# Measures on access to justice in environmental matters (Article 9(3))

## Country report for United Kingdom

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ENVIRONMENTAL LAW & POLICY

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# Table of contents

## Executive summary

The United Kingdom does not have a written constitution as such. Rather, the law which may apply in any given case is likely to be a mixture of statute law and case law. Furthermore, there is not the clear-cut division between criminal, civil and administrative jurisdictions as there is in civil law jurisdictions.

This paper examines the provisions for access to justice in environmental matters in the United Kingdom. However, the main focus of the report is on the situation and provisions as they exist in England and Wales. The situation in Scotland and Northern Ireland are rather similar (but with differences, not least in the legislation that may apply) so these are not repeated in any detail. Instead, the report simply highlights any differences.

There are a large number of different appeal systems set out in the environmental legislation of England and Wales. Indeed, over 50 different appeal routes have been identified under specialised environmental legislation. These 'regulatory' or 'administrative' appeals are only open to the person or business affected by the decision that is being appealed against. The general public do not have a right of appeal in such cases. For this reason, these 'regulatory appeals' are mentioned in only small detail in section 2.1 of this report.

Members of the public may appeal against an act or omission of a public authority through a procedure known as judicial review. In general the jurisdiction of the court covers:

- Applications to prevent a public authority acting unlawfully
- Applications to require a public authority to act lawfully
- Applications to quash an invalid act
- Applications for declarations as to what is the proper legal regime and rules applying to a particular case
- Where appropriate, applications for injunctions
- Where appropriate, applications for damages associated with a substantive claim.

Generally the application for judicial review follows a two stage process. The first stage involves an application for permission to apply for the relief sought by judicial review and acts as a filter against obviously un-meritorious applications. It is also the stage where challenges such as whether the applicant has "sufficient interest" in making the application. The substantive legal and factual merits of the case are considered in the second stage. However, courts are now prepared to consider judicial review proceedings in a combined hearing especially in complicated cases.

The test of whether a person may make an application for judicial review (whether he has "standing") is one of "sufficient interest". This includes an assessment of fact and law and is for the court to determine.

As regards judicial review, there is no definition of "public" and no definition or statutory recognition system for NGOs. It is clear form the case law that the courts are rarely concerned with the actual status of the applicant per se. Judicial review is open to individuals, corporations, incorporated associations and unincorporated associations.

The courts have adopted a wide construction on "sufficient interest" in recent years and the development of the case law suggests a number of themes that the courts may consider:

- The general approach of the court to standing is a liberal one
- Financial interest may be sufficient but will seldom if ever be necessary
- Public interest considerations favour the testing of the legality of the executive actions

- It would be against the public interest if there were a "vacuum" of unchecked illegality for want of a challenger with standing
- The courts seek to strike a balance – distinguishing broadly between those who are "busybodies" and those with a legitimate grievance or interest
- One factor which may count against an applicant in some situations may be where there is an obviously better placed challenger who is not complaining.

Applications for judicial review must be made promptly and in any event not later than three months after the grounds to make the claim first arose. The test here is one of promptness, and an application will not necessarily be allowed to continue simply because it was made within the three month period. However the court may grant an extension of time, if there is a good reason. The court is likely to require that the extension of the time limit will not cause substantial hardship or substantial prejudice or be detrimental to good administration. It appears that the courts may find that there is good reason for an extension of time where the applicant had not been aware of the decision being challenged but had acted swiftly once he became aware of it, or where the claim raises issues of general public importance.

The general principle in court cases is that "costs follow the event"- that is to say that the loser pays the legal costs of the successful party. However the court always has a discretion as to any award as to costs. Thus it is possible that the court will make no order as to costs against an unsuccessful applicant in certain cases where the court feels that the application was in the public interest. It is also possible that the court may reduce the costs to be paid to the other side. But this is to be seen as exceptional.

The courts do have the possibility of making protected costs orders; which is an order that the applicant is not liable to pay the costs of a successful defendant or that his liability will be limited to a particular amount. An application for a protected costs order is made at an early stage of the proceedings. However it appears that the courts rarely exercise their power to make such orders.

As part of the proceedings for judicial review the applicant may seek an interim injunction from the courts on the grounds of environmental protection. It is usual in such cases for the court to require the applicant to provide a cross-undertaking in damages; that is to say that the applicant will pay the successful defendant for any losses suffered as a result of the injunction. If the applicant is unable to make such an undertaking to the court, the court will usually not award the interim injunction. However, where the environmental consequences are sufficiently serious the court may grant the interim injunction without the cross-undertaking in damages.

Public legal assistance is available but on a very restricted basis. It is generally subject to a means test, although this test may be eased where a case has significant wider public interest.

The net result is that bringing an application for judicial review is prohibitively expensive for most people, unless they are either so poor that they qualify for public legal assistance or are so rich so as to be able to undertake an open-ended commitment to expenditure possibly running into tens or hundreds of thousands of pounds.

In conclusion therefore, it may be said 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 may 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 the costs involved.

## Abbreviations

| | |
|---|---|
| AC | Appeal Cases |
| All ER | All England Reports |
| CLS | Community Legal Service |
| CPR | Civil Procedure Rules |
| Env LR | Environmental Law Review |
| EWCA | England and Wales Court of Appeal |
| EWHC | England and Wales High Court |
| GMO | Genetically Modified Organism |
| IPPC | Integrated Pollution Prevention and Control |
| NGO | Non-Governmental Organisation |
| QBD | Queen's Bench Division |
| UK | United Kingdom |
| WLR | Weekly Law Reports |

## 1. Introduction

There is no "written" Constitution in the UK as such. The law that may be applied in any given case is likely to be a mixture of statute law and case law. This case law which has developed over time by judges is known as "common law". Courts may develop and administer the common law, except where otherwise affected by statute law.

There is not such a clear-cut division between criminal, civil and administrative jurisdictions in England and Wales as in civil law jurisdictions. Nor is there such a clear-cut division of competences of the courts as regards the operation of such jurisdictions. In addition, it is only since October 2000 that a specific Administrative Law Court was established.

The lowest tier of criminal court in England and Wales is the Magistrates Court. This deals with some 90% of all criminal cases – usually those that are considered as less serious criminal cases. It has extensive jurisdiction over breaches of many pieces of environmental legislation and of environmental licences. It has the power to fine or imprison offenders. The Magistrates Court also exercises jurisdiction in some family law cases and has a very limited jurisdiction in some other civil cases.

Above the Magistrates Court lies the Crown Court. It exercises a limited appeal from the Magistrates Court but is primarily the "first instance" court for more serious criminal offences. It has statutory powers to fine or imprison and other non-statutory powers that are (in principle) unlimited. The Divisional Court exercises a supervisory jurisdiction over the Magistrates Court, ensuring that the law has been corrected interpreted and applied. A very limited appeal lies to the House of Lords. The Court of Appeal (Criminal Division) is the appeal court from the Crown Court. There is a right of appeal from the Court of Appeal to the House of Lords on points of law of general public interest.

The lowest tier of civil court is the County Court. This court has been established by statute and does not provide for jurisdiction over "public interest" litigation. Above the County Court lies the High Court which acts to a limited extent as an appeal court. However, its main function is to act as the court of "first instance" for more serious civil cases. The High Court is divided into various "Divisions". Above the High Court lies the Court of Appeal (Civil Division), and above that the House of Lords.

Most cases of "public interest" litigation now go to the Administrative Court which was established in 2000. Prior to this such cases would have been heard by the High Court Queen's Bench Division. Appeals from the Administrative Court go to the Court of Appeal (Civil Division), although there is the possibility of appealing straight to the House of Lords where the case merits this. Again there is an appeal form the Court of Appeal to the House of Lords on points of law of general public interest.

In Scotland the High Court of Justiciary is the supreme criminal court and handles the most serious crimes. The Sheriff's Court handles less serious offences and the District Court deals with the minor offences and are administered by the local authority. As regards the civil justice system, the Sheriff's Court handles the majority of civil cases. The Court of Session acts as appeal court from the Sheriff's Court and is the court of "first instance" for more serious civil cases. The House of Lords may hear appeals in civil cases from the Court of Session.

In Northern Ireland the inferior courts are the County Courts and the Magistrates Courts. The County Courts are primarily civil courts and also hear appeals from the Magistrates Courts in both civil and criminal matters. There is a right of appeal from the County Court to the High Court. The Crown Court deals with the more serious criminal cases.

The High Court in Northern Ireland is divided into three Divisions – with the Queen's Bench Division dealing with most civil matters. The Court of Appeal hears appeals from the High Court and the Crown Court, and to a limited extent appeals from the County Courts and Magistrates Courts. As in England and Wales appeals from the Court of Appeal go to the House of Lords.

**Courts in England, Wales, Scotland and Northern Ireland**

**Criminal Courts**

| | |
|---|---|
| England and Wales: | Appeals to the House of Lords<br>Appeals to either Queen's Bench Divisional Court of High Court or Court of Appeal (Criminal Division)<br>Crown Court (jury trials)<br>Magistrates' Court (first instance in summary trials) |
| Scotland: | Appeals and Jury Trials to High Court of Justiciary<br>Sheriff Court (summary and jury trials)<br>District Courts (summary jurisdiction) |
| Northern Ireland: | Appeals to the House of Lords<br>Appeals to Court of Appeal<br>Queen's Bench of High Court<br>Crown Court<br>Magistrates Court |

**Civil Courts**

| | |
|---|---|
| England and Wales: | Appeals to the House of Lords<br>Appeals to Court of Appeal (Civil Division)<br>High Court (3 divisions: Queen's Bench, Chancery and Family), and Administrative Court<br>County Courts |
| Scotland: | Appeals to the House of Lords<br>Appeals to Inner House of Court of Session<br>Outer House Court of Session (trials at first instance)<br>Sheriff Court |
| Northern Ireland: | Appeals to the House of Lords<br>Appeals to Court of Appeal<br>High Court (Queen's Bench, Chancery and Family divisions)<br>County Courts |

There are a large number of 'administrative appeals' or 'regulatory appeals' established by different pieces of environmental legislation and these are mentioned briefly in section 2.1 below.

However the main procedure for access to justice in environmental matters lies with the judicial review procedures that are discussed in section 2.2. The main part of this paper focuses on this aspect of access to justice.

Although this report discusses access to justice in environmental matters in the United Kingdom, the majority of the report focuses on the situation in England and Wales (where a majority of study and research has been undertaken). Where necessary, reference is made to different procedures or different situations in Scotland and Northern Ireland.

# 2. Access to justice in environmental matters

## 2.1. Administrative procedure

There are a very large number of appeal systems set out in the environmental legislation in England and Wales[1]. A recent study *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal*[2], June 2003, identified over 50 different appeal routes under specialised environmental legislation. These range from waste management licensing to the service of statutory nuisance abatement notices. The study refers to such appeals as 'regulatory appeals' to distinguish them from judicial review (which is discussed in section 2.2 below).

The boundaries of 'environmental' legislation in this study were considered to be, at one end the town and country planning legislation and transport legislation; and at the other end the health and safety legislation. Note that there is a clear and well-developed system of appeal processes under the town and country planning legislation which is handled by the Planning Inspectorate[3].

The above study categorised the, over 50, different appeal routes into eight broad categories:

1. appeals to local Magistrates' Courts – mainly in respect of notices served by local authorities under statutory nuisance and contaminated land provisions
2. appeals to the Secretary of State (but formally delegated to the Planning Inspectorate) – mainly IPPC consents, waste management licences, water discharge consents, and contaminated land notices for 'special sites' as designated by the Environment Agency
3. appeals to the Secretary of State which are handled by the Planning Inspectorate but with the final decision resting with the Secretary of State
4. appeals to the Secretary of State where no specific procedure may yet have been identified
5. appeals to the High Court on merit grounds – various provisions, but often dealing with off-shore activities
6. miscellaneous appeals to a variety of other courts – including, e.g., appeals to the County Court in respect of charging notices served under the contaminated land regime
7. cases where no right of appeal on the merits is provided for in the legislation – typically where the initial decision is made by the Secretary of State such as on GMO licences
8. the use of arbitration – for example in respect of decisions by the Secretary of State under voluntary agreements to reduce carbon emissions.

It is important to note that in the regulatory appeals discussed above the right of appeal lies with the person or business affected by that decision – i.e. the licence applicant or the person served with a notice. The members of the general public do not have a general right of appeal other than by way of judicial review.

It is not usual to award costs in these regulatory appeals; however costs may be awarded against a party where it has behaved unreasonably causing extra costs to be incurred unnecessarily.

## 2.2. Judicial procedure

### 2.2.1. General aspects

[1] Both Scotland and Northern Ireland also have similar appeal systems which are not discussed further here.
[2] Authors; Professor Richard Macrory CBE and Michael Woods
[3] Royal Commission on Environmental Pollution, 23rd Report: Environmental Planning, 2002

A specific Administrative Court was established only relatively recently (2 October 2000). Prior to this date matters were dealt with by the Queen's Bench Division of the High Court. The jurisdiction of the Administrative Court is set out in the Civil Procedure Rules (CPR) Part 54. In general this jurisdiction covers:

- Applications to prevent a public authority acting unlawfully
- Applications to require a public authority to act lawfully
- Applications to quash an invalid act
- Applications for declarations as to what is the proper legal regime and rules applying to a particular case
- Where appropriate, applications for injunctions
- Where appropriate, applications for damages associated with a substantive claim

Judicial review cases must be brought promptly, and in any event not later than three months after the grounds to make the claim first arose (this issue is discussed further in section 2.2.3 below).

In addition, the applicant for judicial review must have "sufficient interest" in "the matter to which the application relates" – Supreme Court Act 1981, section 31. This issue is discussed further below (section 2.2.2).

Generally applications for judicial review follow a two-stage process. The first stage involves an application for permission to apply for the relief sought by judicial review. This first stage acts as a filter against obviously unmeritorious applications or vexatious applications. Usually the merits of the case are reviewed only superficially at this first stage and applications should only be rejected where it is clear that there are no merits in the application.

Other challenges may be brought at this first stage: such as that the applicant does not have "sufficient interest" in making the application; that the application be rejected for delay; or to raise objections to permission being granted despite any such delay.

The substantive legal and factual merits of the case are considered and ruled on at the second stage of the process. However, courts are now more prepared to consider judicial review proceedings in a combined hearing, especially in complicated cases. Thus the courts will make a detailed examination of fact and law at the same time as considering the "first stage" permission.

#### 2.2.2. Legal standing and participatory status

As regards judicial review, there is no definition of "public" and no statutory definition or recognition system for NGOs. Rather, the question of "standing" to bring an application for judicial review is one of "sufficient interest", as set out in CPR Part 54.

These rules are rules of court, thus it is for the courts to interpret them. However, the question of "standing" is not an act of discretion but is an assessment of fact and law (*R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd [1982] AC 617, House of Lords).*The courts, in recent years, have adopted a wider construction of standing and "sufficient interest".

A number of themes can be seen in the development of the case law on standing:

- The general approach of the court to standing is a liberal one
- Financial interest may be sufficient but will seldom if ever be necessary
- Public interest considerations favour the testing of the legality of the executive actions
- It would be against the public interest if there were a "vacuum" of unchecked illegality for want of a challenger with standing

- The courts seek to strike a balance – distinguishing broadly between those who are "busybodies" and those with a legitimate grievance or interest
- One factor which may count against an applicant in some situations may be where there is an obviously better placed challenger who is not complaining[4].

It is also clear from the case law that the courts are rarely concerned with the actual status *per se* of the applicant. Judicial review is open to individuals, corporate entities, incorporated associations and unincorporated associations.

***Individuals***

The case of *R v Somerset County Council ex parte Dixon* [1998] Env LR 111, concerned the legality of a permission to extract minerals from a quarry. Mr Dixon was a local resident, although he was not a landowner or had a personal right or interest that was threatened by the proposed quarrying. The court held that he had "sufficient interest" to bring the case. The court stated:

> *"To have 'no interest whatsoever' is not the same as having no pecuniary or special interest. It is to interfere in something with which one has no legitimate concern at all; to be, in other words, a busybody".*

The court went on to say:

> *"Public law is not at base about rights, [...] it is about wrongs – that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power."*

The case of *R (on an application of Hammerton) v London Underground* [2002] All ER (D) 141, concerned the proper application of planning laws. The Court of Appeal stated

> *"That leaves the question of standing. As to that, it seems to me that there is an important distinction to be drawn between, on the one hand, a person who brings proceedings having no real or genuine interest in obtaining the relief sought, and on the other hand a person who, whilst legitimately and perhaps passionately interested in obtaining the relief sought, relies as grounds for seeking that relief on matters in which he has no personal interest.*
>
> *I cannot see how it can be just to debar a litigant who has a real and genuine interest in obtaining the relief which he seeks from relying [..] on grounds (which may be good grounds) in which he has no personal interest."*

***Unincorporated associations***

In the case of *R v Traffic Commissioners for North Western Traffic Area ex parte BRAKE* [1995] QBD, the court was dealing with an application for judicial review by an unincorporated association of individuals and corporations who had formed themselves into a pressure group – BRAKE. The court refused to find that they were not able to bring the proceedings because of their composition and legal status.

***Incorporated action groups***

See also *R (on the application of PPG11 Ltd) v Dorset County Council* and another [2003] All ER (D) 68, where the applicant for judicial review was a limited company formed as an action group.

[4] Judicial Review Handbook, (3rd edition) Michael Fordham, Harts Publishing, 2001, p607

***Established NGOs***

It is now often the situation that the question of "standing" of well-established environmental NGOs is taken for granted. For example, in the case of *R v Secretary of State for Trade and Industry ex parte Greenpeace Ltd* [2000] Environmental Law Reports 221, the court stated:

> *"This is an application by Greenpeace Ltd [...]. It is a well known campaigning body, the prime object of which relates to the protection of the natural environment. Its legal standing to bring proceedings such as the present application is well established".*

***Standing is for the court to decide***

However, it must be emphasised that the question of "standing" is a question of jurisdiction for the court to decide, and is not something that can be conferred by consent between the parties themselves. In the case of *R v Secretary of State for Social Services, ex parte Child Poverty Action Group* [1989] 1 All ER 1047, counsel for the Secretary of State had not put forward any arguments to the effect that the action group did not have sufficient interest to bring the proceedings. The court made it clear that the question of "standing" was for the court to decide, stating:

> *"The question of [standing] goes to the jurisdiction of the court [..]. The parties are not entitled to confer jurisdiction which the court does not have, on the court by consent [...]. It seems to me that, the question being one of jurisdiction, I have to decide at the outset whether this court has jurisdiction to entertain an application by one or other of the Applicants for a declaration of the type sought.*

***Third party interventions***

The CPR Part 54.1 (2)(f) defines an "interested party" as any person (other than the claimant and defendant) who is directly affected by the claim. The applicant must serve the application and supporting evidence on any interested party. A person is "directly affected" if he is affected simply by reason of the grant of a remedy (*R v Liverpool City Council ex parte Muldoon* [1996] 1 WLR 1103). Examples of persons "directly affected" include the receipt of a planning permission where an individual seeks to challenge the lawfulness of that grant of planning permission.

Note also under CPR Part 54.17 provides that any person may apply for permission to file evidence or to make submissions at the hearing.

#### 2.2.3. Possibilities for appeal

***Timing of bringing an application for judicial review***

The CPR Part 54.5 makes it clear that applications for judicial review must be made "*promptly, and in any event not later than three months after the grounds to make the claim first arose*". This time limit may not be extended by agreement between the parties and the rule does not apply when any other enactment specifies a shorter time limit. The time limit begins to run from the date when the grounds for the claim first arose; and not from the date the claimant first learnt of the decision or action under challenge, nor from the date when the claimant thinks that he has enough information to bring the claim.

The test here is promptness and a claim will not necessarily be made promptly simply because it has been made within the three months period (See *R v Independent Television Commission ex parte TV NI Ltd*, The Times, December 30 1991). The House of Lords has left open the question whether the "promptness" test satisfies the requirements of Community law and the European

Convention on Human Rights (*R v Hammersmith and Fulham LBC ex parte Burkett* [2002] 1 WLR 1593).

However the court may grant an extension of time under CPR Part 3.1 (2)(a). The test is whether there is a good reason for extending the time limit. The courts have always recognised that public law claims are unlike ordinary civil litigation and require strict adherence to the time limits contained in the rules governing judicial review. The court is likely to require that the extention of the time limit will not cause substantial hardship or substantial prejudice or be detrimental to good administration (*R v Institute of Chartered Accountants in England and Wales, ex parte Andreau,* (1996) 8 Admin LR 557). The court has held that there was not a good reason for extending the time limit where the delay was the fault of the applicant's lawyers; but there was good reason where the applicant had been unaware of the decision being challenged but had acted swiftly once he became aware of it (*R v Secretary of State for the Home Department ex parte Ruddock* [1987] 1 WLR 1482). This case also suggests that the fact that the claim raises issues of general public importance may be a good reason for extending the time limit.

#### 2.2.4. Costs and length of the procedure

The fee for making an application for judicial review is currently £180 (270 EURO).

The general principle in court cases is that "costs follow the event". That is to say that the party who is not successful pays the costs of the party that is successful. However, there is always a discretion as to any award of costs – see CPR Pt 44.3(2).

The CPR 44.3 provides

(1) The court has discretion as to –
    (a) Whether costs are payable by one party to another;
    (b) The amount of those costs; and
    (c) When they are to be paid.
(2) If the court decides to make an order about costs –
    (a) The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
    (b) The court may make a different order.
(3) […]
(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances […]

This general principle has been applied to award costs against NGOs or individuals who were not successful in their applications for judicial review. See for example, *R (Greenpeace Ltd) v Secretary of State for the Environment, Food and Rural Affairs and another* [2002] WLR 3304.

Indeed, in the case of *R v Bedfordshire County Council ex parte O'Dell & Sons Ltd* (not reported) 29 October 1999, the Court of Appeal made it clear that the fact that an application for judicial review has been brought by a group of residents (acting as an action group) who are concerned with protection of the environment is not a good enough reason in itself not to award costs against them if they are unsuccessful in their application.

It is possible that the court will not award costs against an unsuccessful applicant – but this is exceptional and usually only where the court considers that the application was in the public interest. Thus, for example, in the case of *R (on an application of Friends of the Earth and another) v Secretary of State for the Environment, Food and Rural Affairs and others* [2001] EWCA Civ 1950, the Court of Appeal concluded that the application raised an important issue of public interest and, thus, did not order the NGO to pay the costs of the unsuccessful appeal

(although they had to pay the costs of the original application in the lower court). The Court of Appeal made it clear that this was "*to be regarded as a highly exceptional course*" and should not encourage public interest groups generally to suppose that they will be immune from costs on appeal. The costs of the lower court hearing that Friends of the Earth had to pay was £35,000 (approx. 52,000 EUR).

In *R(Burkett) v LB Hammersmith and Fulham* [2004] EWCA Civ 1342, the judge noted a 'contemporary concern' that:

> *"an unprotected claimant [...], if unsuccessful in a public interest challenge, may have to pay very heavy legal costs to the successful defendant, and that this may be a potent factor in deterring litigation directed towards protecting the environment from harm."*

Information on the levels of costs involved in judicial review cases is difficult to obtain and assess. The levels of costs vary due to the nature of the claim, the complexity involved, the length of any hearings etc. However, the following provide some examples of costs[5].

- In a judicial review case concerning a planning proposal by Canterbury College to develop a travel plan, the College indicated that if the case went to court their costs would be in the order of £126,000 (189,000 EURO).

- In a case where Friends of the Earth (FoE) challenged a decision of the Environment Agency to issue a licence to scrap a number of ships in Hartlepool, FoE faced a potential bill of £100,000 (150,000 EURO).

- Greenpeace were informed that they faced potential costs of £70,000 (105,000 EURO) for a half-day hearing in a case where they were seeking to prevent the import of nuclear waste into the UK.

***Protected costs orders***

A claimant may wish to apply for a protected costs order. This is an order of the court that the claimant is not liable to pay the costs of a successful defendant or that his liability to pay will be limited to a particular amount. An application for a protected costs order should usually be included in the claim form and would be ruled on at the application for permission stage.

In *R (Campaign for Nuclear Disarmament) v the Prime Minister*, [2002] EWHC, 2712, Admin, CND sought an order limiting their liability for the Government's costs in the event that they lost the case. CND wished to argue that UN Security Council Resolution 1441 did not authorise the use of force against Iraq. They argued that their case was exceptional because:

(a) They would be in financial difficulties and at risk of going into liquidation/having to curtail their activities in the event of a large adverse costs order. Without the cap they could not proceed as they did not have time to raise the funds elsewhere
(b) There was a public importance in the issues being raised
(c) If the Government was right that their case was without merit and non-justicable then proceedings would end at an early stage and £25,000 [approx 37,500 EUR] would easily cover the Government's costs
(d) If their challenge ended, then a substitute applicant and possibly a legally-aided one would be found who would not be able to cover the Government's costs to the amount offered.

The judge found these arguments, especially the first three compelling, and made the order limiting CND's costs to £25,000.

[5] Environmental Justice Report, March 2004, available at http://www.elflaw.org/files/EJP%20final.pdf

The main case on Protected Costs Orders is *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600. In this case the Court of Appeal said that a protected costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

(a) The issues are of general public importance
(b) The public interest requires that those issues should be resolved
(c) The claimant has no private interest in the outcome of the case
(d) Having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order
(e) If the order is not made, the claimant will probably discontinue the proceedings and will be acting reasonably in so doing.

The court also made it clear that if the lawyers acting for the claimant were acting *pro bono* this would be likely to enhance the merits of the application for a protected costs order.

However it appears that the Courts rarely exercise their powers to make protected costs orders[6].

***Numbers and length of proceedings***

The study *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal*[7], June 2003, assessed judicial review cases heard by the High Court over the period 2000-2003. The study excluded cases concerning town and country planning including those involving environmental impact assessments.

During this three year period there were 55 environmental judicial review cases – giving an average of 18 per year. Of these, the claimants were:

- Companies/firms: 28
- Individuals/associations/NGOs: 22
- Other: 5

The average length of proceedings was approximately six months from the date of lodging the application to the final court order. There was an average of approximately 1.3 days for the main hearing[8].

More recent statistics on judicial review in environmental matters are not available. However, in 2005 there were a total of 1,981 applications for judicial review which were not criminal or immigration matters. Of these, 744 were granted permission to apply for judicial review. Also in 2005 a total of 159 judicial review cases (not including criminal or immigration) were decided: 7 were withdrawn; 64 were allowed and 88 were dismissed[9].

***Community Legal Service***

Under the Access to Justice Act 1999 a Community Legal Service (CLS) was established by the Legal Services Commission (LSC) which is intended to provide funds to individuals to bring cases – both civil and criminal. Under s28 of the Act the Secretary of State may give guidance to the Commission. Under such guidance documents judicial review cases may be funded, and furthermore funding may be made available for cases which have a significant wider public

[6] Environmental Justice Report, March 2004, available at http://www.elflaw.org/files/EJP%20final.pdf
[7] Authors; Professor Richard Macrory CBE and Michael Woods, University College London
[8] Note that this time does not take account of other procedural hearings, judicial preparation time, or time spent on making decisions based only on written evidence
[9] All data from: Judicial Statistics 2005 England and Wales (revised), Department for Constitutional Affairs, Table 1.13

interest[10]. Under the CLS the assisted person does not have to pay for his own legal representation; and is protected from having to pay the other side's costs if he looses – as costs orders can only be enforced against the assisted person with the permission of the court, which is rarely granted.

The public legal assistance is subject to a "means test" – that is to say it is dependant on levels of income. In practice only people on state benefits are likely to qualify. Public legal assistance is only available to individuals; thus cannot be of use to NGOs or other public interest groups.

Where a case has "*significant wider public interest"* the test for public legal assistance is whether the likely benefits of the proceedings to the applicant and others justify the likely costs, having regard to the prospects of success and all other circumstances[11]. *Wider public interest* means "the potential of the proceedings to produce real benefits for individuals other than the client (other than benefits to the public at large which would normally flow from the type of proceedings in question)". The Funding Code Guidance places the real benefits to the public under four categories:

- Protection of life or other basic human rights
- Direct financial benefit
- Potential financial benefit
- Intangible benefits[12], such as health, safety and quality of life.

The Guidance also sets out assistance in determining when a wider public interest may be *significant*. A common sense approach must be adopted. Much will depend on the nature of the benefits alleged, and the more intangible and indirect the benefits are the harder it will be to show that there is a significant wider public interest. The Guidance goes on to state that "public interest carries with it a sense that large numbers of people must be affected. As a general guideline, even where the benefits to others are substantial, it would be unusual to regard a case as having a significant wider public interest if fewer than 100 people would benefit from its outcome".

It should be noted that, under the LSC funding code, for defendants and others to make representations to the LSC, funding should be discontinued.

A LSC Public Interest Advisory Panel was established to try and interpret these guideline consistently. It is chaired by a member of the LSC but is mainly composed of independent members with a strong interest in public interest litigation. It meets about every six weeks and decides whether a case involves a wider public interest, and if so whether that interest should be classified as "significant", "high" or "exceptional".

The results of the decisions of the Panel are published on the LSC website[13]. To date only ten of the cases concerned an environmental challenge. Nine of these were considered to have significant wider public interest.

#### 2.2.5. Other issues

***Evidence***

The claim must be served by the applicant on the defendant (and the court) and must include a statement of the facts relied upon. The claim form should be accompanied by documents on

[10] Lord Chancellor's Direction 2001
[11] Funding Code Guidance, December 2006
[12] Although not specifically mentioned, it would appear that intangible benefits may include benefits to the environment
[13] http://www.legalservices.gov.uk/civil/guidance/pip_summary_report.asp

which the defendant seeks to rely (CPR Part 54.6). The defendant and any interested party must file an acknowledgement of service with the court within 21 days (CPR 54.8). There is no express provision for the defendant or any interested party to file and serve written evidence at this stage, but there is no reason why it should not be done. However, once the permission for bringing the claim is granted, the defendant and any interested party must serve any written evidence within 35 days of permission being granted (CPR Part 54.14). No written evidence may be relied upon unless it has been served in accordance with the rules or the court gives permission (CPR Part 54.16).

CPR Part 54.17 gives the court power to hear any person. Thus any person may apply to file evidence or make representations at the judicial review hearing – whether in support or against the claim.

The hearing for the substantive issues of a claim for judicial review is normally held before a single judge sitting in open court. However the court may decide the claim for judicial review without a hearing where all parties agree (CPR Part 54.18); this rule appears to be directed at a situation where there is a dispute between the parties but all sides agree that the matter can be dealt with on the papers only. In civil cases, the unsuccessful party may appeal to the Court of Appeal.

***The duty of candour***

In judicial review cases both parties rely upon one another to provide all relevant information, since the court does not normally expect oral examination or cross-examination of witnesses. As was noted in the case of *Banks* v *Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 1031, "*frank disclosure of the decision making process does not mean referring to so much of the truth as assists the public body's case. It means presenting the whole truth including so much of the truth as assists the applicant for judicial review*."

This obligation for full and frank disclosure lies on both parties, and a claimant who presents an incomplete or misleading claim may find that this is a good reason in itself to reject that claim[14].

***Interim injunctions***

At any time in the course of judicial review proceedings, the court may grant an interim injunction in accordance with CPR Part 25. An order of the court granting an interim injunction may be made conditionally or unconditionally. The usual condition imposed is that the claimant has to give a cross-undertaking as to damages: that is to say the claimant would have to pay damages to the defendant for any loss suffered by reason of the injunction if it subsequently transpires that it ought not to have been granted. The cross-undertaking has been described as the "price" of an injunction – if the applicant is unwilling to pay the price he does not get the injunction.

The "*Lappel Bank*" case provides an interesting example of the interaction of judicial review, injunctions and cross-undertakings in damages[15]. In 1991 the Government listed the Medway Estuary and Marshes as a potential Special Protected Area (SPA) for birds under the Wild Birds Directive. In March 1993 the Secretary of State for the Environment indicated his provisional view that the area for designation should exclude Lappel Bank (an area of mud-flats). At this time the Port of Sheerness had planning permission to reclaim parts of the estuary which formed part of Lappel Bank. The NGO Royal Society for the Protection of Birds (RSPB) applied for judicial review of the decision to exclude Lappel Bank from the SPA. The Divisional Court

[14] Judicial Review: a short guide to claims in the Administrative Court, Research Paper 06/44, House of Commons, 28 September 2006

[15] Environmental Justice Report, March 2004, available at http://www.elflaw.org/files/EJP%20final.pdf

refused to quash the decision of the Secretary of State and the Court of Appeal dismissed RSPB's appeal. In February 1995 RSBP appealed to the House of Lords and sought interim relief pending a possible reference to the European Court of Justice (ECJ). The House of Lords referred the matter to the ECJ, but refused to grant the interim relief as RSPB was not prepared to give any cross undertakings in damages in relation to the large commercial loss which may result from the delay in the development of the port. In February 1996 the ECJ ruled that a Member State was not entitled to take economic requirements into account when designating an SPA and defining its boundaries. However, in the 12 months between the case in the House of Lords and the decision of the ECJ, and because no interim relief had been ordered by the House of Lords, the development of Lappel Bank had gone ahead and the area was now a car park.

#### 2.2.6. Judicial review in Scotland and Northern Ireland

The above sections have discussed the position of judicial review as it pertains to England and Wales. Judicial review in Northern Ireland is very similar to that discussed above.

In Scotland the grounds for which judicial review may be sought are broadly similar to those in the rest of the UK. The Scottish Court will recognise case law from the courts in England and Wales and Northern Ireland – and vice a versa. However the distinction between public and private law is not recognised in the same way in Scotland. In Scotland the test for the court to answer for it to judicially review an act is to see if there has been a "tripartite relationship" – that is to say a relationship between the decision-maker, the legislature and the applicant for whose benefit a jurisdiction, power or authority is to be exercised.

The procedure for judicial review in Scotland is similar, procedurally, to private law proceedings between private individuals. All applications for judicial review must be made to the Court of Session. There is no permission stage and in most cases there will only be one hearing which takes place as soon as possible after the application (or petition) has been commenced. There are no fixed time limits within which proceedings must be commenced, although it is open to the court to refuse an application on the grounds that the proceedings have been commenced too late.

Broadly similar remedies are available to the Court in Scotland – although an injunction there is called an "interdict".

## 3. Assessment of the legal measures for implementing Article 9(3) requirements on access to justice

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 may 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[16]. The Environmental Law Foundation study analysed hundreds of potential claims that did not reach the court and found that "too often, legal action that had reasonable prospects of success has not been pursued because it has been prohibitively expensive to do so"[17]. It was assessed that in 31% of these cases it was the cost of pursuing the legal action which was the main reason why the action was not continued. The study also showed that only 30 firms of solicitors in England and Wales had a full LSC franchise for public law. Because of

[16] Access to environmental justice: making it affordable, Coalition for access to justice for the environment, June 2004

[17] Environmental Justice Report, March 2004

the perceived lack of profit in environmental law, UK lawyers in general had little interest in it[18].

The concerns over costs can be divided into three categories:

- The general rule that costs follow the event
- The limited access to public funding for environmental judicial reviews
- The size of lawyers' fees.

As noted above, the usual rule in court cases in the UK is that costs follow the event, thus the unsuccessful party must pay the costs of the successful party as well as his own costs. This usual rule has been applied against members of the public, ad hoc and established NGOs whose application for judicial review has failed. It should also be noted that the Court of Appeal has stated that the fact that an application for judicial review was brought by a group of residents who were concerned with protection of the environment is not a good enough reason in itself not to award costs against them if unsuccessful.

Although the above is the 'usual rule', the court always has a discretion as to any award of costs in any action. It is possible that the court will not make an order as to costs against an NGO in certain cases where they consider that the application was in the public interest. Similarly it is possible that the court will reduce the costs that a party would otherwise have to pay – but such orders should be regarded as "exceptional".

Although the court may make a protected costs order which would set a limit on the financial liability of a party in the event that he was unsuccessful, the experience has been that such an order is rarely made by the court.

In general, whenever a party is seeking an interim injunction from the courts on grounds of environmental protection, they should provide a cross-undertaking in damages: that is to say that, if unsuccessful, they will pay (and are actually able to pay) damages shown to have been suffered as a result of the interim injunction. An inability to make such an undertaking as to damages to the court may result in the interim injunction not being granted. As the case of Lappel Bank shows this can result in a hollow victory – where the RSPB were successful in their action but by the time the case had been finally determined the area for which protection had been sought had been already developed.

However, it is possible for the court not to require a cross-undertaking in damages, and will grant the interim injunction anyway. This may be more likely where the environmental consequences are sufficiently serious.

The restricted access to public legal assistance also can act as a barrier to access to justice. Public legal assistance is provided by the LSC and is only available to individuals. In general it is subject to means testing and is such that in practice, only people who are on state benefits are likely to qualify. Where a case has '*significant wider public interest'* the test for public legal assistance is whether the likely benefits of the proceedings to the applicant and others justify the likely costs, having regard to the prospects of success and all other circumstances

The conclusions of various studies were that LSC funding was extremely hard to obtain for public interest environmental cases. The Environmental Law Foundation study concluded that public funding is not widely available because of the small number of expert environmental lawyers with public funding contracts or franchises and because of the financial and other restrictions placed on applicants for public funding. This includes the reasonableness test which requires individuals to show a reasonable prospect, not only of winning, but also some tangible

[18] Environmental justice: the cost barrier, Profesor Hall memorial lecture, Lord Justice Brook, 17 May 2006

benefit from the success, such as would justify a person of reasonable means bringing the action if required to finance it himself. There is also a provision for the LSC to reduce the amount paid to the assisted individual if others are going to benefit from the case.

The third potential barrier has been identified as the size of lawyers' fees. Lawyers fees can be in the order of £200-300 per hour (300-450 EURO), and a one day hearing can cost anything between £5000-£15,000 (7,500-22,500 EURO). A number of lawyers are prepared to undertake work on a *pro bono* basis, such as Environmental Law Foundation lawyers who in 2004 offered free assistance on 700 enquiries and referred 200 of these on to their network of environmental lawyers and consultants. However, for obvious reasons *pro bono* work is not really sustainable in the longer term and cannot be the answer to all fee-based problems.

In addition, it should be noted that just because a party benefits from *pro bono* representation, this does not prevent the court ordering that person to pay the costs of the other side if he looses the case.

## 4. Conclusions

A procedure by which members of the public may challenge the acts or omissions of public authorities, including on environmental matters exists in the United Kingdom. This procedure is called judicial review and is broadly similar in the different jurisdictions of the UK: England and Wales, Scotland and Northern Ireland.

The test of "standing" to bring a judicial review application is one of "sufficient interest". The law does not make any distinction between members of the public and NGOs whether associated or not and whether they are established on an ad hoc basis. The question of standing is the courts to decide and is a mixture of fact and law. Applications for judicial review must be made promptly and in any event within three months.

Although the question of standing is for the court to decide, it has become increasingly clear that the courts are now taking a wider interpretation of "standing" and "sufficient interest". It is now rare for the issue of standing to be challenged where there is alleged to be an environmental issue at stake. The cases illustrated above indicate that the court does not consider the question of standing in isolation; it is linked with a consideration of the merits of the case. The courts are slow to leave a vacuum of illegality or misuse of power by a public authority and the question of standing is widely construed to allow for this.

As part of the proceedings for judicial review the applicant may seek an interim injunction from the courts on the grounds of environmental protection. It is usual in such cases for the court to require the applicant to provide a cross-undertaking in damages; that is to say that the applicant will pay the successful defendant for any losses suffered as a result of the injunction. If the applicant is unable to make such an undertaking to the court, the court will usually not award the interim injunction. However, where the environmental consequences are sufficiently serious the court may grant the interim injunction without the cross-undertaking in damages.

This usual obligation as to damages is not considered to be in itself a barrier to access to justice. However, it may be so as to the substantive results of a particular case – as the case of *Lappel Bank* indicates.

The normal rule in litigation in the UK is that the loser must pay the winner's legal costs. The potential problem for a potential applicant lies with the uncertainty as to the level of costs that he will be faced with should the application be unsuccessful. Studies have shown that the possibility of having to pay the other side's costs is a major deterrent to pursuing an application for judicial review.

The court always has a discretion as to any award of costs and, indeed, it is possible that the court will make no order as to costs against an unsuccessful applicant in certain cases where the court feels that the application was in the public interest. It is also possible that the court may reduce the costs to be paid to the other side. But this is to be seen as exceptional. The problem for the potential applicant is that the issue of costs is decided at the end of the case.

The courts do have the possibility of making protected costs orders; however it appears that the courts rarely exercise their power to do so. The advantage for a potential applicant is that the issue of protected costs orders is rule don at an early stage in the proceedings.

Public legal assistance is available but on a very restricted basis. It is generally subject to a means test, although this test may be eased where a case has significant wider public interest.

The net result is that bringing an application for judicial review is prohibitively expensive for most people, unless they are either too poor to qualify for public legal assistance or are so rich so as to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds.

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.

## Bibliography

Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal, , Professor Richard Macrory CBE and Michael Woods, University College London, June 2003

Litigating the public interest, Report on the Working Group on facilitating public interest litigation, Chair Lord Justice Maurice Kay, July 2006. Available at http://www.liberty-human-rights.org.uk/publications/6-reports/litigating-the-public-interest.pdf

Environmental Justice Report, March 2004, available at http://www.elflaw.org/files/EJP%20final.pdf

Judical Review Handbook, (3rd edition) Michael Fordham, Harts Publishing, 2001, p607

Statutory appeals and statutory review – proposals for rationalising procedures, Response to a consultation carried out by the Department for Constitutional Affairs, CP (R) 05/4 23-12-2005

Access to environmental justice: Barriers and opportunities, Maria Adebowale, Global Capacity

Judicial Review: a short guide to claims in the Administrative Court, Research Paper 06/44, House of Commons, 28 September 2006

Royal Commission on Environmental Pollution, 23rd Report: Environmental Planning, 2002

Access to Justice in Environmental Matters, Final Report, Commission report ENV.A.3/ETU/2002/0030

Judicial Statistics 2005 England and Wales (revised), Department for Constitutional Affairs,

Civil Procedure Rules – England and Wales available from http://www.dca.gov.uk/civil/procrules_fin/index.htm

Rules of the Court of Session, Scotland, available from http://www.scotcourts.gov.uk/session/rules/Chapter58.asp

The rules of the Supreme Court (Northern Ireland) are available from http://www.courtsni.gov.uk/en-GB/Publications/Legislation/