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To: Administrative Justice, Ministry of Justice
by e-mail to: admin.justice@justice.gsi.gov.uk

RE: JUDICIAL REVIEW: PROPOSALS FOR FURTHER REFORM

UKWIN was founded in March 2007 to promote sustainable waste management. As part of fulfilling our aims and objects UKWIN works to help facilitate access to environmental information, public participation in environmental decision-making, and access to justice in environmental matters. UKWIN currently has more than 100 member groups and regularly takes part in consultations run by various Government bodies.

UKWIN welcomes this opportunity to provide feedback to the Ministry of Justice regarding the Judicial Review: Proposals for Further Reform ('the proposals').

At present, communities in the UK are denied effective participation in key decisions that have a profound effect on the local and wider environment, and their access to environmental justice and environmental information is impeded.

The current procedures in place in the UK not only fail to effectively prevent disadvantaged communities from being disenfranchised, but serve to deprive even the most affluent communities of their Aarhus rights. Regrettably, the reforms put forward in the consultation document would worsen these problems when it should be focussed on addressing them.

Furthermore, UKWIN are concerned regarding the biased nature of the consultation, e.g. directing respondents to focus upon the negative aspects of the *status quo* rather than the positive aspects that might be put in jeopardy were the proposed reforms to be implemented.

Some of the matters raised in this submission are also addressed in UKWIN's 25th October 2013 response to Defra regarding the Draft UK 2013 Aarhus National Implementation Report consultation.

1. Comment on time limits

1.1. Paragraph 2 of the proposals refers to "shortening the time limit for bringing a judicial review from three months to six weeks in certain planning cases and to thirty days in certain procurement cases, bringing them into line with the time limits for statutory appeals".

1.1.1. It should be noted that these changes restrict access to environmental justice by making it harder for meritorious claims to be brought, especially by groups and individuals of little means. Furthermore, it improperly curtails the ability to settle matters out of court as such discussions could risk missing deadlines.

2. Comments on planning

2.1. *Question 6: Should further limits be placed on the ability of a local authority to challenge decisions on nationally significant infrastructure projects?*

2.1.1. The Aarhus Convention states that it is "the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations". Furthermore, judicial review is, as the proposals' consultation document acknowledges, a "crucial check to ensure lawful public administration".

2.1.2. Given that, it seems incumbent that where local authorities consider that environmental decisions have been made improperly that they can challenge those decisions, especially where the development would be within or near to the local authority.

2.1.3. Whilst Paragraph 63 of the proposals states that "Challenges would still be possible from persons and groups able to meet the general test for standing", as noted elsewhere such persons and groups do not always have the means to take such cases forwards, and in any case it may well be that the local authority is best placed to be the claimant.

2.2. *Question 8: Do you have views on whether taxpayer funded legal aid should continue to be available for challenges to the Secretary of State's planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990 where there has already been an appeal to the Secretary of State or the Secretary of State has taken a decision on a called-in application (other than where the failure to fund such a challenge would result in breach or risk of a breach of the legal aid applicant's ECHR or EU rights)?*

2.2.1. As detailed further below, UKWIN believe that it is entirely appropriate for the public purse to continue to fund legal aid for statutory challenges to the Secretary of State's decisions. Indeed, allowing for the public concerned to challenge such decisions is one of the core tenets of the Aarhus Convention right of access to justice in environmental matters. This right includes that remedies are not "prohibitively expensive", e.g. due to the lack of legal aid.

2.2.2. We note mention of "the particularly strong public interest in planning cases not being unduly delayed by court proceedings" at Paragraph 66 of the proposals. UKWIN would like to highlight the even stronger public interest in ensuring that environmental decisions are made lawfully. Statutory challenge and judicial review can often be the only ways to correct erroneous decisions, acts and omissions that could have a significantly adverse affect on the environment and breach people's Aarhus rights.

3. Comments on standing

3.1. *Question 9: Is there, in your view, a problem with cases being brought where the claimant has little or no direct interest in the matter? / Question 10: If the Government were to legislate to amend the test for standing, would any of the existing alternatives provide a reasonable basis?*

3.1.1. The preamble to the Aarhus Implementation Guide (Second Edition) ('the Implementation Guide') states that the Parties to the Convention are: "Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced".

3.1.2. Page 24 of the Implementation Guide explains that this includes an acknowledgement that "judicial mechanisms for enforcement of the law and for redress in the case of infringement of rights should be accessible to the public" and that "if there are technical barriers to access to the courts, such as unreasonable standing requirements, justice may not be accessible to the public", explaining that "Convention negotiators expressed their concern that NGOs as well as individuals should have standing in representing their rights and interests in the courts, and the standing of NGOs promoting environmental protection is thus specifically mentioned in article 2, paragraph 5, and article 9, paragraph 2".

3.1.3. In relation to Questions 9 and 10, as there is nobody who can currently bring a case who should not be able to bring a case there is no problem to fix.

3.1.4. Even in circumstances where a group brings a claim about a decision that would not directly affect them, that does not mean that their interest is improper or essentially political, especially if the case relates to their Aarhus rights having been violated.

3.1.5. As such, the right of access to justice in relation to environmental matters should go as far, and further, than is outlined in Paragraph 81 of the proposal.

3.1.6. Everyone has a stake in protecting the environment and a duty to protect those such as the Osprey who cannot represent themselves. Indeed, there is always a public interest in allowing for members of the public to have access to administrative or judicial procedures to challenge unlawful decisions, acts and omissions that may result in environmental harm or contravene their Aarhus rights in relation to public participation in environmental decision-making.

3.1.7. Indeed, the preamble to the Aarhus Convention also recognises that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations" and considers that "to be able to assert this right and observe this duty, citizens must...have access to justice in environmental matters", acknowledging that "in this regard...citizens may need assistance in order to exercise their rights".

3.1.8. Perhaps nowhere is the ability to challenge decisions, acts and omissions more important than for environmental decisions that relate to long-term waste management commitments and activities that consume a significant amount of resources and/or release a significant quantity of harmful emissions.

3.1.9. Incineration results in thousands of tonnes of greenhouse gasses being released over a prolonged period, impacting on the global environment by exacerbating climate change, and resulting in local pollution from the stack and the traffic (e.g. in relation to nitrogen deposition on sensitive habitats). Incineration can also result in the depletion of valuable resources, and this also comes with climate change impacts in relation to the extraction and production of replacements from raw materials as well as resource security implications. Then there are other disamenities relating to traffic and visual amenity, alongside the significant financial commitments that incinerators require from local authorities.

3.1.10. There should be recognition that, from an Aarhus perspective, the interests of a very large number of people potentially come into play in relation to waste infrastructure proposals such as those for incinerators.

3.1.11. Indeed, as Page 47 of the Implementation Guide acknowledges: "While narrower than the 'public,' the 'public concerned' is nevertheless still very broad. With respect to the criterion of 'being affected', this is very much related to the nature of the activity in question. Some of the activities subject to article 6 of the Convention may potentially affect a large number of people".

3.1.12. Indeed, as is noted at Page 47 of the Implementation Guide, the fact that Article 2 Paragraph 5 of the Aarhus Convention refers to, amongst others, "...the public... having an interest in, the environmental decision-making", meaning the definition of "the public concerned" is wider than simply those who would be affected or likely to be affected by the decision. Page 47 also notes that setting the bar for standing too high has resulted in adverse judgements against member states.

3.1.13. UKWIN notes the proposals state at Paragraph 23 that "The current interpretation of 'sufficient interest' as including those with a public interest provides a more generous approach than is required by Aarhus".

3.1.14. Even if the current interpretation of 'sufficient interest' were wider than the minimum requirement set out in the Convention this would not be by much, and would not be undesirable. However, the proposals put forward could result in an interpretation being adopted that is not consistent with the Aarhus Convention.

3.1.15. Page 6 of the Implementation Guide states that: "The Convention also sets out rights for the 'public' (natural or legal persons, and, in accordance with national law or practice, organizations, associations and groups) and 'the public concerned' (those who are affected or likely to be affected by or having an interest in the environmental decision-making). For the purposes of the Convention, NGOs promoting environmental protection and meeting any requirements under national law are to be considered to be part of the 'public concerned'".

3.1.16. UKWIN also notes the Implementation Guide's preferred interpretation of the phrase "in accordance with national legislation" set out on Page 33, which is that: "the terms introduce some flexibility in the means of implementation but not in the extent to which the basic obligation in question must be met" (emphasis added), and the interpretation of "within the framework of its national legislation" on Page 34 as not allowing for flexibility regarding "the extent to which the basic obligation in question must be met".

3.1.17. Article 9 Paragraph 2 of the Aarhus Convention sets out that: "Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above..." (emphasis added)

3.1.18. The aforementioned Aarhus Article 2 Paragraph 5 of the Aarhus Convention states that: "'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

3.1.19. It is also worth noting that Page 48 and Page 49 of the Implementation Guide state that: "The reference to 'meeting any requirements under national law' should not be read as leaving absolute discretion to Parties in defining these requirements. Their discretion should be seen in the context of the important role the Convention assigns to NGOs with respect to its implementation and the clear requirement of article 3, paragraph 4, to provide 'appropriate recognition' for NGOs ['Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.'].

"Article 2, paragraph 5, explicitly includes within the category of the interested public NGOs whose statutory goals include promoting environmental protection, so long as they meet 'any requirements under national law'. Whether or not an NGO promotes environmental protection can be ascertained in a variety of ways, such as through its charter, by-laws or activities. 'Environmental protection' can include any purpose consistent with the implied definition of environment found in article 2, paragraph 3. The requirement for 'promoting environmental protection' would thus be satisfied in the case of NGOs focusing on any aspect of the implied definition of environment in article 2, paragraph 3. For example, if an NGO works to promote the interests of those with health concerns due to water-borne diseases, this NGO would be considered to fulfil the definition of article 2, paragraph 5."

4. Comments on the procedural defects

4.1. There are many cases where it is perfectly valid for a community to challenge an environmental decision based on procedural defects, and their right to do so should not be diminished.

4.2. It is important to focus on why the public find it necessary to turn to the courts to seek environmental justice in relation to environmental decision-making. The fact that they do should raise the question 'why?'

4.3. UKWIN suggests that failings in respect of the implementation of Articles 3 – 8 of the Convention quite reasonably result in applications for judicial remedy. Similarly, it is understandable that communities will wish to challenge environmental decisions (e.g. in relation to planning and procurement decisions, and the Government policies, regulations and legislation that lie behind them) where either the process or the ultimate decision is seen to be manifestly unfair and/or improper, e.g. because the process is not focussed on finding the best environmental solution and does not adequately involve the community in key environmental decisions.

4.4. In the context of local authority waste management, and in particular schemes involving proposals for waste incineration capacity, members of the public often feel that decisions are made without due diligence, and UKWIN's experience is that the public are too often right.

4.5. In 2008 the Audit Commission's Well Disposed report advised that:

4.5.1. "...If WDAs [Waste Disposal Authorities] overestimate the amount of waste they will need to process, both the overall cost and the cost per tonne of waste processed are likely to be higher than they would have been had estimates proved accurate..." (Paragraph 80);

4.5.2. "...Some WDAs have found that they continued to bear risks they thought they had allocated to a contractor..." (Paragraph 179)

4.5.3. "...WDAs might buy too much disposal infrastructure if they: overestimate future volumes of waste arising (including other authorities' waste or trade waste). They may also achieve a worse environmental solution if, by building large disposal facilities, they reduce their own financial incentive to pursue waste reduction or recycling initiatives..." (Paragraph 151)

4.5.4. "...where authorities have been shocked into taking action, there is a risk that they become desensitised to costs by the scale of the task and the huge sums of money involved..." (Paragraph 164)

4.6. Given the above, it is quite sensible that communities should wish to play the role of citizen watchdog in relation to waste management decisions, aiming to ensure that local authorities pursue a course of action that would deliver both good value for money and the best environmental outcome.

4.7. However, all too often the local authority fails to convince the public that the scheme proposed is a good idea, and in many cases the information that is available shows that if only a few of the underlying assumptions prove to be wrong then the whole rationale for the proposal unravels. Indeed, many waste contracts now look quite out of step with reality.

4.8. The lack of transparency associated with such decisions further exacerbates the public's sense of injustice, as does the community's lack of a symmetrical right of appeal regarding planning decisions.

5. Comments on Protective Costs Orders and legal aid

5.1. At paragraph 156 of the proposals a consideration of PCOs for environmental cases is scoped out of the current review, pending the outcome of proceedings before the European Court of Justice.

5.2. UKWIN's view is that the Government should be more pro-active in widening access to justice in environmental matters.

5.3. UKWIN notes the Article 9, Paragraph 4 Aarhus Convention requirement that "the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive..."

5.4. Aarhus Article 9, Paragraph 5 states that Parties to the Convention must: "...consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice".

5.5. Aarhus Article 9, Paragraph 5 is linked to Aarhus Article 9, Paragraph 4. As the Implementation Guide explains on page 218: "It is essential for access to justice under article 9 that the review procedures in question are affordable for members of the public. In this regard, there is a clear link between the requirement in article 9, paragraph 4, that access to justice procedures not be prohibitively expensive and the obligation on Parties in article 9, paragraph 5, to consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers".

5.6. Page 59 of the Implementation Guide states that: “Another important form of support under the Convention is in the context of access to justice. Such support might include regulations entitling environmental associations, organizations and groups to apply for legal aid, or measures exempting them from court fees or litigation costs...”

5.7. As noted elsewhere, organisations are not eligible for legal aid in the UK, and current exemptions from paying costs are inadequate to prevent access to justice being prohibitively expensive.

5.8. To quote comments made by Lord Neuberger, President of The Supreme Court, speaking at the Tom Sargant Memorial Lecture 2013 on the topic of ‘Justice in an Age of Austerity’ on Tuesday the 15th October 2013: "... If a person with a potential claim cannot get legal aid, there are two possible consequences. The first is that the claim is dropped: that is a rank denial of justice and a blot on the rule of law. The second is that the claim is pursued, in which case it will be pursued inefficiently, and will take up much more of the court staffs’ time and of the judge’s time in and out of court. So that it means greater costs for the court system, and delay for other litigants".

5.9. It would be entirely inappropriate to worsen the current situation by restricting access to legal aid in relation to environmental matters, either in terms of who can access legal aid or in terms of what sort of cases are covered by legal aid.

5.10. Page 217 of the Implementation Guide includes a table of “Potential barriers to access to justice”. Issues highlighted as possible barriers under Article 9 that are occurring in the UK include: Financial barriers; Limitations on standing; Difficulty in obtaining legal counsel; and Unclear review procedures.

5.11. Problems with the UK's existing legal aid and Costs Protection regimes include the facts that:

5.11.1. Not everyone is eligible for legal aid. For example, legal aid does not cover community groups and Environmental NGOs, and legal aid will not be granted to those with relatively modest means who do not qualify, even if their claim is for wider public and environmental benefit;

5.11.2. Not all cases benefiting from legal support are eligible for legal aid, e.g. in relation to participation in planning inquiries;

5.11.3. The relatively small amount paid to lawyers under legal aid discourages some lawyers from participating in the scheme, e.g. environmental law specialists may be unwilling to take up cases, especially complex cases, which prevents some cases from going forward;

5.11.4. The Community Contribution sometimes required under legal aid can be prohibitively expensive;

5.11.5. Cost recovery for successful claims can be impeded if not all grounds are successful;

5.11.6. The £5k - 10k Aarhus cap may still be prohibitive, and the cap on reclaiming costs may discourage more complex cases from coming forward or from being fully argued;

5.11.7. Various environmental claims do not benefit from the Aarhus cap, such as private law environmental claims (including those covered by Aarhus Convention Article 9, Paragraph 3) and challenges under s288 of the Town and Country Planning Act; and

5.11.8. In our understanding, costs and potential costs associated with injunctive relief may fall outside the cost protection regime, making it less likely that injunctions will be sought, making injunctive relief prohibitively expensive to members of the public.

5.12. Other problems with judicial review include the facts that proposed changes would limit the ability of claimants to have an oral hearing of their claim; the time limits for bringing claims can often be prohibitively restrictive, especially if one has to secure legal aid or to raise sufficient funds; and the impossibility of challenging an improper decision when one does not know that it was made improperly, e.g. because the fact or details of the decision were not made public in a timely manner.

Thank you for your consideration of the points raised in this submission.

Yours sincerely,

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