

PE1372/C

**RESPONSE BY UKELA “SCOTLAND) to PETITION BY FRIENDS OF THE
EARTH**

- Do you consider that access to the Scottish courts is compliant with the Aarhus convention on ‘Access to Justice in Environmental Matters’ especially in relation to costs, title and interest and can you demonstrate this?

There is no current guidance for the Scottish Court on compliance with the Aarhus Convention. There have been only two cases, so far as is known to UKELA (Scotland) on this issue. Both cases decided to follow the guidance in an English case on Protective Costs Orders - *R (on the app of Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600. The first case was *McArthur v Lord Advocate* 2006 SLT 170 [Not an environmental case] and *McGinty v Scottish Ministers* [2010] CSOH 5, a challenge to the designation of Hunterston for a new coal fired power station where an impecunious petitioner was granted a PCO limited to £30,000 making it, so we understand, unviable for her to continue the challenge.

- What is the case law, rules of court, or legislation to demonstrate you are compliant?

None – so far as UKELA is aware. Compliance is limited to current court practice of which there is limited experience.

- Will you publish the documents and evidence of such compliance and, if not, why not?

UKELA (Scotland) would support such compliance.

- What action will you take in light of the recent ruling of the Aarhus Compliance Committee against the UK Government?

UKELA (Scotland) would support the Scottish Parliament in taking action to ensure that there is compliance in Scotland with

- What was your response to the [recent DEFRA consultation on this issue](#) and will you publish it?

The UKELA Responses to this Consultation are attached for the interest of the Committee.

- What is your response to the questions posed by the petitioner at the end of the petition ('What we need in Scotland')?

UKELA (Scotland) supports the introduction into Scotland of legislation to bring the Aarhus Convention into direct effect in Scotland so that persons with the relevant interest should be able to litigate on environmental matters in a way that it not prohibitively expensive. The Scottish Court presently allow a litigant to seek a Protective Costs Order, but the law and practice around PCOs in Scotland is so uncertain that it is difficult to advise a litigant as to whether or not a PCO will be granted or the outcome of such a PCO.

Otherwise UKELA (Scotland) would recommend to the Scottish Parliament the Responses of UKELA to DEFRA, which also reflect the views of UKELA (Scotland).

Sir Crispin Agnew of Lochnaw Bt QC
Convenor UKELA (Scotland)



ENSURING ACCESS TO ENVIRONMENTAL JUSTICE IN ENGLAND AND WALES

UKELA's RESPONSE TO THE AUGUST 2010 UPDATE REPORT OF THE WORKING GROUP ON ACCESS TO ENVIRONMENTAL JUSTICE

INTRODUCTION

1. This is the response of the United Kingdom Environmental Law Association to the Update Report of the Working Group on Access to Environmental Justice¹.
2. UKELA is a registered charity the principal objects of which include the promotion, for the benefit of the public generally, of the enhancement and conservation of the environment in the UK, and, in particular, the advancement of the education of the public in all matters relating to the development, teaching, application and practice of law relating to the environment.
3. The Rt Hon Lord Justice Carnwath is UKELA's current President, having taken over the role in 2006 from the late Rt Hon Lord Slynn of Hadley. In addition to Lord Justice Carnwath, the Association's patrons are Baroness Young of Old Scone (former Chief Executive, the Environment Agency), Professor Sir Francis Jacobs KCMG, QC (Kings College London), Professor Richard Macrory (University College London) and Tom Burke CBE (Visiting Professor, Imperial and University Colleges, London).
4. Current membership (lawyers and non-lawyers) is in excess of 1,200.

¹ Contacts are: Richard Kimblin (Convenor of the Environmental Litigation Working Part) rk@no5.com; Vicki Elcoate (Executive Director) Vicki.elcoate@ntlworld.com

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THE UPDATE REPORT

5. The Update Report addresses key changes which have occurred since the Working Party reported in May 2008, namely:

- the judgment in *Commission v Ireland*², in which discretionary judicial approaches to ensuring compliance with the Aarhus Convention were held to be insufficiently certain;
- criticism of the UK position by the European Commission³;
- draft finding from the Aarhus Compliance Committee which are adverse to the UK position in this regard⁴;
- the Jackson Review of Costs in Civil Litigation

6. We note, further, that since drafting the Update Report, the Court of Appeal has had to deal with the approach to what is and is not prohibitively expensive in the PCO regime⁵.

7. The Update Report adopts the conclusions of the Jackson Review, save that it proposes a costs rule as follows⁶:

An unsuccessful Claimant in a claim for judicial review 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.

8. In respect of the Jackson Review, UKELA attended & contributed to Lord Justice Jackson's seminar on costs in judicial review. UKELA also contributed in writing.

² Case C-427/07

³ See the press release of the Environment Minister dated 18 March 2010

⁴ The final recommendations made by the Aarhus Compliance Committee have since been published on 18 October 2010 with minimal changes to the earlier draft recommendations referred to in the Update Report (Findings and Recommendations of the Aarhus Compliance Committee with regard to Communication ACCC/C/2008/33 brought by ClientEarth, the Marine Conservation Society and Mr Robert Latimer concerning compliance by the United Kingdom).

⁵ R (oao) Garner v Elmbridge Borough Council [2010] EWCA Civ 1006

⁶ See para 30 of the Update Report

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Since that time, UKELA has not revisited the issue of access to justice in public law proceedings. It does so now.

RESPONSE

9. UKELA considers that it has now been established that a clear and effective costs system for public law litigants is needed. The requirements of the Convention, as now incorporated in both the EIA Directive and the IPPC Directive, are matters of European law which must be properly transposed to the domestic situation. It is quite obvious that adaption of the Corner House⁷ principles is inadequate, having regard to:

- the PCO regime's lacks certainty;
- the difficulty that the PCO regime answers the question as to potential liabilities at a point in the proceedings which is too late;
- the costs or costs risks associated with the PCO regime themselves restrict access to justice and increase costs for all parties;
- the findings of the Jackson Review;
- the final findings and recommendations of the Aarhus Compliance Committee;
- the absence of a requirement of a 'public interest' issue in EIA cases (see Garner).

10. For these reasons, UKELA considers that there is substantial evidence that there is both a failure to comply with the Convention and European law. The approaches which are presently available to parties and the courts now require a clean break and clear resolution.

⁷ R (oao) Corner House Research v Secretary of State for Trade and Industry [2005] EWCA 192
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11. UKELA notes that the Update Report makes express reference to the use of the permission stage to filter claims⁸. Further, and as was suggested by UKELA during the Jackson Review, there is a need to provide for a permission stage in statutory review, principally via s288 Town and Country Planning Act 1990. Helpfully, the Update Report supports that change⁹.
12. To these points, we would add and draw attention to the existence of an effective means of addressing alleged unlawfulness, namely the pre-action protocol procedure. In UKELA's view, this is an important balancing factor in JR in England and Wales in addressing:
 - the question of conduct of the parties;
 - a means of resolving cases without prohibitive expense.
13. Having regard to these factors, UKELA considers that one way cost shifting of the nature identified in the proposed rule would provide a clear and effective means of complying with the UK's obligations and would do so in a manner which would filter out unmeritorious cases and penalise those who do not conduct their litigation reasonably.
14. In conclusion, UKELA supports the approach proposed by the Working Party.

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⁸ Para 37

⁹ Paras 38-40

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Response to the DEFRA Consultation: UK National Implementation Report - Aarhus Convention

INTRODUCTION

1. This is the response of the United Kingdom Environmental Law Association to the DEFRA Consultation on the Implementation Report to the Meetings of the Parties.¹
2. UKELA is a registered charity the principal objects of which include the promotion, for the benefit of the public generally, of the enhancement and conservation of the environment in the UK, and, in particular, the advancement of the education of the public in all matters relating to the development, teaching, application and practice of law relating to the environment.
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RESPONSE

5. This response addresses concerns that UKELA has in relation to the draft implementation report that the DEFRA is intending to submit to the Meetings of the Parties.

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6. UKELA has particular concerns that the draft report does not reflect accurately the extent to which the United Kingdom has implemented Article 9 of the Convention (Section XXVIII). Nor does it fully reflect the extent of the obstacles encountered in the implementation of Article 9 (Section XXIX).
7. UKELA considers that the UK Government's position as set out at paragraph 126 regarding compliance with the Aarhus Convention (namely that the UK considers it is compliant) is untenable in light of the recent decision of the Aarhus Compliance Committee.
8. UKELA specific concerns with the draft report are as follows:
 - a. The draft report also fails to address what action will be taken in response to the Aarhus Compliance Committee's recommendations.
 - b. The draft report fails to acknowledge the Update Report to the Report by the Working Party into Environmental Justice chaired by Lord Justice Sullivan dated October 2010, and in particular its recommendation for a new costs rule to the effect that an unsuccessful Claimant in a claim for judicial review 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.
 - c. The draft report at Section XXVIII, in relation to Article 9(4) fails to include sufficient detail on the average amount of adverse costs awards following an unsuccessful environmental judicial review. As an example is to be found in *Garner v Elmbridge District Council* [2010] EWCA Civ 1006.
 - d. The draft report at Section XXVIII fails to acknowledge or make reference to Sullivan LJ's judgment in *Garner*, to the effect that as a

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result of Directive 2003/53/EC the UK courts have now recognised that different considerations apply to applications for PCOs in cases to which the EIA Directive applies compared to those of general judicial review claims.

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