# Ensuring access to environmental justice in England and Wales

## Update Report

August 2010

The Working Group on Access to Environmental Justice

# Contents

# Foreword

In our report in May 2008 we said that unless our costs regime was altered so as to recognise that there was a public interest in securing compliance with environmental law it would only be a matter of time before the United Kingdom was taken to task for failing to live up to its obligations under Aarhus.

It seemed to us that the Jackson Review was a giant step forward, and that we should respond to his proposals insofar as they relate to the cost of environmental litigation. When this update report was finalised we were still awaiting the Draft Findings of the Aarhus Convention Compliance Committee in relation to communications concerning our costs regime. Those Draft Findings have now been published. They echo the conclusions in the European Commission's Reasoned Opinion. The United Kingdom is being taken to task for failing to live up to its obligations under Aarhus somewhat sooner than we had anticipated just over two years ago.

If the Compliance Committee adheres to its Draft Findings, it is obvious that tinkering with the Protective Costs Order regime will not be sufficient to address prohibitive costs and secure compliance with Aarhus. A radical change in the Civil Procedure Rules is required, one which recognises the public interest nature of environmental claims. The new Rules must also recognise the need for legal certainty. The broader the ambit of judicial discretion under any new Rules, the less likely it is that they will be Aarhus compliant.

Lord Justice Sullivan
6 September 2010

# Introduction

1. In May 2008, this Working Party published its report *Ensuring access to environmental justice in England and Wales*[1] (the **Sullivan Report**). Our remit was:

> (1) To consider whether current law and practice creates barriers to access to justice in environmental matters in the context of the Aarhus Convention.
> (2) To make practical recommendations for changes in law and/or practice that might overcome any such barriers.

2. Since May 2008, there have been several significant developments in this area including in particular Lord Justice Jackson's Civil Litigation Costs Review[2] (the **Jackson Review**). The purpose of this paper is to respond to those developments.

# Background and wider context

3. In our first report we found that there were a number of respects in which the UK legal system did not ensure compliance with our obligations under Article 9 of the Aarhus Convention. We concluded that:

"we doubt whether, for a significant number of non-legally aided claimants, the current procedures can be said to meet the general requirement that they are 'not prohibitively expensive'."[3]

4. Specifically we concluded that:

"Our overall view is that the key issue limiting access to environmental justice and inhibiting compliance with Article 9(4) of Aarhus is that of costs and the potential exposure to costs. What is notable about the problem is that, by and large, it flows from the application of ordinary costs principles of private law to judicial review and, within that, of ordinary principles of judicial review to environmental judicial review. We consider that the first of those does not take proper account of the particular features of public law. And that the latter is only acceptable in so far as it maintains compliance with Aarhus."[4]

5. Our findings echoed those of an independent report commissioned by the European Commission which concluded, in relation to the UK, that:

"the main obstacle to access to justice for members of the public or NGOs is the issue of costs in judicial review cases. The problem is one of exposure and of uncertainty. At the beginning of a case it is impossible for the member of the public or the NGO to know how much money they will have to find if they lose. The possibility of having to pay a large (and uncertain) bill means that people are unwilling to risk bringing legal proceedings to hold a public body to account for breaking the law. Studies have indicated that a substantial number of potential applicants for judicial review in environmental matters have not proceeded because of the risk of costs involved […]

"In conclusion, it can be said that the potential costs of bringing an application for judicial review to challenge the acts or omissions of public authorities is a significant obstacle to access to justice in the United Kingdom."

1 The report can be found online in a wide range of places. It is on the UNECE website at www.unece.org/env/pp/compliance/C2008-23/Amicus%20brief/AnnexNjusticereport08.pdf
2 http://www.judiciary.gov.uk/publications-and-reports/reports/review-of-civil-litigation-costs/civil-litigation-costs-review-reports
3 Sullivan Report; p.10, para. 14.
4 Ibid. p.15, para. 25.

6. Having identified the 'loser pays' rules as the principal obstacle to the achievement of access to environmental justice in England and Wales and to securing compliance with the Aarhus Convention,[5] we focused on existing mechanisms that could be further developed to secure compliance with the Aarhus Convention. We took this approach as we wished to promote measures that could be taken 'relatively easily and quickly within the existing legal framework'.[6]

7. As such, a particular focus of our recommendations was on developing Protective Costs Orders (**PCOs**).[7]

# Subsequent developments

## International developments

8. In our earlier report we noted that:

"Unless more is done, and the Court's approach to costs is altered so as to recognise that there is a public interest in securing compliance with environmental law, it will only be a matter of time before the United Kingdom is taken to task for failing to live up to its obligations under Aarhus."[8]

9. Since then:

(1) The European Commission has now formally issued[9] the UK with a Reasoned Opinion[10] in response to a complaint by CAJE[11] about prohibitive expense arising out of potential liability for costs. The Reasoned Opinion also raises the issue of interim injunctions and, in particular, the difficulty faced by individuals and NGOs in giving expensive and often unaffordable 'cross undertakings in damages' before such orders are granted by the courts.

(2) Although the EC has not yet issued proceedings against the UK in the European Court of Justice (ECJ), a recent judgment of that Court gives support to the concerns raised by the Commission about the adequacy of the UK's current approach to adverse costs. In September 2009 the ECJ handed down judgment in Case C-427/07 *(Commission v. Ireland)*.[12] The Case partly concerned Ireland's failure to implement the Aarhus implementation provisions in the EIA Directive (Art. 10a of Directive 85/337 as amended by Art. 4(4) of Directive 2003/35) including the requirement that such cases be 'not prohibitively expensive'. On that point, the Court held:

5 Ibid. p.13, paras 23-25.
6 Ibid. p.6, para. 5; also p.12, para. 22.
7 Ibid. Chapter 8.
8 Ibid. Foreword, p.2.

9 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/312&format=HTML&aged=0&language=EN&guiLanguage=en: European Environment Commissioner Janez Poto_nik said: "When important decisions affecting the environment are taken, the public must be allowed to challenge them. This important principle is established in European law. But the law also requires that these challenges must be affordable. I urge the UK to address this problem quickly as ultimately the health and wellbeing of the public as a whole depends on these rights."
10 The Reasoned Opinion is the penultimate stage in Art. 226 proceedings by the European Commission against a Member State. The Reasoned Opinion follows an earlier stage (the Letter of Formal Notice) and is only issued where the Commission is not satisfied with the response of the Member State. If the Member State is not able to satisfy the Commission in response to the Reasoned Opinion then the Commission will apply to the European Court of Justice for a ruling that the UK is in breach of the Treaty.
11 The Coalition for Access to Justice for the Environment (consisting of several leading environmental NGOs operating in England and Wales).
12 http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=C-427/07

"92 As regards the fourth argument concerning the costs of proceedings, it is clear from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, that the procedures established in the context of those provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement.

"93 *Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts.*

"94 *That mere practice which cannot, by definition, be certain, in the light of the requirements laid down by the settled case-law of the Court, cited in paragraphs 54 and 55 of this judgment, cannot be regarded as valid implementation of the obligations arising from Article 10a* of Directive 85/337, inserted by Article 3(7) of Directive 2003/35*,* and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35.

"95 The fourth argument is thus well founded."

*(emphasis added)*

(3) There have been a number of Communications[13] to the Aarhus Convention Compliance Committee in relation to access to justice issues including the issue of prohibitive expense.[14]
Three Communications have now been heard orally by the Committee. The draft 'findings' for the first Communication were published in June 2010 (but did not concern the issue of 'prohibitive expense'). Draft findings in relation to the two remaining UK Communications concerning costs are expected in summer 2010.

10. The above developments provide further support for the concerns raised in our previous report as to the current compliance of the UK system with Aarhus. It remains our view that unless more is done to secure compliance with our international obligations it will only be a matter of time before the UK is the subject of censure at the international level in relation to this matter.

11. In order to comply with the ECJ's judgment, Ireland has amended the Planning and Development Act 2000 regarding judicial review proceedings in respect of EC Directives on EIA, SEA and IPPC. There is now one rule for such cases (each side bears its own costs, in general) and another rule for all other environmental cases (the loser pays the costs of both sides, in general). However, concern has been expressed that neither rule will address prohibitive costs. The situation is further complicated when a case involves directives that engage different rules – for example, a case concerning both the EIA and the Habitats and Species Directives – in which case it is not clear which regime will apply.

13 The Aarhus Convention permits members of the public to make 'communications' (i.e. formal complaints) to the Aarhus Compliance Committee.
14 All available at www.unece.org/env/pp/pubcom.htm

## Developments in the PCO field

12. In our previous report we focused on changes that could be made to the PCO regime to improve compliance with Aarhus. We concluded that[15]:

**Protective Costs Orders**

> (9) The availability of a Protective Costs Order (PCO) at an early stage in proceedings can provide an important mechanism in meeting the requirements on access to justice, in that a PCO provides a cap and advance certainty on the potential exposure to costs should an application fail. But the current judicial principles on PCOs were not developed with Aarhus in mind, and contain constraints that are not consistent with Aarhus.
>
> (10) Rather than reformulate the general principles of PCOs, specific principles concerning PCOs should be applied to those environmental judicial reviews to which Aarhus applies. It would follow that in a case falling within the terms of Aarhus and where a PCO is sought, the overarching requirement must be for a PCO that secures compliance with Aarhus. Conditions relating to the requirement of 'general public importance' and 'no private interest' that might still be applicable to PCOs in other types of cases but which are inconsistent with Aarhus would not apply. If the individual Aarhus claimant, acting reasonably in the circumstances, would be prohibited by the level of costs or cost risks from bringing the case, then the court must make some form of PCO to ensure compliance."

15 Sullivan Report, Executive Summary, p.4.

13. Since publication of the Sullivan Report a number of cases have developed the PCO jurisprudence both generally and specifically in the Aarhus/environmental context.[16] Several of those cases have made reference to the Sullivan Report.[17]

14. This paper is not the place to provide a detailed analysis of the developing jurisprudence on PCOs. However, it is relevant to note the following key points:

> (1) The Court of Appeal has expressly recognised that the requirement that cases be 'not prohibitively expensive' applies to the totality of costs in a case including potential liability for adverse costs (*Morgan* §47(i)).
>
> (2) In cases where an Aarhus implementing EU Directive is engaged then the Court has recognised that judicial discretion on costs may be insufficient to secure compliance with the relevant requirement (*Morgan* §47(ii)).
>
> (3) There has been marked judicial reluctance to develop a separate set of PCO principles for environmental judicial reviews. The Court of Appeal and the High Court have repeatedly stressed that there ought to be a single set of principles applicable across all judicial reviews (e.g. *Compton* §20; *Morgan* §47(iv)).

16 See e.g., R *(Compton)* v Wiltshire Primary Care Trust [2008] EWCA Civ 749; R (McCaw) v. City of Westminster Magistrates Court [2008] EWHC 1504 (Admin); R (*Buglife* – The Invertebrate Conservation Trust) v. Thurrock Thames Gateway Development Corporation [2008] EWCA Civ 1209; R (*Morgan* & anor) v. Hinton Organics [2009] EWCA Civ 107; R *(Birch)* v. Barnsley MBC [2009] EWHC 3561; R *(Garner)* v. Elmbridge BC [2010] EWHC 567; R *(Eley)* v. SSCLG [2008] EWCA Civ 1632; R (David Edwards and Lilian *Pallikaropoulos*) v Environment Agency, First Secretary of State and the Secretary of State for the Environment, Food and Rural Affairs (Costs Assessment Proceedings) [2006] EWCA Civ 877).

17 The Sullivan Report was specifically cited in McCaw (§9); Buglife (§16); Morgan (§§16, 32, 33, 38 & ors); Compton (§19).

> (4) The judiciary has expressed concern that the system of applying for PCOs ought not to develop in such a way as to promote satellite litigation on costs (e.g., *Compton* §.9; *Eley* §11).

15. Developments in the PCO field are welcome. However, in light of the ECJ's subsequent finding that judicial discretion is insufficient to meet the Aarhus obligations with regard to prohibitive expense (§9(b) (above)), we are of the view that a PCO regime (such as the present one) which is entirely dependent on the exercise of judicial discretion cannot provide requisite certainty such as fully to secure compliance with EU law and the Aarhus Convention.

16. Our view is consistent with the finding of the Court of Appeal in *Morgan* relating specifically to areas where Aarhus obligations have been directly incorporated in EU law (§47(ii)).

17. We also note that in the case of *Morgan*, the Court of Appeal (§47(v)) expressed its reluctance further to develop PCO principles in the Aarhus context because:

"The Jackson review provides an opportunity for considering the Aarhus principles in the context of the system for costs as a whole. Modifications of the present rules in the light of that report are likely to be matters for Parliament or the Civil Procedure Rules Committee."[18]

18. In addition, the development of the PCO jurisprudence has been the result of, and continues to result in, considerable satellite costs litigation which is time consuming for the Administrative Court and expensive for litigants.

18 Morgan §47(v).

## The Jackson Review

19. On 14 January 2010, Lord Justice Jackson published his review of Civil Litigation Costs[19] (the **Jackson Review**).

20. The review is wide-ranging and detailed. It makes recommendations across the full range of civil litigation costs. In our earlier report we decided to focus explicitly on judicial review and the operation of the Administrative Court.[20] The recommendations of the Jackson Review in respect of judicial review are therefore of most relevance.[21]

21. Having given careful consideration to the issues arising in respect of environmental (Aarhus) judicial reviews and the developing PCO case-law, the Jackson Review recommends a solution of 'qualified one way costs shifting' (**QuOCS**)[22] *in all judicial reviews* (i.e. environmental and non-environmental) as well as in other legal areas including personal injury, clinical negligence and defamation (though in each case in slightly different terms).

22. Lord Justice Jackson explains his reason for proposing QuOCS in the judicial review context as follows:

> 4.1 In principle. Having considered the competing arguments advanced during Phase 2 as well as the factors set out in PR chapters 35 and 36, I am quite satisfied that qualified[92] one way costs shifting is the right way forward. There are six principal reasons for this conclusion:

19 http://www.judiciary.gov.uk/publications-and-reports/reports/review-of-civil-litigation-costs/civil-litigation-costs-review-reports. In Scotland a Report by Lord Gill on equivalent issues in the Scottish Courts is at http://www.scotcourts.gov.uk/civilcourtsreview (Chapter 12 dealing with judicial review).
20 Ibid. p.6, para. 4.
21 Chapter 30.
22 "A system of one way costs shifting which may become a two way costs shifting system in certain circumstances, e.g. if it is just that there be two way costs shifting given the resources available to the parties" (Jackson Review, p.xiv).

(i) This is the simplest and most obvious way to comply with the UK's obligations under the Aarhus Convention in respect of environmental judicial review cases.
(ii) For the reasons stated by the Court of Appeal on several occasions,[93] it is undesirable to have different costs rules for (a) environmental judicial review and (b) other judicial review cases.
(iii) The permission requirement is an effective filter to weed out unmeritorious cases. Therefore two way costs shifting is not generally necessary to deter frivolous claims.
(iv) As stated in the [paper by Michael Fordham QC and Jessica Boyd], it is not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the very considerable financial risks involved.
(v) One way costs shifting in judicial review cases has proved satisfactory in Canada: see PR paragraphs 35.3.8 and 35.3.9.
(vi) The PCO regime is not effective to protect claimants against excessive costs liability. It is expensive to operate and uncertain in its outcome. In many instances the PCO decision comes too late in the proceedings to be of value.

[92] I say 'qualified' one way costs shifting, because only some categories of claimants merit protection against liability for adverse costs.

[93] See PR paragraph 36.4.9.

23. The precise mechanism that Lord Justice Jackson proposes is to develop a new civil procedure rule based on the current Legal Aid 'shield' provisions contained in section 11(1) Access to Justice Act 1999. Specifically, Lord Justice Jackson proposes a rule in the following terms[23]:

"Costs ordered against the claimant in any claim for personal injuries, clinical negligence or judicial review shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

(a) the financial resources of all the parties to the proceedings, and
(b) their conduct in connection with the dispute to which the proceedings relate."

24. The Jackson Review then makes a number of further recommendations in respect of judicial review including that Success fees should no longer be recoverable.[24]

23 Chapter 30, para. 4.5, p.311.

24 Ibid, para. 4.10, p.312.

# Our conclusions

## On the issues of principle

25. This Group welcomes the findings of the Jackson Review in respect of judicial review and, subject to the specific matters below, endorses its conclusions in that area.

26. In our earlier report we did not recommend QuOCS but instead focused our recommendations on improving the PCO system. That approach was taken explicitly in order to provide recommendations that *'could be fairly swiftly and easily introduced initially by the judiciary under their discretionary powers and later incorporated into a Practice Direction and/or the Civil Procedure Rules'*.[25]

27. The difference between PCOs and QuOCS is important. PCOs operate as a case-by-case (and discretionary) exception to the general rule[26] contained in the 'loser pays' costs rule. By contrast, QuOCS *replaces* the general rule with a presumption that, other than in exceptional circumstances, the Claimant will not be at risk of liability for another party's costs. Doing so results in very considerable benefits in terms of Aarhus compliance as a result of the increased certainty arising from the changed presumption.

28. Since publication of our earlier report, events have made clear that (a) judicial discretion will not satisfy the ECJ as to compliance with Aarhus; and (b) the Courts themselves are of the view that compliance with Aarhus needs to be secured through changes to the Rules rather than further development of Judge-made law.

29. In light of those developments, we consider that the Jackson recommendation to introduce QuOCS (rather than merely to improve PCOs) and to do so across the judicial review board is a better solution. Specifically, we consider that QuOCS is capable of securing compliance with Aarhus and will be simpler to operate. We agree with the reasons given by Lord Justice Jackson as set out at (§20) above. We consider that the provision of clear rules on liability for costs in Aarhus cases is an essential precondition for securing full compliance with Aarhus.

## On the proposed rule

30. However, while we agree with the conclusion and broad recommendation of the Jackson Review, we propose a different formulation of the rule proposed by Lord Justice Jackson.[27] We propose the following wording:

> "44.X An unsuccessful Claimant in a claim for judicial review[28] shall not be ordered to pay the costs of any other party other than where the Claimant has acted unreasonably in bringing or conducting the proceedings."[29]

25 Sullivan Report, para. 22, p.12.
26 CPR 44.3(2)(a) 'the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party'.

27 See para. 22 above.
28 We confine our observations to costs in judicial review claims as that is the focus of our original report. We express no view as to the nature of the rule in other areas such as defamation, personal injury, clinical negligence etc.
29 This wording reflects the language found in modern Tribunal Rules such as the Upper Tribunal Rules (Rule 10).

31. We do so for the following reasons:

(1) Although 'the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances' causes little difficulty when limited (as it is in the context of the Access to Justice Act 1999) to people financially eligible for legal aid, problems could arise when they are applied more widely.

i. First, there is a danger that it would be applied to create a financial liability which does not comply with the requirements of the Aarhus Convention.

ii. Second, it relies on an exercise of discretion which we do not consider would satisfy the requirements of EU law for certainty (as above).

iii. Third, there is a danger that it would be applied so as to undermine what we understand to be the intention behind Jackson LJ's proposals in this area, namely that the claimant's liability should be nil other than in exceptional circumstances (as considered further below).

iv. Fourth, it implies a process of evaluation by the court in circumstances where it would be highly undesirable for judges to be required to carry out detailed assessments of the means of the parties (as the proposed rule would require). That would be a very time consuming exercise, demanding a significant amount of limited judicial resources. It would also be likely to result in significant delay to the administration of justice in the Administrative Court. Such an exercise is, in any event, disproportionate to the potential gain in terms of securing modest additional protection of the public purse.[30]

(2) Prior (or at least very early) certainty is absolutely essential to secure compliance with Aarhus. A (prospective) claimant must be sure of the extent of his liability at the outset. Any system of QuOCS must be designed such that the nature of the 'qualification' is abundantly clear in order that the claimant knows that s/he will not face liability for costs other than in very clearly specified (and narrowly drawn) circumstances. It is our view that the proposed rule as drafted by Jackson LJ does not provide sufficient certainty and leaves open the significant possibility that a judge at the end of a case could order costs against a claimant in an amount which he, as an exercise of judicial discretion, considered reasonable for the Claimant to pay even where that claimant's conduct in the litigation could not be criticised. The risk inherent in such a broad judicial discretion would have a 'chilling' effect on claimants' willingness to pursue environmental challenges.

32. We consider that (consistent with the thrust of Jackson LJ's recommendations) the only circumstances in which 'one way costs shifting' presumption ought to be qualified are where the Claimant has behaved unreasonably. This qualification necessarily permits an element of judicial discretion, but on a much more tightly defined basis.

33. Where a Claimant has behaved unreasonably in the conduct of the litigation then s/he ought to be at risk of costs and the usual costs rule should apply such that the Court will be able to have regard to a range of factors in deciding on the level of any liability for costs. That is part of the discipline of ensuring not only that only properly arguable cases are allowed to proceed (hence the permission filter) but also that such cases are conducted responsibly. Even in those Tribunals where the general rule is that each party

30 In our earlier review we assessed the likely increase in the number of cases from the proposals then made and concluded that they would be relatively modest. See specifically Sullivan Report, Chapter 14, §§101-107. Lord Justice Jackson explicitly concludes that the permission requirement is a sufficient filter to weed out unmeritorious cases (Jackson Review, §4.1(iii), Chapter 30).

31 See e.g. Rule 10(1) of The Tribunal Procedure (Upper Tribunal) Rules 2008 and rules in relation to planning appeals.

has to bear its own costs, the Tribunal[31] invariably has power to order costs against a party that has behaved unreasonably. However, the threshold of unreasonable behaviour is a high one.

34. However, it will be important to ensure that a Defendant or interested party who wishes to claim costs on the basis that there has been some unreasonable conduct has given proper and adequate notice to the Claimant of his intention to do so and the basis of his proposed claim. Such a requirement may properly be included in a revised practice direction.

35. In our discussions, the group carefully considered an additional qualification to the QuOCS rule to allow costs shifting in respect of a claimant who is 'conspicuously wealthy'.[32] However, on balance we considered that the additional complication and uncertainty caused by such a qualification was disproportionate to the benefit it would secure. Specifically, we rejected this approach because (a) adding such a qualification would not act as a filter because 'conspicuously wealthy' claimants were unlikely to be deterred from bringing a judicial review because of the risk of costs; (b) we are not aware of any evidence that public authorities, in practice, recover significant sums in from unsuccessful commercial claimants in judicial reviews; and (c) such a qualification would lead to considerable uncertainty of application and would be likely to increase satellite costs litigation.

32 'Conspicuously wealthy' is set out in the Jackson Review as one of the exceptions to QuOCS in the Personal Injury context. Chapter 19, para. 4.8, p.190.

# Other matters

36. In formulating our response to the Jackson Review we have also considered the following matters.

### The permission filter

37. We agree with the Jackson Review that the permission requirement is capable of being 'an effective filter to weed out unmeritorious cases such that two way costs shifting is not generally necessary to deter frivolous claims'.[33] However, it is important that the Administrative Court is adequately resourced (including through the deployment of specialist judges to deal with environmental cases, as we suggested before) to ensure that sufficient consideration is given to permission applications. We also restate the various proposals made in our previous report for improving case management of environmental judicial reviews.[34] These measures are appropriate and necessary in an economic climate in which the public purse will be under intense scrutiny.

### Statutory Appeals

38. In the environmental field, whether the challenge is made by way of a statutory appeal or by way of judicial review is sometimes a matter of historical happenstance – many environmental challenges can be made by way of statutory appeal. Therefore we consider that the QuOCS system ought to apply to all cases in the administrative court[35] (i.e. statutory appeals as well as judicial reviews). In the Aarhus context this is likely to be particularly important in the planning context.

33 Jackson Review. §4.1(iii), p.310.

34 Sullivan, Chapter 13, including (§100) the proposal that Aarhus judicial reviews be handled, particularly at the permission stage, by judges with expertise in environmental cases.

35 Consideration will also need to be given to the implications of the transfer of judicial reviews to the Upper Tribunal so as to ensure that claimants pursuing a judicial review in the Upper Tribunal will not be at a disadvantage compared to claimants in the Administrative Court.

39. We consider that this is appropriate to avoid two entirely different rules within the same Court and for reasons of logical consistency – the reasons for QuOCS in judicial review apply with equal force in the context of statutory appeals.

40. However, we are concerned that the absence of a 'permission filter' in statutory appeals increases the possibility of an increased number of (unmeritorious) cases being brought under the QuOCS system. As such we recommend giving consideration to the possibility of introducing a permission filter to statutory appeals.

## Injunctive Relief

41. Bearing in mind the already considerable scope of Lord Justice Jackson's report we fully understand why the issue of costs in applications for interim injunctive relief was not addressed. However, we remain of the view that unless this issue is properly addressed the UK will not be able to demonstrate compliance with the provisions of Aarhus.

42. In our earlier report[36] we recommended that the requirement to provide a cross-undertaking in damages should not apply in environmental cases where the court is satisfied that an injunction is required to prevent significant environmental damage and preserve the factual basis. We recommended that in such cases it would be incumbent on the Court and its administration to ensure that the full case is heard promptly. That remains our considered view.

43. We note that the European Commission has expressly raised this issue as a ground of challenge in its Reasoned Opinion sent to the UK.

36 Sullivan §82.

## Members of the Working Group

All members of the Working Group acted in a personal capacity and this report therefore does not purport to represent the views of any specific organisation with which they are associated.

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