

COALITION FOR ACCESS TO JUSTICE FOR THE ENVIRONMENT

Rt Hon. Caroline Spelman MP,
Secretary of State for Environment, Food and Rural Affairs,
Defra,
Nobel House,
17 Smith Square,
London SW1P 3JR

8th October 2010

Dear Secretary of State,

Re: Access to Environmental Justice in England and Wales

We write regarding recent developments in this field.

The Government will, by now, have had the opportunity to consider the findings of the UNECE Aarhus Convention Compliance Committee (ACCC) regarding “prohibitive expense” and legal action in England and Wales. Further to this, an Update Report published by Lord Justice Sullivan’s Access to Environmental Justice Working Group in early September confirms that tinkering with the Protective Costs Order (PCO) regime will not secure compliance with the requirements of Article 9(4) of the Aarhus Convention (we attach a copy of the Report for ease of reference).

CAJE continues to be actively engaged in these initiatives. It was our complaint to the European Commission in 2005 that prompted the European Commission to examine the UK’s compliance with the provisions of the EC Public Participation Directive (PPD) and which resulted in the issuing of a Reasoned Opinion to the UK on this matter in March 2010. CAJE also submitted written and oral evidence to the ACCC in Geneva and we continue to be represented on Lord Justice Sullivan’s Working Group.

We were, therefore, very concerned to read the UK’s response to the ACCC following the Committee’s findings in C27 and C33, which essentially confirms that the Government intends to consolidate the case law on PCOs into the rules of court.

It is our understanding that the Ministry of Justice will be issuing a consultation paper in response to Lord Justice Jackson’s review of civil litigation costs in the Autumn. Lord Justice Jackson’s review— as you will recall – recommended the introduction of qualified one-way costs shifting (QuOCS) in relation to all judicial reviews, primarily in order to ensure compliance with the Aarhus Convention. The Government’s response to the ACCC essentially prejudices the results of the Ministry of Justice’s consultation exercise and, if solely focused on codifying the PCO regime, not only ignores Lord Justice Jackson’s conclusions, it will not secure compliance with the Aarhus Convention. As Lord Justice Sullivan pointed out in his Update Paper, what

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is clearly needed is a radical change in the Civil Procedure Rules, which recognises the public interest nature of environmental claims.

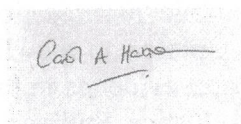
In our view, the only way to secure compliance with the Aarhus Convention and the PPD is to introduce qualified one way costs shifting for environmental cases. The Government may have concerns about introducing such a wide-ranging measure across the whole spectrum of judicial review (and, indeed, even further afield as Lord Justice Jackson recommended). However, introducing it initially for environmental cases – which represent a very small proportion of the overall number of cases – would ensure compliance with international and EU law and could represent a useful “pilot scheme” for other areas.

It is not in anyone’s best interests for the Commission to refer this case to the European Court – not least because the ECJ’s judgment in *Commission v Ireland* (Case C-427/07) is very clear – an EC Directive cannot be implemented by way of judicial discretion. Similarly, it is not helpful, in our view, for CAJE – or other NGOs – to continue to bring this matter to the attention of the ACCC. However, if the Government is minded to press ahead with an amendment to the Civil Procedure Rules which simply relies on the exercise of judicial discretion, it is clear that this will be the result. In our view this would be a deeply regrettable course of events.

You may be aware that CAJE has a meeting with officials in Defra and the Ministry of Justice in November 2010. We hope that will provide us with an opportunity to discuss a range of options in more detail with requisite personnel.

With best wishes.

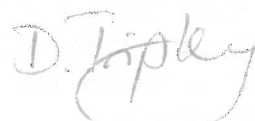
Yours sincerely,



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Encs.

Copy to: Rt. Hon. Kenneth Clark QC MP, Lord Chancellor and Secretary of State,
Ministry of Justice