COALITION FOR ACCESS TO JUSTICE FOR THE ENVIRONMENT

This Communication is submitted by way of an *Amicus* intervention in respect of the following Complaints some or all of which are due to be considered by the Aarhus Convention Compliance Committee on 1st July 2009:

ACCC/C/2008/23 (Mr Morgan) (Complaint 23)
ACCC/C/2008/27 (Cultra Residents' Association) (Complaint 27)
ACCC/C/2008/33 (James Thornton et al) (Complaint 33)

I. INFORMATION ON CORRESPONDENT SUBMITTING THE COMMUNICATION

1. The Intervener is the Coalition for Access to Justice for the Environment (**CAJE**).

2. CAJE includes most of the leading environmental NGOs in the UK including Friends of the Earth, WWF-UK, Greenpeace, Royal Society for the Protection of Birds, Capacity Global and the Environmental Law Foundation. We are recognised as a significant commentator on access to justice issues in the UK. In addition, Friends of the Earth and WWF-UK have represented CAJE at meetings of the Aarhus Convention Working Group, the Task Force on Access to Justice and the Aarhus 10th anniversary MOP - engaging in detail with access to justice issues and the development of the Convention at the international level.

3. CAJE's goal is ensure that access to justice in environmental matters is fair, equitable and not prohibitively expensive; that it is genuinely accessible to all; and that the justice system, so far as possible, works to protect the environment in accordance with the law.

4. CAJE is represented by **Carol Hatton** (Solicitor)
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II. STATE CONCERNED

United Kingdom

WWF RSPB Friends of the Earth Environmental Law Foundation

GREENPEACE capacity global living in a clean and healthy environment is everyone's right

III. FACTS OF THE COMMUNICATION

PROCEDURAL ISSUES

5. The purpose of this communication is not to comment in detail on the specific facts arising out of the above cases. Rather, the purpose of this communication is to provide some wider context to, and support for, communications to the Compliance Committee in respect of the United Kingdom's compliance with the access to justice provisions of the Convention. In particular, this communication refers to the following complaints:
   ACCC/C/2008/23 (Mr Morgan) (**Complaint 23**)
   ACCC/C/2008/27 (Cultra Residents' Association) (**Complaint 27**)
   ACCC/C/2008/33 (James Thornton et al) (**Complaint 33**)

6. We understand that Complaints 23 and 27 are currently due to be heard on 1st July 2009 but that the State Party (through DEFRA) has applied for an adjournment (at least in respect of Complaint 23). We make some comments in respect of Complaint 33 (notwithstanding that it is not due to be heard at the next meeting) on the basis that there is considerable overlap between the three Complaints. We would, however, wish to make additional points concerning the issues raised in Complaint 33 when it is considered by the Committee.

7. Ms Carol Hatton (for CAJE) intends to attend the hearing on 1st July (or any subsequent date to which the hearing is adjourned) so as to make a short oral submission and to assist the Committee with any questions arising out of this written submission.

THE SCOPE OF THIS INTERVENTION

8. Although there are a number of factors that operate within our legal system to curb access to justice in environmental matters we focus here on the single issue of prohibitive expense arising from the risk of liability for another party's legal costs as it is widely recognised as being the most significant barrier to access to justice in the United Kingdom and the clearest, most serious and most persistent breach of the United Kingdom's obligations under the Aarhus Convention.

9. We do so also because it is the feature that is shared by the three Complaints.

10. The focus of our communication in this regard concerns the issue of prohibitive expense in the public law context (i.e., challenges by members of the public or NGOs to decisions/actions/omissions by public authorities). It is therefore of lesser relevance in the context of Complaint 23 which concerns issues of costs in a private law context. Although our complaint focuses on the public law context, CAJE's view is that the Convention plainly requires that equivalent standards of access to justice are required so as to permit members of the public to challenge acts and omissions of private persons which are alleged to contravene provisions of national law relating to the environment (Art. 9(3)).

THE NATURE OF THE PROBLEM - COSTS "FOLLOW THE EVENT"

11. The most significant obstacle to access to justice in environmental matters arises from the principle that the loser must pay the winner's legal costs[1]. This rule evolved from simple

1 Rule 44.3, Civil Procedure Rules, attached as Annex A

civil cases between private parties and was then applied (almost by default) to public law cases. This means that, unless public funding[2] is available, an unsuccessful applicant will have to cover their own legal fees plus the legal costs of the defendant. The rule that the losing party must pay the legal costs of the winning party is known as '*costs follow the event*'. Additionally, there is always the threat that the applicant may have to cover the costs of an interested third party for example an airport or factory operator whose permit was being challenged in the legal proceedings.

12. CAJE believes that the current costs rules (in which the presumption is that 'costs follow the event' even in environmental public law cases) and the Courts' application of the costs rules renders legal action prohibitively expensive for the vast majority of individuals, community groups and environmental NGOs in England and Wales. This assertion is based both upon our own organisations long experience as well as the findings of a number of reports and commentaries published between 2003 and 2008[3] (listed below), some of which are considered further in this submission. The overwhelming evidence arising from these reports is that many individuals and NGOs are deterred from either commencing or progressing legal action in England and Wales because of the "chilling effect" of the potential, and unknown, costs of the other side should they lose the case.

13. The 'chilling effect' is well illustrated in Complaint 33 in which the Marine Conservation Society decided not to issue judicial review proceedings as a result of the fear of liability for legal costs.

14. The 'chilling effect' has also been expressly recognised by the courts in this country. In 2004 the Court of Appeal in *R (Burkett) v LB Hammersmith & Fulham* [2004] EWCA Civ 1342 recognised this problem when it noted that:

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2 Public funding is not available to NGOs or to associations but only to individuals. Moreover, public funding is only available for individuals of very limited means and in limited circumstances. These circumstances are set out in footnote 33 (page 15) of "*Ensuring access to environmental justice in England and Wales*" (the "Sullivan Report"), attached as Annex N

3 A number of reports are referenced in Annex VI of ACCC/C/2008/33 and some of these have been provided to the Aarhus Secretariat by CAJE in our communication on the United Kingdom's National Implementation Report. For the Committee's ease of reference, we enclose copies of the relevant pages of these Reports - full copies are available upon request:

(1) *Using the Law: Barriers and Opportunities for Environmental Justice* (Capacity Global) (2003) (pages 51-52);
(2) *Environmental Justice* (the Environmental Justice Project, comprising the Environmental Law Foundation, Leigh, Day & Co Solicitors and WWF-UK) (2004) (pages 39-48);
(3) *Civil Law Aspects of Environmental Justice* (Environmental Law Foundation3) (2003);
(4) *Modernising Environmental Justice – Regulation and the Role of an Environmental Tribunal* (Macrory and Woods) (2003) (pages 24-26);
(5) *Access to Justice: Making it Affordable* (CAJE) (2004);
(6) *UKELA Position Statement on Costs* (2004);
(7) *Access to Justice in Environmental Matters* (Professor Nicolas de Sadeleer, CEDRE) (pages 30-31);
(8) *Litigating the Public Interest – Report of the Working Group on Facilitating Public Interest Litigation* (Liberty and the Civil Liberties Trust) (page 20);
(9) *Measures on Access to Justice in Environmental Matters* (Article 9(3)) (European Commission) (2007) (pages 14-16 of the UK report).

Please note that the first four of these reports were partly or wholly commissioned/funded by the UK Government

"**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."**

15. Despite that clear recognition by judges in that case, and despite a wealth of supporting evidence as to the chilling effect of the current system, the Courts have found themselves unable to take the steps necessary to bring about access to justice that is compliant with the Convention. Instead, the Courts have made clear that any further action in this area is a matter for the executive Government and the legislature, including in particular through changes to the Civil Procedure Rules (see the references to the recent judgment of the Court of Appeal in *R v. (Francis Morgan) v Hinton Organics (Wessex) Ltd*[4] at paragraphs 47-48, below.

16. It is therefore not possible for the UK to rely any longer on the development of 'judge made case law' as an answer to this challenge.

17. In this respect, it should be noted that CAJE has repeatedly invited the Civil Procedure Rules Committee (CPRC) to address this issue[5]. However, despite written submissions in 2005 and 2008, CAJE has never received a response (we elaborate on this further in paras 49 to 51, below).

18. In terms of our organisations own experience (i.e. as CAJE members) we attach a Table showing the number of environmental Judicial Reviews embarked upon by four CAJE members since 1990 and the costs incurred when unsuccessful[6].

19. A fundamental problem with the 'costs follow the event' rule is that although a claimant in an environmental case can control its own legal costs it has no control over the costs of the other parties. As such, its liability is potentially open ended. It will be noted that the order of costs incurred has regularly extended to tens of thousands of pounds and, in one case, initially exceeded two hundred thousand pounds. The Milieu Ltd reports commissioned by the European Commission suggest that these levels of costs are much higher than in other EU countries[7]. Indeed, it is clear that in other similarly sized jurisdictions within the EU (such as France or Germany) the level of costs that might be incurred by a claimant bringing an environmental legal challenge is very much less than in the UK. In addition, our experience as to the level of costs is supported by the level of costs set out in Complaints 23 and 27.

20. It is precisely because of the prohibitive expense that each of our organisations (amongst the leading environmental NGOs in the UK) are so slow to take cases to Court involving alleged breaches of environmental law. That is despite the fact that we regularly identify situations in which we consider that there is a real case to be brought before the Courts for

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4 [2009] EWCA Civ 107, judgment attached as Annex K

5 See CAJE letters to the CPRC dated 10th June 2005 and 23rd July 2008 attached as Annex L

6 Annex M

7 See the Milieu Ltd Reports undertaken for the European Commission. The UK report is attached as Annex J and the full suite of reports can be found at: http://ec.europa.eu/environment/aarhus/study_access.htm

their consideration and in respect of which we think that there is, at least, a good arguable case. Although costs of that magnitude would not cause us to cease operating, it does require a significant re-direction of resources away from planned activities (for which we are accountable to our members and trustees) and, along with the possibility of an order for costs in favour of an interested third party, has a considerable "chilling" effect.

21. The effect is that even the largest environmental NGOs in the UK are very slow to take legal action against the UK Government. It is extremely rare for small environmental NGOs (such as the co-complainant MCS in Complaint 33) to take such action for precisely the same reason. In one unusual recent case in which a small environmental NGO (Buglife - The Invertebrate Conservation Trust[8]) brought judicial review proceedings, it was granted a Protective Costs Order limiting its liability for the costs of the other side to £10,000 (which, together with its own costs limited its total costs liability to £20,000). However, the judge thought that in this situation it was also fair for the local authority to be similarly protected and capped the amount recoverable by Buglife to the same level. The Sullivan Report pointed out that an arrangement of this type (referred to as reciprocal costs capping) does little to encourage lawyers to represent individuals or organisations in environmental cases (see Appendix 3 paragraph 7).

22. The situation is even more difficult for individuals who bring cases, as explained in more detail below (see paragraph 42(8)).

OTHER CRITICS OF THE CURRENT SYSTEM

23. It is important to note that the problem we note here has been the subject of wide-ranging and long-standing criticism from a number of quarters including independent reporters for the European Commission. We do not make reference to all of those out here but note that the Committee has been referred (by the Complainant in Complaint 33) to copies of a number of relevant reports.

24. However, we do wish to highlight the following in particular as they are independent reports produced in the UK by senior members of the judiciary on the basis of considerable evidence and analysis:

    (1) The Sullivan Report; and
    (2) The Jackson Review (Part 1).

The Sullivan Report

19. In May 2008, a Working Group on Access to Justice published "*Access to Environmental Justice in England and Wales*"[9]. The stimulus for the Working Group was a Report produced under the Chairmanship of Lord Justice Maurice Kay, which raised the issue of UK compliance with the access to justice provisions of the Aarhus Convention.

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8 See *R (on the application of Buglife – the Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation & Rosemound Developments Ltd* [2008] EWCA Civ 1209

9 Annex N and available at: http://www.wwf.org.uk/search_results.cfm?uNewsID=656

20. CAJE strongly endorses the findings of the Sullivan Committee and commends it to the Committee as a sound basis upon which to consider the three Complaints.

21. The remit of the Working Group was to examine whether current law and practice prevented concerned individuals and groups from achieving access to justice in environmental matters and to make recommendations where such barriers existed.

22. The membership of the Group, under the chairmanship of a High Court judge (now a Court of Appeal judge) Hon. Mr Justice Sullivan, included a wide range of expertise in environmental Judicial Review (JR), including the views of claimants (both individuals and NGOs), public authority defendants (the Environment Agency), interested third parties such as developers, the judiciary and the wider public interest.

23. The Hon Mr Justice Sullivan as the Report's lead author summed up the UK position succinctly in his foreword:

"*For the ordinary citizen, neither wealthy nor impecunious, **there can be no doubt that the Court's procedures are prohibitively expensive. If the problems identified in this report are not addressed it will not be long before the UK is taken to task for failing to live up to its obligations under the Aarhus Convention***". (emphasis added)

24. As of October 2008, neither Defra nor the Ministry of Justice has formally responded to the Sullivan report. Moreover, at a meeting with civil servants in September 2008, CAJE was informed that a substantive response would almost certainly not be forthcoming.

25. We do not summarise all of the Report's main points but would note that the Working Group undertook comparative research by examining the position on costs and injunctions in France, Germany, Hungary, Italy, the Netherlands and Spain. The Working Group noted that most of the other jurisdictions it examined have a "loser pays" principle that would apply in environmental public law proceedings. But in most cases this was tempered by a number of factors. In particular:

(1) It is more usual for the court to decide that the parties are to bear their own costs in public law proceedings – this being the general rule rather than the exception;

(2) In all jurisdictions examined the costs payable are capped by a professional body/statutory scale and, in comparison to the UK, such costs are usually very limited (i.e. in the low thousands of Euros and not tens or hundreds of thousands);

(3) In some of the jurisdictions it is the case that natural persons challenging public law decisions can be ordered to pay costs only in exceptional circumstances;

The Jackson Review

26. In 2008 a wide ranging review of legal costs in civil (i.e. non-criminal) matters was announced by the Master of the Rolls (one of the UK's most senior judges). That review is being carried out by Lord Justice Sir Rupert Jackson (a Court of Appeal Judge). In April 2009 he published his Preliminary Report. These findings are only 'initial' and are now subject to a wide ranging consultation. He will publish his final conclusions and recommendations in December 2009.

27. The Compliance Committee's consideration of the matters raised in these Complaints is extremely timely because any views that it expresses can be fed into the conclusions and recommendations of Sir Rupert Jackson's Report.

28. Although Environmental Cases (or Judicial Reviews more widely) only form a relatively small part of Sir Rupert Jackson's review his conclusions on those aspects are significant. Importantly, the interim Jackson report does expressly recognise the problems identified in these Complaints and notes the possibility that the UK is currently not complying with the Convention. The interim report is a very lengthy document[10], however, the relevant text can be found in Chapters 35 (Judicial Review Claims) and 36 (Environmental Claims)[11]. The Paragraphs referenced below relate to those chapters.

29. The Jackson Report deals with Environmental Judicial Reviews at para. 4.1 (p.334). It concludes that:

> "*As our costs rules now stand, on one view England and Wales are not complying with the provisions of the Aarhus Convention, to which the UK has voluntarily signed up*."

30. We agree with that view. In "signing up" to the Aarhus Convention the UK Government has taken on a legally binding commitment to comply with the provisions of the Convention. The Jackson Review Report then sets out a number of options for improving the current system – about which we comment below (Paras 43-44 and 56-57)[12].

EC INFRINGEMENT PROCEEDINGS

31. The Committee's attention is drawn to the question of the UK's compliance with the EC Public Participation Directive (which applies the "not prohibitively expensive" requirement in Article 9(4) of the Convention to legal review procedures in respect of Environmental Impact Assessment and Integrated Pollution Prevention Control (IPPC)). CAJE submitted a complaint to the European Commission on this issue in 2005[13] and a Letter of Formal Notice was sent to the UK in December 2007. The Commission is currently considering whether to issue the UK with a Reasoned Opinion, having had the opportunity to consider the UK's response to the Sullivan report (which Defra submitted to the Commission but not to Sullivan LJ or CAJE). CAJE understands that the Commission's decision will be informed by a forthcoming judgment of the European Court of Justice[14] concerning an earlier complaint in relation to costs (amongst other issues) against the Republic of Ireland.

THE UK GOVERNMENT'S POSITION

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10 http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm

11 See Annex O

12 The reference in the Jackson Review to England and Wales arises because the remit of the report only covered those parts of the United Kingdom. In light of the facts set out in Complaint 27 (and our own experiences in Northern Ireland) we suggest that the same criticisms apply with equal force in Northern Ireland. Our experience in Scotland leads us to believe that the situation is no better in that jurisdiction.

13 A copy of CAJE's complaint is attached at Annex P

14 See Case C-427/07 and the Opinion of Advocate General Kokott, paras 87-99

32. In their National Implementation Report[15] (and more generally) the UK Government rely on three particular features of the UK's costs regime as follows:

(1) The availability of legal aid (public funding);
(2) The existence of judicial discretion as to whether to award costs (and at what level); and
(3) Recent legal developments in relation to Protective Costs Orders (**PCOs**)[16].

33. However, for the reasons set out below none of those provide answers to our concerns or those expressed in the Sullivan Report and the Jackson Review Report.

Public Funding

34. The responses of CAJE and Friends of the Earth to the UK's National Implementation Report commented on the availability of legal aid funding. These pointed out that the financial limits for legal aid eligibility are extremely low. In addition, LSC funding is only available for individuals. By contrast, most environmental cases are brought by community groups or NGOs and so are automatically excluded.

Judicial Discretion

35. There have been a small number of examples of cases in which a Court – following a hearing – has ordered that the claimant, despite losing, does not need to pay the defendant's costs. See *R (on the application of Greenpeace Ltd) v SS for the Environment, Food and Rural Affairs* [2005] EWHC 2144 (Admin); *Friends of the Earth & Help the Aged v SS for Business, Enterprise and Regulatory Reform* [2008] EWHC 2518 (Admin).

36. However, there are three principle objections to the UK's reliance on this approach:

(1) First, such judicial discretion is only exercised at the conclusion of a case. The result is that the claimant bringing the case cannot rely on such discretion being exercised but must proceed on the basis that he is likely to be at risk of having to pay the other side's legal costs. Such an approach is therefore only of any use to large environmental NGOs or claimants with deep pockets that are prepared – rarely - to take a very substantial risk.

(2) Second, the Court's discretion in this regard is only exercised very rarely. The approach taken by the courts is to exercise their discretion in this way only where the case raised matters of 'real public importance' that needed to be resolved. That is a very high test and is unlikely to include the vast majority of environmental claims. Below we explain why such an approach is incompatible with the Convention (see paragraph 42, below).

(3) Third, in any event, the provisions of the Aarhus Convention have been treated by the Courts as having a very limited application in such circumstances. In a very recent judgment of the Court of Appeal (*R (Francis Morgan) v. Hinton*

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15 http://www.defra.gov.uk/environment/internat/aarhus/pdf/compliance-report.pdf

16 http://www.unece.org/env/documents/2008/pp/mop3/ece_mp_pp_ir_2008_gbr_e.pdf ; see especially paras 107-108.

Organics (Wessex) Ltd [2009] EWCA Civ 107 – the case which underlies Complaint 27 – the Court held that:

> "*47(iii) … the rules of the CPR relating to the award of costs remain effective, including the ordinary "loser pays" rule and the principles governing the court's discretion to depart from it. The principles of the Convention <u>are at most a matter to which the court may have regard in exercising its discretion</u>*."

In other words, the existence of the Convention does not mean that the discretion will be exercised so as to secure access to justice which is not prohibitively expensive but is merely a factor to be taken into account.

*<u>Protective costs orders (**PCOs**)</u>*

37. The UK's reliance on PCOs relates to a relatively recent development in case-law in England and Wales which relates to the broader issue of costs in public interest litigation. CAJE's view is that whilst such developments are welcome they are of limited value and do not remedy the significant deficit that exists in relation to access to justice in environmental matters.

38. The leading case in this area is *R (Corner House Research v Secretary of State for Trade and Industry*[17] ("*Corner House*"), in which the Court of Appeal set out the circumstances in which the Courts might grant a claimant a Protective Costs Orders (**<u>PCO</u>**).

39. A PCO is an order of the court by which the potential costs liability of one or more parties in the event that they 'lose' the case is fixed in advance of the hearing. Such costs can be fixed at any level and may be eliminated entirely – i.e., there be no liability for costs at all. In theory, therefore, a PCO *<u>can</u>* provide early certainty on the limits of a claimant's costs liability and, by controlling the level involved, ensure that costs exposure will not be prohibitively expensive in line with the Aarhus Convention.

40. PCOs represent a significant development and, if sufficiently modified, would be capable of forming the basis of a costs system which would comply with the Convention. However, as the law currently stands PCOs do not provide access to justice that is compliant with Art. 9(4) of the Convention because access to justice in environmental matters remains prohibitively expensive.

41. In *Corner House* the Court of Appeal set out the following conditions for the grant of a PCO[18]. Those criteria continue to form the basis:

    (a) The issues raised 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[19];

17 [2005] 1 WLR 2600, judgment attached as Annex R, see paragraph 74

18 Paragraph 74

(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; and
(e) If the order is not made, the claimant will probably discontinue the proceedings and will be acting reasonably in so doing.

In addition to these conditions, the Court of Appeal said that if those acting for the applicant were doing so *pro bono*, this would be likely to enhance the merits of the application for a PCO.

Reasons why *Corner House* PCOs do not ensure compliance with Art. 9(4) of the Convention

42. There are a number of reasons why PCOs as developed by the Court of Appeal in *Corner House* are insufficient to discharge the UK's obligations under the Convention:

(1) The first point to note is that in *Corner House*, the Court of Appeal held that PCOs should only granted in "…the most exceptional circumstances". The restrictive nature of the PCO regimes is further reflected in the first *Corner House* criteria for the grant of a PCO which is that the case is a matter of "*general public importance*". The effect is that a PCO is only available for a very narrow class of cases. However, there is no such limitation within the Aarhus Convention which provides that access to justice in respect of all environmental cases should be not *prohibitively expensive*. The difficulty is set out clearly in the Sullivan Report [Appendix 3, para 2]:

> "In *Corner House*, the Court of Appeal accepted that PCOs should only be granted in "exceptional" cases. But it now seems this 'exceptionality' test is being applied so as to set too high a threshold for deciding (for example) 'general public importance', thus overly restricting the availability of PCOs in environmental cases. For example, in a recent case, *Bullmore*, the implicit approach taken in the High Court and confirmed in the Court of Appeal was that there really should only be a handful of PCO cases in total every year. Such an approach if generally adopted would ensure that the PCO jurisdiction made no significant contribution to remedying the access to justice deficit it was intended to deal with, including in the environmental field. Unless the exceptionality criterion is eased, PCOs cannot be used in any significant way to assist compliance with Aarhus" (emphasis added)

(2) The result is that the Courts rarely exercise their powers to make PCOs whether in environmental cases or more widely. For example, in relation to (a) and (b) referred to above, in *River Thames Society v First Secretary of State & 3 ORS sub nom Lady Berkeley v First Secretary of State*[20], the Hon Mr Justice Underhill refused an application for a PCO on the basis that the issues raised, despite involving a large development in a prominent local site, was not one of *general*

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19 Although this aspect of the Corner House guidelines has been subject to considerable criticism by the Courts it remains the law though the Court of Appeal has recently emphasised that this requirement is to be treated *flexibly*. See the judgment in *Morgan*, paras. 39-40

20 [2006] EWHC 2829, see paragraph 10

public importance. Similarly, in another recent (albeit non-environmental) case**,** the affected population was accepted to be that of West Hertfordshire - some 500,000 people - and yet the Court of Appeal decided there was no "general public importance".

(3) We believe that the Convention recognises the existence of a general public importance in allowing members of the public to vindicate the rule of law in environmental matters such that a PCO should (subject to issues of fairness/equity) be available in all environmental cases at a level that is capable of ensuring that access to justice is not prohibitively expensive. In public law cases (judicial reviews) it is to be noted that it is first necessary to obtain the court's *permission* to bring a case. The Court will not grant permission to cases that are frivolous or vexatious or which are not properly arguable or unmeritorious. Therefore, any concern about the possibility that the "floodgates" will be opened cannot be sustained because a PCO in a judicial review will only be granted where the case is a decent one, i.e. where there are real issues of law and/or fact requiring determination by the Court.

(4) Furthermore, there is potentially considerable risk of costs involved in even applying for a PCO. That is because, if a PCO is not granted, the claimant will normally be required to pay (a) the costs of making the application; (b) the costs of the Defendant resisting the application (see paragraphs 78-79 of Corner House [page 261-262]); and (c) the costs of the Defendant in resisting the application for permission to bring judicial review proceedings (if unsuccessful). In addition, the developing and sometimes contradictory natures of the case-law on PCOs can means that an application for a PCO often involves detailed legal argument which of itself adds to the legal costs of both sides. A leading solicitor in this field has pointed out in a recent article[21] that:

> "the overall risk a potential claimant must therefore consider, before embarking upon a challenge in the public interest may be excess of £10,000 (and is likely to be in the region of £5,000 even if the matter is not pursued beyond the paper application stage". That is the case even if the claimant applies for a Protective Costs Order.

(5) A further concern is as to the level at which liability for costs is currently being capped in those rare contexts in which a PCO is actually granted. So, for example, in *R (on the application of the British Union for the Abolition of Vivisection) v Secretary of State for the Home Office*,[22] the Hon Mr Justice Bean capped BUAV's liability at £40,000 (as opposed to the £20,000 BUAV asked for) on the basis of the financial resources of the parties and the likely costs in the case. In the recent case of *R (ota Buglife-The Invertebrate Conservation Trust) v. Thurrock Thames Gateway Development Corporation*[23] the environmental charity

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21 See Stein, R. and Beagent, J. (2005). *Court of Appeal (Civil Division): R (Corner House Research) v The Secretary of State for Trade and Industry.* J. Environmental Law 2005 17:413-445. See http://jel.oxfordjournals.org/cgi/content/full/17/3/413?etoc

22 [2005] EWHC 530 (Admin)

23 [2008] EWCA Civ 107

Buglife obtained a PCO which only limited its potential liability for the Development Corporation's costs to £20,000[24].

(6) Further, in responding to the draft UK National Implementation Report last year Friends of the Earth referred to a case in which a community group client of its Rights & Justice Centre were sent a schedule of costs by the other side claiming £28,000 of legal costs simply for filing a defence to a claim (i.e. before the point at which any application for a PCO would have been heard) putting additional pressure on its client not to proceed.

Pro bono representation and other issues

(7) The inclusion of *pro bono* representation as a factor in whether to grant a PCO is also of concern to CAJE. We do not consider it appropriate that in order to be able to conduct what the court considers litigation of public importance, NGOs (and the lawyers we instruct) are expected to work for free. We consider that the current costs rules are a direct reason for the extremely limited number of claimant environmental law solicitors in the UK. This point is ably illustrated by reference to "*Chambers UK – A Client's Guide to the Legal Profession 2009",* which lists lawyers practising in environmental law. The number of lawyers representing claimants is considerably smaller than the list of those representing defendants (two bands as opposed to six bands)[25].Many individuals and NGOs are unable to instruct the lawyers of their choice and, in any event, finding lawyers who are prepared to work *pro bono* at short notice (i.e. within the very short timescales for bringing judicial review) is difficult. Reliance upon goodwill and charity can only go so far towards achieving access to justice. It is our contention that *pro bono* assistance does not, and cannot, provide a meaningful contribution to access to environmental justice in the long-term.

(8) Finally, UK rules concerning individual liability mean that community groups are often obliged to incorporate themselves (i.e. become a limited company) in order to limit the personal liability of their members for legal costs, a process that involves additional time, bureaucracy and expense.

43. The Jackson Review Report suggests that:

> "*One possible option would be to expand the [PCO] test and to introduce one way cost shifting for all environmental judicial review claims, leaving the permission" requirement as a sufficient mechanism to weed out weak claims.*" (para. 4.6)

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[24] That should be set against that organisation's entire income for 2007 of £447,000 and its expenditure (also of £447,000). In other words those proceedings represented nearly 5% of the charity's entire income for the previous year

[25] See pages 476-483 of *Chambers 2009* attached as Annex Q

44. We agree and support for that proposal. We would invite the Committee to endorse that 'possible option' as a sensible way forward for the UK to comply with the provisions of Art. 9(4) in respect of the problem of adverse costs liability.

THE NEED FOR GOVERNMENT ACTION AND THE LIMITS TO THE ROLE OF THE COURT

45. Overall, there is now a compelling body of evidence that the real (i.e. actual and potential) costs risks involved in an application for judicial review render the process prohibitively expensive for the majority of individuals and organisations. That evidence includes an independent report for the European Commission (the Milieu Ltd. Report); a report by a working group led by a High Court Judge (the Sullivan Report); and a preliminary and hugely detailed report by a Court of Appeal Judge (the Jackson Review Report). It also includes considerable earlier work which has been provided to the Committee by the Complainant in Complaint 33 including a detailed report on *Environmental Justice* (Annex C).

46. It is CAJE's view that the potential costs liability faced by claimants creates a palpable "chilling" effect for potential litigants to the extent that the UK is clearly not in compliance with the requirements of the access to justice provisions of the Convention.

47. If developed further, the PCO regime developed by the Courts has the potential to improve access to justice and even to bring practice into compliance with the Convention. However, it is now clear that the judiciary consider that they have reached the limits of their discretion in developing this area of the law. In the recent Court of Appeal case of *Morgan* (which forms the basis for Complaint 33) the Court of Appeal expressly invited DEFRA (the UK) to make submissions to it as to the compatibility of the UK legal system with the UK's legal obligations under the Convention. DEFRA declined to do so on the basis that the issues under consideration were the subject of ongoing infringement proceedings against the UK on the part of the European Commission.

48. However, at the conclusion of that case the Court of Appeal made clear that it is now a matter for the Government to resolve stating:

> "*47 (iv) The Corner House statement of those principles must now be regarded as settled as far as this court is concerned, but to be applied "flexibly".* ***Further development or refinement is a matter for legislation or the Rules Committee.***
>
> *(v) The Jackson review provides an opportunity for considering the Aarhus principles in the context of the system for costs as a whole.* ***Modifications of the present rules in the light of that report are likely to be matters for Parliament or the Civil Procedure Rules Committee***." (emphasis added)

49. This is not the first time that such a view has been expressed. The need for the Civil Procedure Rules Committee to codify the position in relation to Protective Costs Orders has been made on several occasions by the Courts starting with *Corner House* itself in December 2005. In that case the Court of Appeal (in March 2005) called on the Civil Procedure Rules Committee to codify the rules in relation to Protective Costs Orders. This

hope was repeated recently by the Court of Appeal in *R (on the application of Compton) v Wiltshire Primary Health Care Trust*[26].

50. In June 2005, CAJE made a detailed submission to the Civil Procedure Rules Committee asking it to take action to codify the rules in relation to Protective Costs Orders. Following *Compton*, CAJE wrote again in July 2008, enclosing further amendments agreed between CAJE and leading public interest environmental lawyers. These amendments sought to strike an appropriate balance between the need to comply with the access to justice requirements of the Aarhus Convention whilst at the same time retaining the Court's discretion to grant Orders on such terms and conditions as it deems appropriate. Thus, the exact form of an "Aarhus PCO" could be decided on the basis of the circumstances of each particular case.

51. CAJE has never received a response to those letters and the Civil Procedure Rules Committee has not taken any action to create rules in respect of Protective Costs Orders. Similarly, no legislation has been put before Parliament to provide for such access to justice. The UK's position that this is a matter for the Courts is contradicted by clear expressions from the Courts that action by the executive and/or the legislature is required.

52. Following an informal meeting with UK Government representatives at the Aarhus MOP in Riga in June 2008, CAJE representatives formally met representatives of the UK government in the Autumn. Our objective was to discuss possible changes to the CPR and problems with access to justice in the UK. However, it was made clear to us that the Government did not intend to take any action on the issue at that time.

53. The current position is that the UK is unwilling to consider how to address the issue of costs liability in environmental cases (including, for example, the possibility of effecting amendments to the Civil Procedure Rules). In the absence of any decisive action on the part of Government it is of considerable importance that the Committee make appropriate recommendations to the UK.

CONCLUSIONS AND POSSIBLE SOLUTIONS

54. Given that:

(1) guidelines on the application and operation of the Aarhus convention have not, so far, come forward from either the Government, the Rules Committee or through the *ad hoc* process of litigation and decided cases, and

(2) (at least until more formal legislative or CPR provisions are in place) the issue (and compliance with the Aarhus Convention and the EU Directives in play) is to be dealt with through the exercise of the ordinary judicial discretion on costs,

CAJE invites the Committee to find that the UK's current approach to costs – in particular its general approach to 'costs shifting' and the application of the general rule that 'costs follow the event' – is incompatible with Art. 9(4) of the Convention and to recommend that therefore the UK create binding normative rules that would provide for non-prohibitively expensive access to justice in environmental cases.

26 [2008] EWHC 880 (Admin), paragraph 43

55. CAJE considers that the timing of the Committee's consideration of these issues is particularly important having regard to the ongoing work under the Jackson Review.

56. In that regard CAJE notes that the Jackson Review Report (Part 1) sets out possible options for moving forward in this area:

> "*4.7….Three options for ensuring that there is compliance with the Aarhus Convention would be the following:*
>
> *(i) to introduce one way costs shifting;*
>
> *(ii) for protective costs orders to become the norm in environmental judicial review cases (where the claimant is of limited means), applicable only to the claimant's costs liability;*
>
> *(iii) for protective costs orders to become the norm in environmental judicial review cases (where the claimant is of limited means), with a substantially higher cap upon the defendant's costs liability than the cap upon the claimant's costs liability*."

57. CAJE agrees that PCOs should become the norm in environmental judicial review cases. In particular, CAJE endorses option (i) as set out above – namely '*one way fee shifting*' (i.e., that only the Claimant could recover its legal costs and not the other way around). However, CAJE would also welcome option (ii) as representing a very significant step towards compliance with the Convention.

58. However, CAJE notes that the UK Government is currently resistant to any of the three options as the UK's position remains that (i) PCOs should only be granted in exceptional cases; and (ii) that such an approach complies with the Convention.

59. In addition CAJE fully endorses the Sullivan Report's suggestion (Appendix 4) as to the approach to Aarhus and PCOs, and would invite the Committee to endorse those conclusions and give overall guidance in accordance with them namely:

- In an environmental judicial review there should be no additional public interest/general public importance requirement, since access to environmental justice is made unconditional by Aarhus and because, by virtue of the Aarhus Convention, protecting the environment and upholding environmental law is recognised as inherently a matter of public interest/importance.

- The claimant in an environmental judicial review is entitled to a PCO (level to be set according to criteria below) where otherwise, and acting reasonably in the circumstances, the claimant would be prohibited by the level of costs or cost risks from bringing the case. The level of PCO must not make litigating "prohibitively expensive" for the member of the public or non-governmental organisation such as reasonably to deter such a person from embarking on the challenge in question.

- The process of applying for a PCO itself must not expose the claimant to a "prohibitively expensive" risk of costs. The *Corner House* figures for costs exposure at this stage will not therefore apply and instead we consider a maximum figure of £500 to be consistent with these principles. No other other costs liability should arise prior to a decision on whether to grant a PCO.

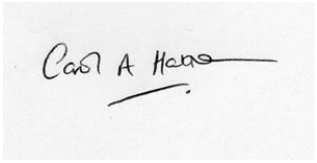
- The claimant's private interest will not be a bar to making a PCO, but may be a factor to be taken into account in determining the level at which the PCO will be set in the circumstances of the case.

- The court may impose a cap on the claimant's costs at the request of the defendant/third party in order to ensure that the defendant does not face an unreasonable costs exposure and that the defendant (i.e., the public authority) also has some degree of certainty about its exposure from an early stage.

- No relevance should be attached to whether the claimant's lawyers are acting pro bono or otherwise.

SUMMARY

CAJE asks the Committee to consider the three UK complaints and the considerable body of evidence before it. It is our view that legal action to uphold the provisions of national law relating to the environment in the UK is prohibitively expensive and that, accordingly, the UK is not in compliance with Article 9(4) of the Aarhus Convention. CAJE has taken numerous steps to draw attention to the problem, however, it is clear that the responsibility to address the UK's failure to give full effect to the provisions of the Convention lies squarely with the UK Government. CAJE invites the Compliance Committee to recognise this problem and to recommend that UK authorities remedy this issue without further delay.



Carol Hatton
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IV. Supporting documentation

Annex A Rule 44.3, Civil Procedure Rules
Annex B *Using the Law: Barriers and Opportunities for Environmental Justice* (Capacity Global) (2003) (pages 51-52)

Annex C	*Environmental Justice* (the Environmental Justice Project, comprising the Environmental Law Foundation, Leigh Day & Co. Solicitors and WWF-UK (2004) (pages 39-48)
Annex D	*Civil Law Aspects of Environmental Justice* (ELF) (2003)
Annex E	*Modernising Environmental Justice – Regulation and the Role of an Environmental Tribunal* (Macrory and Woods) (2003) (pages 24-26)
Annex F	*Access to Justice: Making it Affordable* (CAJE) (2004)
Annex G	*UKELA Position Statement on Costs* (2004)
Annex H	*Access to Justice in Environmental Matters* (Professor Nicolas de Sadeleer, CEDRE) (pages 30-31)
Annex I	*Litigating the Public Interest – Report of the Working Group on Facilitating Public Interest Litigation* (Liberty and the Civil Liberties Trust) (page 20)
Annex J	*Measures on Access to Justice in Environmental Matters* (Article 9(3)) (Milieu Ltd) (pages 14-16 of the UK Report)
Annex K	*R v. (Francis Morgan) v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 (see para 47(v))
Annex L	CAJE letters to the Civil Procedure Rules Committee dated 10th June 2005 and 23rd July 2008 (with enclosures)
Annex M	Table showing Environmental Judicial Reviews embarked upon by four CAJE members since 1990
Annex N	*Ensuring Access to Justice in England and Wales* (2008) Report of the Working Group on Access to Environmental Justice
Annex O	*Review of Civil Litigation Costs – Preliminary Report* (May 2009) the Right Honourable Lord Justice Jackson (Chapters 35 and 36)
Annex P	CAJE Complaint to European Commission (2005)
Annex Q	Pages 476-483 *Chambers 2009*
Annex R	*R (Corner House Research v Secretary of State for Trade and Industry* [2005] 1 WLR 2600, see paragraph 74