Neutral Citation Number: [2014] EWCA Civ 1539

Case No: C1/2013/3555

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MRS JUSTICE LANG
CO/6859/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2014

Before:

LORD JUSTICE SULLIVAN
LADY JUSTICE GLOSTER
and
LORD JUSTICE VOS

- -

Between:

THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Appellant**
- and -	
SARAH LOUISE VENN	**Respondent**

- -
- -

James Eadie QC and Andrew Deakin (instructed by Treasury Solicitors) for the **Appellant**
Richard Drabble QC and Christopher Jacobs (instructed by **Richard Buxton Environmental & Public Law**) for the **Respondent**

Hearing date: 17th November 2014

- -

Approved Judgment

Lord Justice Sullivan:

Introduction

1. This is the Secretary of State's appeal against the amended Order dated 21st November 2013 of Lang J granting the Claimant a Protective Costs Order ("PCO") limiting her liability to pay the Defendants' costs to £3500 (inclusive of VAT) in respect of her application under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") to quash a decision dated 25th April 2013 of an Inspector appointed by the Secretary of State (the First Defendant below), allowing the Second Defendant's appeal under section 78 of the 1990 Act against the refusal of the Third Defendant to grant planning permission for a single storey courtyard dwelling on the side garden area of 47 Dundalk Road, Lewisham, London, SE4 2JJ. The Second and Third Defendants did not appear before Lang J, and they have played no part in this appeal.

Facts

2. The factual background is set out in Lang J's judgment [2013] EWHC 3546 (Admin). In summary, the Claimant lives next door to number 47, at 49a Dundalk Road. In Ground 1 of her challenge under section 288 the Claimant contended that the Inspector had failed to have regard to emerging local plan policy in the form of the Third Defendant's Development Management Local Plan Policy No 32, which provides that the development of back gardens for separate dwellings in perimeter form residential typologies identified in the Lewisham Character Study will not be granted planning permission. The Claimant contended that this policy was supported by paragraph 53 of the National Planning Policy Framework (NPPF), by Policy 3.5 in the London Plan, and by the Mayor of London's Supplementary Planning Guidance on Housing.

3. In paragraphs 17-20 of her judgment Lang J referred to evidence from the Royal Horticultural Society (RHS), the London Wildlife Trust, and the Campaign for the Protection of Rural England, all of whom expressed concern about the adverse effects of what was described by the RHS as "garden grabbing", and to a 2010 briefing from the Town and Country Planning Association which was to the same effect.

The Issues

4. Before the Judge, the Claimant contended that:

   (1) her application under section 288 was an "Aarhus Convention claim" within CPR 45.41, and that she was entitled to costs protection under that rule; alternatively

   (2) the Court should exercise its inherent jurisdiction to make a PCO upon the basis that this was an environmental challenge falling within Article 9(3) of the Aarhus Convention ("*Aarhus*").

5. The Secretary of State contended that:

   (1) the Claimant's application under section 288 of the 1990 Act did not fall within Article 9(3) of *Aarhus*;

(2) even if the Claimant's application fell within Article 9(3) of *Aarhus* it was not an "Aarhus Convention claim" for the purposes of CPR 45.41 because it was a statutory application to quash and not an application for judicial review;

(3) while the Court had a discretion to make a PCO, that discretion had to be exercised in accordance with the principles set out in R (on the application of Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192, [2005] 1 WLR 2600 ("*Corner House*") which could be modified only insofar as it was necessary to secure compliance with directly enforceable EU environmental Directives, which were not in issue in the present case: see R (Garner) v Elmbridge Borough Council [2010] EWCA Civ 1209; [2011] Env. LR 10 ("*Garner*").

6. The Judge concluded that:

(1) the Claimant's section 288 application was an environmental challenge falling within Article 9(3) of *Aarhus* (paragraph 24 judgment);

(2) it was not an "Aarhus Convention claim" for the purposes of CPR 45.41 because costs protection under that rule was confined to claims for judicial review, and the Claimant's section 288 application was a statutory application to quash, albeit that it would be determined on the basis of the legal principles that are applicable to judicial review claims (paragraph 32 judgment);

(3) she should exercise the Court's discretion to make a PCO because "the Corner House criteria should be relaxed to give effect to the requirements of the Aarhus Convention" (paragraph 36 judgment).

7. The Claimant does not challenge the Judge's conclusion that CPR 45.41 applies only to claims for judicial review, and does not apply to statutory appeals or applications, such as her application under section 288 of the 1990 Act. I have no doubt that this concession on the part of the Claimant is correct. The wording of CPR 45.41 is clear, and it is plain that the omission of statutory appeals and applications from costs protection under CPR 45.41 was deliberate: see paragraph 30 of the judgment.

8. The issues in this appeal are therefore:

(1) whether the Claimant's section 288 application falls within Article 9(3) of *Aarhus*; and

(2) if it does, what are the principles (if any) upon which the Court should exercise its discretion to grant a PCO in an *Aarhus* case in which directly enforceable EU environmental Directives are not engaged?

9. I will deal with these two issues in turn. For convenience, the full text of Article 9 is set out in the Annex to this judgment.

Issue (1) Article 9(3)

10. I can deal with this issue briefly because Mr. James Eadie QC on behalf of the Secretary of State did not take issue with Lang J's conclusion (see paragraph 11 of the judgment) that the description of "environmental information" in Article 2(3) of

Aarhus was an indication of the intended ambit of the term "environmental" in the Convention, and that the *Implementation Guide* to *Aarhus* was of assistance in reaching that conclusion. The *Implementation Guide* says that:

> "The clear intention of the drafters, …. was to craft a definition [of environmental information] that would be as broad in scope as possible, a fact that should be taken into account in its interpretation."

11. In his Skeleton Argument the Secretary of State accepted that "environmental information" is given a broad definition in Article 2.3, and further accepted that since administrative matters likely to affect "*the state of the land*" are classed as "environmental" under *Aarhus* the definition of "environmental" in the Convention is arguably broad enough to catch most, if not all, planning matters. The Judge's conclusion that environmental matters are given a broad meaning in *Aarhus* (see paragraph 15 of the judgment) is supported by the decision of the CJEU in Lesoochranárske VLK v Slovenskej Republiky (Case C-240/09) [2012] QB 606 ("the *Brown Bear* case").

12. In the *Brown Bear* case, the CJEU concluded that the provisions of the Convention "now form an integral part of the legal order of the European Union" (paragraph 30). While the provisions of Article 9(3) are not directly enforceable (paragraph 45), "it must be observed that those provisions, although drafted in broad terms are intended to ensure effective environmental protection" (paragraph 46). In paragraphs 49 and 50 the CJEU said:

> "49. Therefore, if the effective protection of European Union environmental law is not to be undermined, it is inconceivable that article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by European Union law.
>
> 50. It follows that, in so far as concerns a species protected by European Union law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by European Union environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in article 9(3) of the Aarhus Convention."

13. The Secretary of State rightly rejected the distinction that was drawn at the permission stage in R (Save Britain's Heritage (1) and the Victorian Society (2) v Sheffield City Council and University of Sheffield (CO/7189/2013) between the reference to "decision, act or omission" in Article 9(2), and Article 9(3) which refers only to "acts or omissions", not "decisions". As the Secretary of State's Skeleton Argument points out, there is persuasive authority in the *Implementation Guide* (see page 209); in decisions of the Aarhus Compliance Committee (see ACCC/C/2005/11 (concerning compliance by Belgium) at paragraph 34 and ACCC/C/2008/33 (concerning compliance by the United Kingdom) at paragraphs 123-127; and in paragraph 100 of Advocate General Sharpston's Opinion in the *Brown Bear* Case; to the effect that the

term "acts or omissions" is sufficiently broad in this context to encompass administrative decisions.

14. The sole basis upon which Mr. Eadie submitted that the Judge had erred in concluding that the Claimant's section 288 application fell within Article 9(3) of *Aarhus* was that the Claimant was not challenging an act or omission by a public authority which contravened a provision of *national law relating to the environment*. Recommended Policy 32 in the Third Defendant's Development Management Local Plan was emerging policy at the date of the Inspector's decision, to which weight was to be given in accordance with paragraph 216 of the NPPF. Recommended Policy 32 was not a provision of *national law*, and the complaint was not that it had been contravened, but that there had been a failure to take it into account as a material consideration in accordance with section 70(2) of the 1990 Act. Insofar as the Claimant was alleging a contravention of *national law*, it was a contravention of section 70(2), which could not be characterised as a *law relating to the environment*. It was submitted that a distinction should be drawn between section 70(2) and other enactments which were "specifically environmental laws", such as sections 80 and 82 of the Environmental Protection Act 1990, section 55(2) of the Clean Air Act 1993, and section 2(4) of the Noise Act 1996.

15. The Secretary of State's submission is ingenious, and it might have had some force if Article 9(3) was a domestic UK enactment, and was not a provision governing the obligations of the parties to an international Convention, each of whom has agreed to give effect to Article 9 "within the framework of its national legislation." National legislation may address the issue of environmental protection in different ways. The UK has a sophisticated Town and Country Planning system, and Parliament has chosen to implement much of the UK's environmental protection through that system. One obvious example is the Environmental Impact Assessment process, which is tied to the grant of planning permission. Another example is the requirement that local development plan documents must include policies that are designed to ensure that development in each local plan area contributes to the mitigation of, and adaptation to, climate change: see section 19(1A) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act").

16. As a consequence, it is a characteristic of the UK's approach to environmental protection that much (if not most) of the detail is contained, not in statutory regulations, but in policies, both national policies adopted by the Government (the NPPF), and local policies adopted by local planning authorities in their development plan documents. When preparing their local development plan documents local planning authorities must have regard to national policies; including the NPPF: see section 19(2)(a) of the 2004 Act. Decision makers are then required by section 70(2) to have regard to such policies; and if the policies are contained in the development plan they must be followed unless material considerations indicate otherwise: see section 38(6) of the 2004 Act (paragraph 22 of the judgment).

17. Given that this is the way in which the UK has chosen to implement a great deal of environmental protection "within the framework of its national legislation", it would deprive Article 9(3) of much of its effect if a distinction was drawn between the *policies*, both national and local, which do relate to the environment, and the *law* which does not directly relate to the environment, but which requires those policies which do relate to the environment to be prepared, and then to be taken into account,

and in certain cases to be followed unless material considerations indicate otherwise. It would not be consistent with the underlying purpose of *Aarhus* to adopt an interpretation of Article 9(3) which would, at least in the UK, deprive it of much of its effect: see paragraphs 49 and 50 of the *Brown Bear* case (paragraph 12 above). In the *Aarhus* context the UK's combination of statute and policy, with the former requiring that the latter be prepared, taken into account and in some instances followed, is properly characterised as "national law relating to the environment."

18. For these reasons, I endorse the Judge's conclusion that the Claimant's section 288 application falls within Article 9(3) of *Aarhus*.

Issue (2) PCOs in *Aarhus* cases where no EU Directive applies

19. It is common ground that:

(a) the Court has power to grant costs protection in *Aarhus* cases falling outside CPR 45.41; and

(b) the discretion is not untrammelled, but must be exercised in accordance with the CPR and "established principles": see paragraph 8 of *Corner House*.

The issue is whether those "established principles" are still, after the coming into effect of CPR 45.41 on 1st April 2013, the governing principles which are set out in paragraph 74 of *Corner House*, as modified by *Garner*, but only insofar as it is necessary to do so in order to comply with directly effective EU environmental Directives (which do not apply in the present case).

20. There is no dispute that those were the "established principles" prior to the coming into effect of CPR 45.41. In R (on the Application of Buglife: The Invertebrates Conservation Trust) v Thurrock Thames Gateway Development Corp [2008] EWCA Civ 1209; [2009] Env LR 18 ("*Buglife*"), The Court agreed with the conclusion of the Court of Appeal in R (on the application of Compton) v Wiltshire Primary Care Trust [2008] EWCA Civ 749 ("*Compton*"), that the principles stated in *Corner House* were binding on this Court (paragraph 19). The Court also said that the opinion expressed by Waller LJ in *Compton* "that there should be no difference in principle between the approach to PCOs in cases which raise environmental issues and the approach in cases which raise other serious issues and vice versa" was a statement of general application: see paragraphs 17 and 18.

21. This approach was followed in Morgan v Hinton Organics (Wessex) Limited [2009] EWCA Civ107 [2009] Env LR 30 ("*Morgan*"). Responding to a submission that a different approach should be adopted in cases which fell within *Aarhus*, Carnwath LJ (as he then was) said:

> "44. These arguments raise potentially important and difficult issues which may need to be decided at the European level. For the present we are content to proceed on the basis that the Convention is capable of applying to private nuisance proceedings such as in this case. However, in the absence of a Directive specifically relating to this type of action, there is no directly applicable rule of Community law. The UK may be vulnerable to action by the Commission to enforce the Community's own obligations as a party to the treaty. However, from the point of view of a domestic judge, it seems to us (as the DEFRA statement suggests) that the principles of the

> Convention are at the most something to be taken into account in resolving ambiguities or exercising discretions (along with other discretionary factors including fairness to the defendant)."

22. Carnwath LJ drew the threads together in paragraph 47 of his judgment. The following points are of particular relevance for the purpose of this appeal:

> "ii) Certain EU Directives (not applicable in this case) have incorporated Aarhus principles, and thus given them direct effect in domestic law. In those cases, in the light of the Advocate-General's opinion in the Irish cases, the court's discretion may not be regarded as adequate implementation of the rule against prohibitive costs. Some more specific modification of the rules may need to be considered.
>
> iii) With that possible exception, 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 are at most a matter to which the court may have regard in exercising its discretion.
>
> iv) This court has not encouraged the development of separate principles for "environmental" cases (whether defined by reference to the Convention or otherwise). In particular the principles governing the grant of Protective Costs Orders apply alike to environmental and other public interest cases. 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."

23. The problem identified in paragraph 47(ii) of *Morgan* arose in *Garner*. In paragraphs 32 and 33 of my judgment in that case I said:

> "32. It is unnecessary to rehearse the authorities which deal with the application of *Corner House* principles. The threads are drawn together in *Morgan*'s case…. Although the principles must be applied flexibly, they are settled so far as this court is concerned. However, this court has not had to consider whether those principles do comply with the requirements of art 10a in a case where the Directive applies. It is common ground that the Directive has a direct effect in our domestic law. In such a case, the Court of Appeal recognised in *Morgan*'s case (see [2009] 2 P & CR 30 at [47](ii)) that some more specific modification of our domestic costs rules may be required.
>
> 33. There is no dispute that the decision to grant planning permission in the present case is a decision to which the Directive applies. The council required that an EIA should accompany the planning application. It seems to me, therefore, that we must modify the *Corner House* conditions in so far as it

> is necessary to secure compliance with the Directive, but only in so far as it is necessary to secure such compliance."

24. Judgment in *Garner* was given on the 29th July 2010. There have been a number of developments since that date, including the decision dated 24th August 2011 of the Aarhus Compliance Committee ACCC/C/2008/33 (concerning compliance by the United Kingdom) that the UK's regime for costs in *Aarhus* environmental cases was not compliant with *Aarhus*; the publication of the government's Consultation Paper CP16/11 *Costs Protection for Litigants in Environmental Judicial Review Claims* on 19th October 2011; the Government's Response to Consultation (CP (R) 16/11) on 28th August 2012; the coming into effect of CPR 45.41 on 1st April 2013; and the decision on the 13th February 2014 of the CJEU in European Commission v United Kingdom of Great Britain and Northern Ireland (supported by Kingdom of Denmark and another intervening) (Case C-530/11) [2014] 3 WLR 853 ("*Commission v UK*"), that the UK had failed to fulfil its obligations under the EIA and SEA Directives to ensure that judicial proceedings were not prohibitively expensive.

25. Against this background, the issue between the parties is a very narrow one. Both rely upon the fact that CPR 45.41 has come into effect. Mr. Eadie submitted that the previously settled principles in *Corner House* (and *Garner*, where relevant) had been amended by CPR 45.41 in respect of *Aarhus* judicial review claims, but there was a deliberate legislative decision (the CPR being secondary legislation made under powers contained in the Civil Procedure Act 1997, see paragraph 25 of *Morgan)* that the previously settled principles should not be amended in respect of statutory appeals and applications. He submitted that it was not a proper exercise of a judicial discretion to side-step a limitation that has been deliberately enacted in the CPR in order to give effect to an international Convention which has not been directly incorporated into our domestic law (see paragraph 22 of *Morgan*).

26. In support of his submission Mr. Eadie referred to a post CPR 45.41 decision, Austin v Miller Argent (South Wales) Limited [2014] EWCA Civ 1012, ("*Austin*") in which the Appellant had sought a PCO in her claim in private nuisance against the Respondent. The Court accepted that private nuisance actions were, in principle, capable of constituting procedures which fall within the scope of Article 9(3) (paragraph 21), but rejected the Appellant's submission that the EIA Directive was applicable (paragraph 35). Applying R v Home Secretary ex parte Brind [1991] 1 AC 696, Elias and Pitchford LJJ in paragraph 37 of their judgment rejected the Claimant's submission that the Court was obliged to exercise its discretion to grant a PCO where the failure to do so would involve a breach of *Aarhus*. In paragraph 39 the Court said:

> "39. In our view, therefore, the Article 9.4 obligation is no more than a factor to take into account when deciding whether to grant a PCO. It reinforces the need for the courts to be alive to the wider public interest in safeguarding environmental standards when considering whether or not to grant a PCO."

27. Mr. Eadie accepted that there was one respect in which the principles in *Corner House* had been modified: the fact that a Claimant has a private interest in the outcome of a challenge to an environmental decision falling within *Aarhus* does not, of itself, bar the Claimant from obtaining a PCO: see paragraphs 40-44 of *Austin*. If the existence of a private interest in the outcome of an application was a bar it would

often be impossible in practice to obtain a PCO in a section 288 case because of the need for the applicant to be a "person aggrieved" by the decision under challenge. However, the existence of a personal interest is a relevant factor in the exercise of the Court's discretion to grant a PCO (ibid). In *Austin* the Court considered that the "strong element of private interest in the claim" was one of the factors which pointed against the grant of a PCO; see paragraph 47. Subject to this exception, Mr. Eadie submitted that the Court could exercise its discretion to make a PCO in a statutory appeal or application falling within Article 9(3) of *Aarhus* (where no EU environmental Directive was applicable) only if it was satisfied that the remaining *Corner House* principles (i), (ii), (iv) and (v) were met. The Judge did not conclude (i) that the issues raised in this case were of general public importance, nor did she conclude (ii) that the public interest required that those issues should be resolved.

28. On behalf of the Claimant, Mr. Richard Drabble QC submitted that the coming into effect of CPR 45.41 on 1st April 2013 had removed the underlying premise upon which the principles in *Corner House* had been applied to environmental cases by this Court in *Buglife, Morgan* and *Garner*: that there should be no difference in principle between the approach to PCOs in environmental cases and the approach to PCOs in other public interest cases (see paragraphs 17 and 18 of *Buglife* and 47(iv) of *Morgan*). The CPR now drew a distinction between *Aarhus* cases and other public interest cases. This distinction was not considered by the Court in *Austin*, which was distinguishable in any event because it was a private nuisance claim and not a statutory application in which judicial review principles would be applied.

29. Mr. Drabble submitted that if the Secretary of State was correct the Court now had to exercise its discretion in circumstances where the availability of costs protection for a Claimant making a challenge falling within Article 9(3) of *Aarhus* to an environmental decision depended, not on the nature of the environmental decision, but simply upon the identity of the decision taker. If the decision to grant planning permission in the present case had been taken by the local planning authority, a challenge to that decision by the Claimant on identical legal grounds would have been by way of judicial review, and her claim would then have fallen within CPR 45.41.

30. More generally, if a planning application was decided by a local planning authority a legal challenge to that permission falling within *Aarhus* would have costs protection under CPR 45.41, whereas if the same application was called in by the Secretary of State for his determination, there would be no costs protection for a Claimant wishing to challenge the Secretary of State's decision on identical legal grounds, since a challenge to the latter could be made only by way of a statutory application under section 288: see section 284 of the 1990 Act. Mr. Drabble submitted that an inevitable consequence of the Secretary of State's argument that the Court's discretion had to be exercised in accordance with *Corner House* principles in cases where an EU environmental directive was not applicable was that the UK would continue to be in breach of *Aarhus*, a situation which CPR 45.41 was intended to remedy.

31. Mr. Drabble further submitted that none of the reasons given in the Government's formal response to the consultation *Costs Protection for Litigants in Environmental Judicial Review Claims* for excluding statutory appeals and applications from costs protection under CPR 45.41 (see paragraph 30 of the judgment) were applicable in the present case. While there was no permission filter for section 288 applications, the

Judge had concluded that this Claimant's application was arguable (see paragraph 40 of the judgment); the application was made by a private individual, not a developer; and it was a public law case against the Secretary of State and not a private law case against another party with limited financial resources. He accepted that some applications for PCOs in claims falling within Article 9(3) of *Aarhus* might raise wider policy issues which it would be inappropriate to resolve by the exercise of a judicial discretion, but he submitted that no such issue arose in the present case. The nature of the environmental challenge within Article 9(3) of *Aarhus* in this statutory application was identical to a challenge by way of an application for judicial review. In such a case the principles in *Corner House*, in particular principles (i) and (ii) (see paragraph 27 above), were no longer applicable.

Conclusions

32. I have not found this an easy case to resolve. The arguments are finely balanced. Mr. Eadie fairly conceded that if, as I have concluded (see paragraph 18 above), the Claimant's section 288 application does fall within Article 9(3) of *Aarhus*, there will on the Judge's findings (which are not challenged) as to the Claimant's means, be a breach of *Aarhus* if the discretion is not exercised so as to grant her a PCO. He also accepted that whether costs protection was available under CPR 45.41 for environmental challenges falling within Article 9(3) would, in many cases, depend solely upon the identify of the decision-taker. He recognised that there was no principled basis for that distinction if the object of the costs protection regime was to secure compliance with the UK's obligations under *Aarhus*.

33. Notwithstanding these implications of the Secretary of State's case, I have been persuaded that his appeal must be allowed. The coming into effect of CPR 45.41 is the sole basis upon which the Claimant submits that "the goal posts have moved" (my expression) to such an extent that this Court is no longer bound to apply *Corner House* principles to applications for PCOs in environmental cases falling within Article 9(3). Once it is accepted that the exclusion of statutory appeals and applications from CPR 45.41 was not an oversight, but was a deliberate expression of a legislative intent, it necessarily follows that it would not be appropriate to exercise a judicial discretion so as to side-step the limitation (to applications for judicial review) that has been deliberately imposed by secondary legislation. It would be doubly inappropriate to exercise the discretion for the purpose of giving effect under domestic law to the requirements of an international Convention which, while it is an integral part of the legal order of the EU, is not directly effective (see the *Brown Bear* case), and which has not been incorporated into UK domestic law (see *Morgan*).

34. For these reasons I would allow the appeal. I do so with reluctance. In the light of my conclusion on Article 9(3), and the decisions of the Aarhus Compliance Committee and the CJEU in *Commission v UK* referred to in paragraph 24 above, it is now clear that the costs protection regime introduced by CPR 45.41 is not *Aarhus* compliant insofar as it is confined to applications for judicial review, and excludes statutory appeals and applications. A costs regime for environmental cases falling within *Aarhus* under which costs protection depends not on the nature of the environmental decision or the legal principles upon which it may be challenged, but upon the identity of the decision-taker, is systemically flawed in terms of *Aarhus* compliance.

35. This Court is not able to remedy that flaw by the exercise of a judicial discretion. If the flaw is to be remedied action by the legislature is necessary. We were told that the government is reviewing the current costs regime in environmental cases, and that as part of that review the Government will consider whether the current costs regime for *Aarhus* claims should make provision for statutory review proceedings dealing with environmental matters: see the speech of Lord Faulks in the House of Lords Committee stage of the Criminal Justice and Courts Bill (Hansard, 30th July 2014: Column 1655). That review will be able to take our conclusions in this Appeal, including our conclusion as to the scope of Article 9(3), into account in the formulation of a costs regime that is *Aarhus* compliant.

Lady Justice Gloster:

36. I agree.

Lord Justice Vos:

37. I also agree.

ANNEX

Article 9
ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in riting, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

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

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to

challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article each Party shall ensure that information is provided to the public on access
to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.