Justice*[16], a comprehensive report based on data obtained from the Ministry of Justice from 2013 and anecdotal reports prior to then. The Report aimed to inform an understanding of the impacts of legislative reform on access to environmental justice in England and Wales.

21. The Report demonstrated that the above reforms governing JR procedure (and some statutory reviews), which were criticised at the time as presenting a backwards step away from the type of access to justice required by the Convention, have done exactly that. The key findings of the Report were that:

- The number of Aarhus Convention claims peaked in 2015-16 but by October 2019 they had fallen back to 2013-14 levels.

- There was an increase in the number of challenges to the status of Aarhus Convention claims by defendant public bodies seeking to remove costs protection from claimants, which is likely to have arisen from the reduced adverse costs exposure from losing such applications.

- The number of Aarhus Convention claims granted permission to proceed fell markedly post-April 2016. This decline follows the passage of the Criminal Justice and Courts Act 2015 and the introduction of a new test requiring the High Court to refuse permission for JR where it appears to the court to be "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred" (s.84 CJCA 2015). Notwithstanding this, Aarhus Convention claims continue to demonstrate a higher success rate at the permission stage when compared to JRs generally.

- The average number of Aarhus Convention claims per month that are ultimately successful for the claimant at final hearing fell by two-thirds between April 2016 and May 2019. While it is possible the CJCA 2015 played a role in this, it does not fully explain the continuing decline. Despite this, Ministry of Justice Quarterly Statistics demonstrate that Aarhus Convention claims are approximately twice as successful as JR claims generally at first instance.

22. In light of the above, it is unsurprising that the Sixth Meeting of the Parties to the Aarhus Convention concluded (for the third time)[17] in 2017 that the UK remains in breach of the

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15 *RSPB & Others v Secretary of State for Justice* [2017] EWHC 2309 (Admin)

16 Available here

17 See Decision VI/8k of the Meeting of the Parties to the Convention here

requirements of the Convention with regard to legal action and prohibitive expense (Article 9(4)). The UK has recently submitted its final Report on progress with the implementation of Decision VI/8k to the Aarhus Convention Compliance Committee. Our view is that unless significant improvements are made, it is highly likely the UK will remain in non-compliance. Particular attention has been drawn to: (i) eligibility for costs protection (in addition to the confusion surrounding Unincorporated Associations, private law cases are excluded from costs protection); (ii) increasing incidences of default cap variation (uniformly upwards); (iii) confusion around the situation with regard to appeals and VAT; and (iv) the imposition of reciprocal caps (which can make complex environmental cases such as Heathrow "too expensive to win").

The contemplated reforms

23. The Terms of Reference for the Review raise fundamental questions about the role and process of JR. We wish to make a number of points in relation to the issues raised below. However, a point we wish to make to the Panel most forcefully is that proposals for change should be supported by robust and compelling evidence that there is, in fact, a problem. Where is the evidence that JR is routinely "abused" by claimants or that it is putting a brake on economic recovery? If the Government intends to make the process of JR more difficult for claimants, that should only be contemplated on the basis of information, data or evidence that there are real and pervasive problems as opposed to a knee-jerk reaction to a handful of high profile or anecdotal cases. Our evidence, which is based on the MoJ's data, suggests that the number of environmental JRs are falling, which – if anything – strengthens the case that any reforms contemplated should serve to address the difficulties this evidence highlights and improve access to justice for environmental cases (and all JRs if that trend is reflected beyond environmental cases).

Questions raised in the IRAL Call for evidence

24. **Whether the terms of Judicial Review should be written into law** - Link is concerned that codifying the grounds of JR (as set out in a-g of the list provided in the IRAL document) in statute would not add anything in terms of clarification – not least because the grounds are often difficult to define and overlap. We are also concerned that codification could restrict the development of law in the future. Link recognises the importance of the law being able to evolve to ensure it keeps up to date to meet new challenges and opportunities; such evolution benefitting all parties and also the working of the court. If the Panel is minded to recommend codification, it should be done in a way that does not make it harder for civil society to challenge potentially unlawful actions by Government or otherwise undermine access to justice or the rule of law.

25. **Whether certain executive decisions should be decided on by judges** – we are not entirely clear what this question is seeking to elicit views on, but we assumes it equates to question 4 in the IRAL call for evidence questionnaire to Government departments, i.e. whether certain decisions should not be subject to JR and, if so, which? Our principled view is that no-one is above the law, not even Government, and that it is a cornerstone of modern democracy that executive power is subject to control by the courts. After all, if Government decisions were excluded from control by JR, what other mechanisms exist to ensure Government acts lawfully?

26. **Which grounds and remedies should be available in claims brought against the Government** – the majority of remedies imposed by the courts are designed to ensure that the decision-maker complies with the rules set out by Parliament, while leaving primary responsibility for making decisions with the public authority decision-maker. As such, the implications of a remedy being imposed in the event of illegality encourages good and careful decisions to be taken in the first

instance. For that reason, Link would be concerned about any proposals to narrow the range of remedies available or to propose that in certain situations even proven illegality should not necessarily lead to a decision being quashed. The flexibility of remedies helps ensure that different solutions can be found for different situations.

27. The ToR invite views on any **further procedural reforms to Judicial Review**:

(i) **Duty of candour** – Link welcomes this duty within JR. It ensures transparency in decision-making, is cheaper than full disclosure and in technical environmental cases, where the court gives great deference to the public authority's expert, the duty of candour allows the court and the Claimant to rely on such evidence. It is also important in planning cases. In our experience, Local Planning Authorities routinely rely on (and seek to extend) the statutory time period of 20 working days to provide information under the Environmental Information Regulations 2004. This makes it extremely challenging for potential claimants to obtain the information they need in order to comply with the Pre-Action Protocol for JR and decide whether to issue proceedings or not. The possibility of obtaining documents under the duty of candour at an early stage of the JR proceedings can therefore be an important factor in determining whether the claim proceeds on an informed basis.

The importance of the duty of candour was articulated by the Court of Appeal in *R (on the application of Citizens UK) v Secretary of State for the Home Department,*[18] in which the Court of Appeal held that " *… It is the function of the public authority itself to draw the Court's attention to relevant matters; as Mr Beal [leading counsel for the Secretary of State in that case] put it at the hearing before us, to identify 'the good, the bad and the ugly'. This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law*."

(ii) **Standing** – the Government consulted on proposals in relation to standing in JR in 2013.[19] The Consultation paper recognised that the requirements of the Aarhus Convention meant that cases which raised environmental issues would need to be approached differently as NGOs campaigning for environmental protection are guaranteed rights of standing under the Convention even if they are not directly affected. However, the Government also suggested that the current interpretation of "sufficient interest" as including those with a public interest provides a more generous approach than that required by the Aarhus Convention, and that it does not extend to individuals unless they can demonstrate that they have both a genuine interest in the environmental matter at issue and that they have sufficient knowledge to be able act on behalf of the public interest.

Link remains opposed to that view. The Aarhus Implementation Guide[20] confirms that the Convention requires — as a minimum — that members of the "*public concerned"* either having a sufficient interest or maintaining impairment of a right have standing to review the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6. Although the Convention allows sufficiency of interest and impairment of a right

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18 [2018] EWCA Civ 1812, paragraph 106(3)

19 See *Judicial review: proposals for further reform,* Ministry of Justice, September 2013 (here)

20 The Aarhus Convention – An Implementation Guide available here

to be determined in accordance with requirements of national law, the criteria should not be understood as inviting Parties to limit the scope of persons with standing. Most importantly, the determination of what constitutes a sufficient interest and impairment of a right must be consistent "*with the objective of giving the public concerned wide access to justice within the scope of the Convention*", i.e. Parties may not use the discretion bestowed on them in order to narrow down the scope of persons with standing. Rather, they should interpret their national law requirements in the light of the general obligations of the Convention found in Articles 1, 3 and 9.

Thus, compliance with the Convention requires that the objective of wide access to justice is upheld when determining the scope of persons — both natural and legal — with regard to standing. It is also worth recalling that the essence of public law is to ensure that the decisions taken by public bodies are legal. With that in mind, the particular skills or knowledge set of the person bringing the claim are largely irrelevant.

Link would also highlight the recent case of *R (McCourt) v Parole Board,*[21] in which the Divisional Court held that what counts as a "sufficient interest" for the purposes of s. 31(3) of the Senior Courts Act 1981 will vary depending on what the rule of law requires in the particular context of the decision under challenge. For some decisions, it may not be possible to identify any class of persons, or any class of persons within the jurisdiction, who are more affected than the public at large. In other cases, the direct impact of the challenged measure falls on a class whose members are likely to lack the financial and organisational resources required to litigate. This is one reason why organisations have sought to challenge measures of general application in areas falling within their purview, for the most part without dispute as to their standing. Another reason is that a suitably expert organisation may be better placed to present arguments about the impact of policy on the affected class as a whole, rather than one individual in particular (see paragraph 43).

(iii) **Time limits** – the time limit for making an application for JR is already short (it must be brought "promptly", and in any case no more than 3 months after the initial decision is made). This time limit is shorter than that in other areas (e.g. an action in tort can be brought up to six years after the relevant act takes place). Our experience is that the reduced time limit of six weeks for lodging a JR concerning decisions made under the Planning Acts is extremely challenging for claimants. The reality is that if a community group is not already formed, comprehensively organised, sufficiently funded, fully engaged in the process leading up to the relevant decision and already in touch with lawyers - then it is unlikely to be able to mount a legal challenge. These difficulties are evidenced by the recognition that the shortened time-limit may not allow sufficient time to fulfil the Judicial Review Pre-Action Protocol, which reduces the possibility that a strong case may be conceded, that the claim may be settled before proceedings are issued or that the grounds of a case can be narrowed or refined at an early stage. Link questions whether the imposition of this stringent deadline is Aarhus-compliant and would be opposed to any proposal to extend its application to environmental JRs more generally.

(iv) **Cross-undertakings in damages** – CPR PD 25A provides the court with discretion to award interim injunctive relief without requiring a cross-undertaking in damages in Aarhus cases.

21 (2020) EWHC 2320

This should be made clearer and more certain: that once a fixed costs cap is set, beyond which prohibitive expense would be experienced, then no cross-undertaking should be awarded. The overall outcome for the claimant should be broadly the same, with or without the possibility of a cross undertaking.

(v) **Appeals (including on permission**) – While the Civil Justice Quarterly Statistics confirm that a number of the cases refused permission on the papers are subsequently granted permission at the oral renewal stage, the statistics do not reveal the success rate for oral renewal.[22] When consulting in 2013, the Government stated that of the 2,000 renewed applications made in 2011, 300 (some 15%) were granted following an oral renewal. This confirms the importance of the oral hearing as an established common-law right and a fundamental safeguard to ensure that arguable cases proceed. Our experience is that even cases deemed "wholly without merit" can ultimately be successful. In *R (on the application of Friends of the Earth Ltd) v Secretary of State for Energy and Climate Change* [2012] EWCA Civ 28, Friends of the Earth's application for JR was originally refused permission on the papers, but was granted permission with expedition at oral renewal and subsequently succeeded in both the High Court and Court of Appeal, with the Government being refused permission to appeal to the Supreme Court. Had oral renewal not been available, the JR of an unlawful government decision would have run aground, causing enormous and irreparable harm to the UK's solar industry. There should be no further restrictions on the right of oral renewal and, indeed, the most recent change regarding cases deemed totally without merit should be reversed.

(vi) **Costs and interveners** – There would appear to be no published figure for the number applications to intervene in JR, but in our experience it is now extremely rare (at least in environmental cases) following the passage of the Criminal Justice and Courts Act 2015 (s.87).

The need for positive reforms

28. The Panel has been asked to consider if there is a need to reform the JR process and, in particular, to consider whether the right balance is being struck between the rights of citizens to challenge executive decisions and the need for effective and efficient government. The Review is to be conducted due to the Conservative Manifesto commitment to ensure the JR process is not open to abuse and delay.

29. However, data obtained from the MoJ confirms the cumulative impact of reforms in recent years have meant that the number of environmental JRs are falling and that their success rates at permission and at first instance have been negatively impacted. In light of these findings, any contemplated reforms should clearly be targeted towards ensuring the process of JR is "fit for purpose" as a core element of the rule of law and fulfils the UK's ongoing international environmental obligations.

30. Unfortunately, the environmental rights in the Aarhus Convention are not clearly and comprehensively enshrined in domestic law. However, that issue is beyond the remit of this Review. Instead, we confine ourselves to identifying improvements that could be made to the process of JR to ensure the process of JR respects the rule of law and satisfies the UK's

[22] See, for example, page 11 here

international responsibilities. Many of these are developed further in the joint FoE/RSPB Report *A Pillar of Justice*[23] – they include:

- **Time limits** – as mentioned above the introduction of a six-week time limit for lodging planning cases is making it challenging for claimants to find lawyers, fundraise and secure legal opinion in sufficient time to issue proceedings. In addition, there is an increasing tendency for defendants to delay responding to Pre-Action Protocol correspondence until after the limitation deadline. This is causing claimants to have to issue proceedings "blind" (i.e. without any response from the defendant on their likely defence) and then apply to the court to stay the proceedings to avoid any risk of costs. There have been cases in which defendants have opposed a stay. Moreover, for non-planning cases a claim form must be filed "promptly" and, in any event, not later than 3 months after the grounds to make the claim first arose (CPR 54.5(1)). The uncertainty around the meaning of promptly is unhelpful and an added burden on claimants at the crucial stage of the proceedings. The promptly requirement should be removed, and a more reasonable timeframe for the issuing of claims in planning cases specified.

- **Eligibility –** There should be clearer rules and guidance to ensure challenges are made on an informed basis. This would remove the current uncertainty around bodies such as Unincorporated Associations and ensure environmental claimants receive the full benefit of Aarhus protection to which they are entitled. Furthermore:
  - Aarhus claims should be exempt from the requirements of s. 84 of the Criminal Justice and Courts Act 2015, i.e. that permission to JR is refused where it appears "*highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*". Link suggests this should also be considered for non-environmental JRs; and
  - The 2013 indemnity basis for costs awards for unsuccessful challenges to Aarhus Convention claims be reinstated. This would mitigate aggressive behaviour by some defendant public bodies by reversing the cost exposure and – crucially - avoid an amount of unrecoverable costs for claimants who successfully defend such challenges to their eligibility to costs protection.

- **Standard of Review** – an obvious consequence of Brexit is that the UK will no longer be able to refer matters to the CJEU, which applies a proportionality standard of review, for a preliminary reference. The scope and intensity of review to be provided by the future Office for Environmental Protection (to be established under the current Environment Bill to (amongst other things) replace the scrutiny and enforcement functions of the European Commission) is as yet unknown. However, it seems extremely unlikely that it will (at best) apply anything other than the usual intensity of review, characterised by *Wednesbury* unreasonableness. Concerns have been raised with the Compliance Committee about the UK's failure to provide an adequate review of the "substantive legality" of certain decisions, acts and omissions in accordance with Articles 3(1) and 9(2), (3) and (4) Aarhus Convention. Communication ACCC/C/2017/156 challenges the restrictive nature of JR, including the focus principally being on procedural issues and the very high threshold for irrationality or

[23] See here, pages 35-37

Wednesbury unreasonableness.[24] The findings of the Compliance Committee are expected later in 2020 or early 2021.

- **Costs -** Link recommends the reinstatement of a modified version of the 2013 Aarhus fixed cost caps regime as follows:
  - **Aarhus Caps** - adverse caps covering the duration of the first instance proceedings should be set at the outset of the case. These caps should be set at a maximum of £5,000 for individuals and £10,000 in all other cases (although there is much to be said for the Scottish model in which one cap of £5,000 applies across the board) and should only be varied downwards where the claimant can show that a lower cap is required). The imposition of a new additional cap (at the same levels) upon any appeal should be granted exceptionally and only where this would not be prohibitively expensive for the claimant, taking into account all costs incurred up to that point. The reciprocal cap of £35,000 should be removed – there is no basis for a cross-cap in the Convention and it can render complex environmental cases "too expensive to win".
  - **Multiple caps** - the UK maintains that the basis for separate costs caps for each claimant is to provide fairness and proportionality to all the parties while ensuring the costs of the claim are not prohibitively expensive. There is no basis for this rationale – the concept of "fairness" in Article 9(4) of the Convention refers to what is fair for the *claimant* not the defendant public body.[25]
  - **Cross-undertakings in damages** – CPR PD 25A provides the court with discretion to award interim injunctive relief without requiring a cross-undertaking in damages in Aarhus cases. This should be made clearer and more certain: that once a fixed costs cap is set, beyond which prohibitive expense would be experienced, then no cross-undertaking should be awarded. The overall outcome for the claimant should be broadly the same, with or without the possibility of a cross undertaking.
  - **Intervener's costs** – interventions in JR are now quite rare. We consider it likely that the introduction of new cost rules for interveners through the CJCA 2015 is a strong reason for the reluctance to intervene. Consideration should be given to removing the possibility of a costs award in respect of interveners.
  - **Own Costs** - 'costs neutrality' or where each party bears their own costs, as is currently operating in the Tribunal system of England and Wales, can have the same deterrent effect – making cases 'too expensive to win' as applicants cannot recover the cost of doing so.
  - **Public funding** – the Aarhus Convention expressly recognises that members of the public may need assistance in order to secure their rights of access to environmental justice. However, legal aid is not available unless permission is granted to bring JR proceedings. This may have the effect of dissuading claimants from bringing proceedings in the first place (which links to the decreasing numbers of cases being granted permission to proceed). Moreover, a local community may often have to find a considerable "community contribution" to benefit from public funding and, in any event, it is not available for environmental NGOs. Consideration should be given the expansion of legal aid provision.

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24 Documentation, including the original Communication, available here

25 See the Aarhus Convention Compliance Committee's findings in Communication ACCC/C/2008/33, which concludes that "fairness" in respect of Article 9(4) of the Convention refers to what is fair for the claimant, not the defendant. – see here, para 135

Conclusion

31. The foundations of democracy require citizens to have access to effective mechanisms to ensure the decisions of public bodies are lawful. Moreover, a lawful process of decision making is a minimum requirement for environmental protection.

32. We are about to embark on unchartered terrain in the absence of former EU protections, some of which have ameliorated the more damaging proposals for environmental JRs in recent years. It goes without saying that the Panel has an important job and great responsibility. The Review provides a timely opportunity to question whether the process of JR is fit for purpose in our changing landscape. It is one that should be informed by robust evidence and participation from all of those involved in the JR process including claimants (individuals, community groups and charities) from all sectors - as well as business and public authorities.

33. We urge the Panel to scrutinise as much of the available evidence as possible within the Review period and to require the Government provide such evidence where it is lacking. We also urge it to base its recommendations on the changes that are needed to ensure the process of JR is fit for a newly independent democracy and complies with the international standards to which the UK remains committed.

34. Link remains willing to meet the Panel to discuss this evidence and the future role of Judicial Review in environmental protection.

Legal Strategy Group

20 October 2020

This response is supported by the following Link members:

Client Earth

Royal Society for the Protection of Birds

League Against Cruel Sports

Friends of the Earth

Open Spaces Society

Buglife

Butterfly Conservation

Amphibian & Reptile Conservation

Marine Conservation Society

Annex A – Significant Environmental Cases

1. ***R (on the application of FoE Ltd) v Secretary of State for Transport [2020] EWCA Civ 214; [2019] EWHC 1070 (Admin)***

   The designation of the Airport National Policy Statement approving of expansion at Heathrow Airport was ruled unlawful for failure to consider the Paris Agreement and the full climate impacts of airport expansion, breaching sustainable development duties under s10 of the Planning Act 2008 (including on the basis of being irrational), and also the Strategic Environmental Assessment Directive. The decision was also found to be irrational.

2. ***R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs [2015] UKSC 28***

   Directive 2008/50 established legal limits for the concentration of harmful nitrogen dioxide pollution in ambient air, with the purpose of protecting human health. After the compliance deadline passed in 2010, the UK reported breaches in 40 of its 43 reporting zones. In 2011, ClientEarth launched legal action against the Secretary of State with respect to its failure to comply with the limit values, as well as its failure to put adequate plans in place to tackle ongoing exceedances. Both the High Court ([2011] EWHC 3623 (Admin)) and the Court of Appeal ([2012] EWCA Civ 897) recognised the Secretary of State's failure to secure compliance, but considered that enforcement was not a matter for the domestic courts and neither Court was willing to grant a substantive remedy. After appeal to the Supreme Court, and following a reference to the Court of Justice of the European Union, in April 2015 ClientEarth secured a mandatory order requiring the Secretary of State to prepare new compliant air quality plans by 31 December 2015, with the Court stressing that the Government "*should be left in no doubt as to the need for immediate action to address this issue*". This led to updated plans which, whilst inadequate (see below), included commitment from the Government to introduce Clean Air Zones in five of the most polluted cities in the country.

   R (ClientEarth (No.2)) v Secretary of State for the Environment, Food and Rural Affairs [2016] EWHC 2740

   Pursuant to the order from the Supreme Court in *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28 (see above), the Government published an air quality plan in December 2015 to address illegal levels of nitrogen dioxide air pollution across the UK. ClientEarth successfully challenged the lawfulness of that plan. The Court held that the Secretary of State had failed to satisfy a key legislative requirement under Article 23 of Directive 2008/50 to ensure that the period of exceedance of the relevant limit value is kept "as short as possible", as they had employed overly optimistic assumptions when modelling the extent of likely future non-compliance, and had modelled only 5-yearly intervals when determining the target date for compliance. The Court declared the 2015 plan unlawful and issued a mandatory order requiring that the Secretary of State draw up a new plan by 31 July 2017. This led to the publication of a plan that, whilst still inadequate (see below), more accurately identified the extent and likely persistence of illegal pollution levels across the country and included an increased programme of central government spending on measures to reduce pollution.

   R (ClientEarth (No.3)) v Secretary of State for the Environment, Food and Rural Affairs and others [2018] EWHC 315 (Admin)

   The Government's court-ordered 2017 air quality plan was accompanied by formal directions to 28 local authorities, requiring each to identify local pollution reduction measures to tackle exceedances

in their respective areas in the shortest possible time. ClientEarth successfully challenged the lawfulness of this plan, on the basis that it (a) failed to address illegal levels of pollution in 45 additional local authority areas in England which had not been mandated by ministers to take action, and (b) failed to include a compliant plan for Wales. In February 2018, the High Court declared the plan unlawful, and ordered that the Secretary of State publish a supplemental plan by 5 October 2018 to account for these additional English local authorities. The Welsh Ministers separately undertook to the Court to publish a supplementary Welsh air quality plan by 31 July 2018. The resulting plans have led to the adoption of/commitment to additional local pollution reduction measures in these areas, including Clean Air Zones, bus upgrades, active travel infrastructure and speed limit restrictions.

3. ***RSPB and others v Secretary of State for Justice [2017] EWHC 2309 (Admin)***

Following the Government's decision to proceed with a number of reforms to the Aarhus costs rules in November 2016, the RSPB, Friends of the Earth and ClientEarth issued proceedings against the Secretary of State for Justice. The case secured a number of amendments to the Civil Procedure Rules, largely around securing early costs protection for claimants, including requirements that applications to vary the default cap must be made at the earliest opportunity (Acknowledgement of Service) unless there has been a significant change in the Claimant's financial position following the issuing of proceedings, clarification regarding the level of information to be provided in a financial statement when applying for JR and a requirement that any hearings into financial means must be held in private.

4. R. (on the application of FoE Ltd) v Department of the Environment [2017] NICA 41; [2016] NIQB 91

This was a successful challenge to the decision not to issue a stop notice for unlicensed sand dredging of the bed of Lough Neagh, a protected nature site. The case clarified the correct interpretation and application of the precautionary principle under the Habitat's Directive and Environmental Impact Directive regimes in the UK.

5. ***Fish Legal v Information Commissioner & Ors and another case [2015] UKUT 0052 (AAC)***

This case clarified that private water and sewage companies were public authorities for the purposes of the Environmental Information Regulations 2004. Prior to this case, the Upper Tribunal had decided that privatised water companies were outside the EIR regime in *Smartsource Drainage & Water Reports Ltd v Information Commissioner* [2010] UKUT 415 (AAC). However, the UT revisited the issue in this case and referred the matter to the CJEU for a preliminary ruling (*Fish Legal & Emily Shirley v The Information Commissioner, United Utilities, Yorkshire Water and Southern Water* C -279/12). The CJEU gave guidance on when the EIR are applicable but declined to consider the facts of the Fish Legal case and so the matter was left for the UT. The UT subsequently held that the water companies were public authorities because they exercise 'special powers', including the power to promote bye-laws which create criminal offences, and the power to enter private land without permission.

6. Dover District Council v CPRE Kent [2017] UKSC 79

This case concerned a proposed development of 155 hectares of land in an Area of Outstanding Natural Beauty (AONB) to the west of Dover. The Officer's Report recommended a reduction in the number of houses from 521 to 365 (thus sparing some 2 hectares of particularly sensitive landscape) but the Planning Committee approved the original proposal for 521 houses and gave no reasons for doing so. The Supreme Court (Lord Carnwath giving judgment) contained a full account of where statutory planning law requires the giving of reasons. The Court held that there was a duty to give reasons in development involving EIA development (supported by Article 6(9) of the Aarhus Convention).

7. ***Stephenson v Secretary of State for Housing and Communities and Local Government [2019] EWHC 519 (Admin)***

   NGO Talk Fracking challenged the inclusion in the revised National Planning Policy Framework ("NPPF") of a paragraph (209a) that directed Minerals Planning Authorities to recognise the benefits of fracking (and other on-shore oil and gas development), including its role in supporting the transition to a low-carbon economy, and to put in place policies to facilitate it. The Court held that the Government had purported to consult on the merits of fracking policy when adopting the revised NPPF. It was therefore material to consider scientific evidence, including the effects on climate change, and the government had failed to do so and had consulted unlawfully. Paragraph 209a was therefore removed from the NPPF.

8. ***CHEM Trust v Secretary of State for the Environment, Food & Rural Affairs*** **(CO/2390/2019)**

   In June 2019, CHEM Trust sent a Pre-Action Protocol letter to the DEFRA Secretary of State, pointing out that the proposed post-Brexit Statutory Instrument for chemicals and pesticides failed to include the most controversial part of the EU's pesticides law, the ban on endocrine (hormone) disrupting chemicals, which would enter into force in the event of a no-deal Brexit. On receiving the letter, the Government claimed there had been a "drafting error", withdrew the SI and re-laid a new SI with the requisite text inserted.

9. ***R. (on the application of FoE Ltd) v SoS for Energy and Climate Change [2012] EWCA Civ 28; [2011] EWHC 3575 (Admin)***

   This case prevented the Secretary of State from retrospectively removing feed-in tariffs for solar energy and undermining the growing small-scale solar industry. It was correctly argued that the Secretary of State did not have the necessary power to modify the tariff rate proposed under the 2008 Energy Act, with retrospective effect.

10. ***Greenpeace v. Secretary of State for Trade and Industry [2007] EWHC 311***

    In this case, Greenpeace challenged the Government's decision in the Energy Review Report 2006 (The Energy Challenge) to support nuclear new build as part of the UK's future energy-generating mix. Greenpeace argued that the Government's had promised in the 2003 Energy White Paper, "*Our energy future – creating a low carbon economy*" to carry out full public consultation on the issue before it decided whether or not to change its declared policy position not to support nuclear new build. The High Court gave Greenpeace declaratory relief that their legitimate expectation had been frustrated and that the procedure followed was unfair, such that the decision to support nuclear new build was unlawful.

11. ***Kay v Commissioner of Police of the Metropolis [2008] UKHL 69***
    Successful challenge to protect the right of 'Critical Mass' cyclists to protest and raise awareness of safe cycling; overturning attempts by the Metropolitan Police to restrict their right of assembly. It was found that the police had misunderstood the scope and operation of s.11 of the Public Order Act 1985.

12. ***Friends of the Earth, re Application for JR [2006] NIQB 48***
    Successful challenge to a failure to comply with the Urban Waste Water Directive and the Urban Waste Water Treatment Regulations (Northern Ireland) 1995. If unchallenged it would have allowed sub-standard sewerage treatment connections that endangered the environment and public health without any consideration for the attainment of the necessary standards set out in law.