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Planning Challenges and Environmental Claims by Interested Parties Under Aarhus: Still Prohibitively Expensive?

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Abstract

In 1998, the Aarhus Convention established an enhanced framework to encourage access to information, public participation in decision-making, and access to justice in environmental matters. According to Article 9(4), contracting parties are responsible for ensuring that members of the public can challenge decisions made by public or private bodies. Markedly, access to justice shall not be "prohibitively expensive". Although access to justice is guaranteed to different degrees across contracting States, in the United Kingdom, members of the public who intend to challenge a planning decision of a local authority encounter a prohibitive access to justice because of high litigation costs. In 2013, the EU Commission started proceedings against the UK since there was not a clear guidance for judges to make sure that access to justice was not prohibitively expensive. Subsequently, a fixed costs model was implemented, allowing interested parties to cap their litigation costs in the court of first instance by applying for a Protective Costs Order (PCO). In 2017, a hybrid costs model was introduced with the purpose of discouraging unmeritorious claims. It replaced the fixed costs model and resulted in renewed uncertainty for interested parties since judges had the discretion of varying litigation costs downwards and upwards when granting a PCO. In *Bertoncini* (2020), the High Court decided that an increase of costs by £10,000 was not prohibitively expensive. While the meaning of not prohibitively expensive costs is decided

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on a case-by-case basis, an increase in costs by £10,000 or more represents a significant financial risk for some members of the public. Furthermore, the fact that PCOs can only be granted in the court of first instance comes as a downside for interested parties who wish to take their case to higher appellate courts. Against this background, environmental claims and planning challenges continue to be prohibitively expensive for interested parties in the UK.

Keywords: Aarhus Convention, litigation costs, interested parties, environmental claims, justice

> "Nearly all other objectors had to raise funds by appeals to the public, coffee mornings, bring and buy sales and any other honest way of raising enough money to mount a respectable case against what they perceived to be a massive threat to the environment".
>
> – Brooke LJ[1]

I. Introduction

According to Article 9(4) of the Aarhus Convention, contracting parties *shall* ensure that members of the public can challenge decisions of public or private bodies before an administrative or judicial authority.[2] Particularly, procedures shall not be *prohibitively expensive*.[3] In 2005, the *Corner House*[4] rules were developed by the Court of Appeal, bringing greater flexibility to afford not prohibitively expensive justice in environmental litigation. Subsequently, amendments to the Civil Procedure Rules (CPR) were introduced in 2013, 2017, and 2018.[5] As a result, under CPR rr.45.41–45.45, courts are allowed to cap litigation costs by granting Protective Cost Orders (PCOs) to interested parties who bring judicial review actions before the court of first instance under Aarhus. PCOs may be granted in private law claims only if the appellant proves there is sufficient public interest.[6] While applicants can appeal

1 Brooke LJ, 'David Hall Lecture Environmental Justice: The Cost Barrier' (2006) 18(3) Journal of Environmental Law 343.

2 Convention on Access to Environmental Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 1998 (United Nations).

3 Article 9(4) Aarhus Convention.

4 *R. (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

5 Civil Procedure (Amendment) Rules 2013; Civil Procedure (Amendment) Rules 2017; Civil Procedure (Amendment) Rules 2018.

6 Stuart Bell and others, '10. Access to environmental justice and the role of the courts' in Bell Stuart and others (eds.), *Environmental Law* (9th edn., OUP 2017) 339-343.

a decision against the local planning authority without cost, interested parties can only appeal through judicial review.[7]

This article will argue that although the CPR rr.45.41–45.45 have afforded a degree of proportionality and predictability in litigation costs, the financial risk interested parties face throughout the process of judicial review and further appeals makes them prohibitively expensive. Despite the multiple existing challenges to bring judicial review actions before the court of first instance,[8] this work specifically focuses on the analysis of litigation costs for interested parties under the Aarhus Convention and the prohibitively expensive character of appeal processes concerning environmental claims against planning decisions made by public authorities. Firstly, an analysis of litigation costs in judicial review will be provided, followed by a commentary on the application of the Aarhus Convention and a discussion of possible reforms. Given the significant overlap between planning and environmental law, some statistics in relation to public funding in environmental law will be used to support the author's argument.

II. Litigation Costs as Prohibitively Expensive

For the most part, the hybrid costs model to grant PCOs introduced in the Civil Procedure (Amendment) Rules 2017 does not afford adequate protection to interested parties. When allowing a PCO, judges must follow a subjective (an individual's financial condition) and objective (the financial condition of an ordinary member of the public) approach to evaluate the financial circumstance of an applicant.[9] Nevertheless, numerous criticisms against the model have resulted in actions against the Secretary of State brought by environmental charities such as Client Earth, Friends of the Earth, and the Royal Society for the Protection of Birds.[10] In light of the 2017 amendments, the Secondary Legislation Scrutiny Committee concluded that the Ministry of Justice had not presented a convincing case to justify the implementation of the hybrid model.[11] Further, the amendments were challenged in *RSPB v SoS*[12] since they had been incorporated with the purpose

7 ibid.

8 ibid.

9 Civil Procedure (Amendment) Rules 2017, 45.41-5.

10 Lexis PSL, 'Protective costs orders (PCOs) in environmental matters' (*Lexis PSL*, 2021) <https://www.lexisnexis.com/uk/lexispsl/environment/document/393765/5B98-DVD1-F18C-T4X8-00000-00/Protective _costs_orders__PCOs__in_environmental_matters> accessed 2 March 2021.

11 *R. (on the application of Royal Society for the Protection of Birds) v Secretary of State for Justice* [2017] EWHC 2309 (Admin) (Case comment) 286.

12 *R. (on the application of Royal Society for the Protection of Birds) v Secretary of State for Justice* [2017] EWHC 2309 (Admin).

of discouraging unmeritorious claims despite that the Ministry of Justice had not provided any figures of the number of unmeritorious claims brought under Aarhus.[13] In this sense, the fear of "legal-aid abusers" and unmeritorious claims has been overstated, resulting in policies that reaffirm a prohibitively expensive approach.

Before the implementation of the hybrid model, it was questioned if the financial means of applicants should always be irrelevant, as established in CPR (Amendment) 2013.[14] Academic scholarship considered the scenario of a wealthy individual applying for a PCO who may be in a better financial position than the body that is being challenged.[15] Although the argument is compelling, the scenario was examined only at a superficial level. In 2003, it was reported that only 7% of a number of judicial review challenges involving environmental matters received public funding.[16] Similarly, in 2004, £7 million were spent in representations for public law cases of which only 10% concerned environmental protection.[17] Consequently, the multiple amendments to the CPR and the legal costs system in the UK have unduly given most weight to potential legal-aid abusers and unmeritorious claims. Against this background, the anticipatory protection procured to interested parties through PCOs and legal aid is insufficient, prompting prohibitive justice for interested parties who fall outside the 'wealthy appellant' paradigm.

In a similar way, the cost variations in PCOs introduced in the CPR (Amendment) 2017 have resulted in a prohibitively expensive access to justice within the meaning of Aarhus. The 2013 amendments capped the liability of individual claimants to £5,000 and £10,000 for all other claims in the court of first instance.[18] Nonetheless, judges now have the power to vary the limits upwards or downwards and even remove them if, in the court's opinion, the cost variation is not prohibitively expensive.[19] In *Garner*,[20] although the subjective approach applied was consistent with the *Corner House* rules, the High Court failed to regard the underlying purpose of Article 10(a) Directive 85/337/EEC (Environmental Impact Assessment Directive), whose objective is to give "the public concerned wide access to justice".[21] Subsequently, the Court of Appeal granted special status

[13] *RSPB v SoS* (n 11).
[14] Simon Ricketts, 'Heroes and villains – challenge and protest in planning: What's a developer to do?' (2014) 13 Supplement (Power to the People?) Journal of Planning & Environmental Law 17.
[15] ibid.
[16] Brooke LJ (n 1) 353, 354.
[17] ibid 350.
[18] Civil Procedure (Amendment) Rules 2013.
[19] Civil Procedure (Amendment) Rules 2017; CPR 45.44.
[20] *R. (on the application of Garner) v Elmbridge BC* [2010] EWCA Civ 1006.
[21] ibid; Article 10(a) EIA Directive.

to Environmental Impact Assessment (EIA) and Integrated Pollution Prevention and Control (IPPC) cases so it would be easier for interested parties to obtain a PCO.[22] By way of contrast, the current legal costs system does not appreciate whether the potential liability will be prohibitively expensive for an ordinary member of the public. Particularly, the complexity behind this issue can be easily noticed when thinking about the fact that most PCOs could be justified under an objective approach, where the financial circumstance of an interested party is measured in light of the financial condition of an ordinary member of the public.[23]

As the law stands, while there is a fixed starting point, the court's discretion gives way to significant legal uncertainty since there are not codified limits as to the maximum and minimum in costs variation.[24] In the recent case of *Bertoncini*,[25] the Queen's Bench Division doubled the cost liability of a claimant and decided that an increase of costs by £10,000 was not prohibitively expensive. Thereupon, regardless of the financial position of the appellant, importance must be given to the amount of costs the court of first instance may increase and still consider not to be prohibitively expensive under Aarhus. An ordinary member of the public might see this precedent as disincentivising since there are no upper or lower limits for costs variation. Even though it may not be prohibitively expensive for a particular claimant, the risk of facing an increase in cost liability of £10,000 or more has the potential of diluting the number of Aarhus Convention claims brought by interested parties.

Further, the ample discretion given to the courts undermines the principle of predictability in litigation costs, leaving interested parties in a disadvantaged position. In *Commission v UK*,[26] the EU started proceedings because of the prohibitively expensive nature of the UK's legal cost regime.[27] EU Member States are obliged to strike a balance between predetermined tariffs and judicial discretion to ensure proportionality and predictability in their legal costs systems.[28] While the CPR (Amendment) 2017 made provision for courts' discretion, in practice, it is difficult to reconcile the predictability of potential cost liability with the courts' wide

[22] Cain Ormondroyd, 'Access to environmental justice' (2011) 3 Journal of Planning & Environmental Law 253.

[23] ibid 254.

[24] Jorren Knibbe, 'New costs limits for environmental claims under the Aarhus Convention' (Guildhall Chambers, March 2017) <https://www.guildhallchambers.co.uk/uploadedFiles/Jorren2.pdf> accessed 12 May 2021, 4.

[25] *R. (on the application of Bertoncini) v Hammersmith and Fulham LBC* [2020] 6 WLUK 174.

[26] C-530/11 *Commission v. UK* EU:C:2014:67.

[27] Janke T Nowak, 'The right to "not prohibitively expensive" judicial proceedings under the Aarhus Convention and the ECJ as an international (environmental) law court: Edwards and Pallikaropoulos' (2016) 53 Common Market Law Review 1735.

[28] ibid 1735.

discretion. The most recent alleged breach brought against the UK in January 2021 by the Aarhus Compliance Committee (ACC) concerns, *inter alia*, the prohibitively expensive access to justice in Northern Ireland (NI).[29] The submission involved a litigant in person (LIP) with no income other than benefits who appealed against the construction of a ferry terminal and had an impending invoice of £3,000 unable to pay.[30] Even though there was a costs reduction under Aarhus, in the litigant's opinion, the Appeal Court (NI) did not consider her financial situation.[31] The UK has already submitted its observations in response to the ACC's communication and requested the Committee to find the case inadmissible.[32] Markedly, the UK emphasised that the Convention intends that access to justice is not prohibitively expensive and not that environmental litigation is free of costs.[33] Consequently, the legal costs system in the UK has left interested parties in an unfair position. The absence of affordable mechanisms undermines the rights guaranteed in the Convention[34] as it is the case in NI where litigation costs impair the ability of LIPs to continue the appeal process of their environmental claim.

For the most part, litigation costs are a crucial factor to provide interested parties fair access to justice in planning challenges and environmental claims as stated in Article 10(a) of the EIA Directive and Article 15(a) Directive 96/61/EC (IPPC Directive).[35] The CJEU's interpretation of not prohibitively expensive costs in the preliminary ruling of *Edwards*[36] sheds light on the wider implications of unaffordable litigation. In this case, the Supreme Court ruled that a costs order of £25,000 was not prohibitively expensive.[37] The Environment Agency, the Secretary of State for the Department for Environment, Food & Rural Affairs, and

[29] Aarhus Convention Compliance Committee Oral Submission Introduction by Christine Gibson, PRE/ACCC/C/2020/184 (United Kingdom and European Union) (31 December 2020) <https://unece.org/sites/default/files/2021-01/frCommC184_12.01.2021_statement.pdf> accessed 22 March 2021.

[30] Testimony from Christine Gibson (28 November 2017) <https://unece.org/DAM/env/p p/compliance/C2013-90/Correspondence_Communicant/frCommC90_28.11.2017_update/frCommC90_26.11.2017_att_3b_Testimony_Gibson_redacted.pdf> accessed 22 March 2021.

[31] Testimony from Christine Gibson (n 29).

[32] Letter from Grace Adisa-Solanke to Fiona Marshall, PRE/ACCC/C/2020/184 (United Kingdom and European Union) (22 January 2021) <https://unece.org/sites/default/files/2021-01/frPartyC184_22.01.2021_comments.pdf> accessed 22 March 2021.

[33] ibid; see also Ruddie, Brian K 'The Aarhus Convention in England and Wales' in Charles Banner (ed), *The Aarhus Convention: A Guide for UK Lawyers* (Hart Publishing 2015) 34.

[34] Áine Ryall, 'The Aarhus Convention: Standards for Access to Justice in Environmental Matters' in Stephen J Turner and others (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019) 123.

[35] Nowak (n 27) 1728.

[36] *R. (on the application of Edwards) v Environment Agency* [2013] UKSC 78; Nowak (n 26) 1735.

[37] *Edwards* [56-57]; Ruddie (n 32) 36, 37.

the first Secretary of State applied for a review decision to uphold a cost security for £88,000, which was finally reduced to £25,000.[38] Even though the costs award against the appellant did not represent a costs burden, the same cannot be said about any other appellant.[39] Nowak has accurately pointed out this problem by considering the case of individuals who earn below £15,000 per year.[40] He has warned about the eligibility conditions for acceding legal aid and how this impacts access to justice.[41] Even though his argument mainly focuses on the compliance of cost rules with EU Directives, he believes legal aid access in the UK is a major challenge.[42] In *RSPB v SoS*, the Ministry of Justice wished to discourage legal-aid abusers, yet as it has been demonstrated, individuals without income other than benefits, as it is currently happening in NI, are subjected to financial hardship throughout the process of judicial review and further appeals. On this basis, it can be concluded that the appeal process in Aarhus claims is manifestly unfair for interested parties. Beyond the court of first instance, appellants are left without adequate financial protection to seek judicial review of planning decisions under Aarhus. Effective remedies are not provided since access to the highest court of appeal in the UK is precluded by cost rules.

The introduction of the CPR (Amendment) 2013 made provision for fixed costs; however, appeals to the Court of Appeal and the Supreme Court cannot be done under CPR 45.41.[43] In regards to orders for costs, rule 46(1) of the Supreme Court Rules 2009 states that "the Court may make such orders as it considers just in respect of the costs of any appeal".[44] While a fixed starting point is available in the courts of first instance, ultimately, costs orders in the highest appellate stage fully depend on the discretion of the court. The principle of predictability is lost after the court of first instance, putting claimants at risk claimants of what has been described as a "nasty surprise"[45] or an impending invoice of £25,000. Moreover, the financial means of claimants to fund a legal challenge is discriminatory in practice since it does not consider dependents, special needs, or outgoings.[46] Although the hybrid model made provision for this, appeals are deemed to fail if there are no appellants

38 *Edwards* [57].

39 David Hart, 'The Supreme Court on "prohibitively expensive" costs: Aarhus again' (*UK Human Rights Blog*, 11 December 2013) <https://ukhumanrightsblog.com/2013/12 /11/the-supreme-court-on-prohibitively-expensive-costs-aarhus-again/> accessed 15 March 2021.

40 Nowak (n 27) 1741.

41 Nowak (n 27) 1738.

42 ibid 1740.

43 Ricketts (n 14) OP17.

44 Supreme Court Rules 2009, Rule 46(1).

45 Paul Stookes and Jona Razzaque, 'Community participation: UK planning reforms and international obligations' (2002) Journal of Planning & Environmental Law 793.

46 ibid 794.

willing to bear the financial risk. In a case of the Environmental Law Foundation, local residents faced threats of legal costs of £126,000 when they challenged a planning decision that allowed the development of 60 acres of greenfield land.[47] The reason why the appeal survived was the willingness of one resident to take the risk of losing her home.[48] Even though the action was successful, it is worth noticing the fundamental role that litigation costs played in this case. It motivated a group of objectors to withdraw legal proceedings except for one. Along the same lines, in *Edwards*, the action survived since a second claimant stepped in to take the financial risk while the first desisted because of further litigation costs.[49] Having to pay thousands of pounds is one of the reasons why individuals and community groups are unwilling to bring actions before the courts.[50] While the anticipatory protection afforded to interested parties has provided a degree of financial security, the financial risks that objectors face throughout the appeal process impair a fair access to justice when appellants are being forced to discontinue proceedings.

III. The UK and the Aarhus Convention

On several occasions, the ACC has reported on the UK's minimum and non-compliance of Article 9(4) in light of the prohibitively expensive access to justice it provides for the protection of the environment. Even though the nature of the ACC is non-judicial, non-confrontational, and consultative,[51] the recurrent non-compliance of the UK evinces the country's weak commitment to comply with Article 9(4). Significantly, the legal force of the Convent`` As a consequence, the findings of the ACC tend to be treated as soft law, putting into question if a contracting party has as a matter of fact breached its obligations under Aarhus.[52] By the same token, the Court of Appeal in *Venn*,[53] to some extent, downplayed the legal effect of the Convention. In the words of Sullivan LJ, "it would be doubly inappropriate" to use the court's discretion to give effect to an international Convention that has not been incorporated into domestic law.[54] Further, the UK recently received a third communication from the ACC concerning the prohibitive

47 ibid (unreported case).

48 ibid.

49 Hart QC (n 39).

50 Stookes (n 45) 763; Brooke LJ (n 1) 345.

51 Gor Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice' (2020) 9(2) Transnational Environmental Law 211; Ryall (n 34) 134.

52 ibid 216, 217.

53 *Venn v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539.

54 Gayatri Sarathy, 'Costs in Environmental Litigation: *Venn v Secretary of the State for Communities and Local Government*' (2015) 27 Journal of Environmental Law 316.

access to justice in NI. Still, the UK firmly reinstated its position as being in compliance with the Convention. Nevertheless, even though there is an alleged compliance, it must be underscored that since 2011, the UK has been positioned in the lower spectrum of compliance.[55] The UK government continues defending this position, although the current legal costs system and case law make the appeal process in judicial review prohibitively expensive for interested parties.

In *Commission v Ireland*,[56] the CJEU ruled that having to pay court fees in cases involving Aarhus claims was not in breach of the Union's law.[57] Nevertheless, it has been argued that participation fees in disputes concerning environmental matters contravenes the spirit of the Convention.[58] Early engagement from civil society in decision-making processes must be given due importance.[59] For the most part, the chilling effect arising from adverse costs orders and a claimant's own legal expenditure are two main reasons why interested parties are discouraged from challenging planning decisions. Wide access to justice should allow any interested party to bring proceedings regardless of their financial circumstance.[60] Contrarily, the protection of the environment will be at the expense of the "wealthier-than-usual" individuals,[61] limiting the effectiveness of the Convention and impairing the practical relevance of Article 9(4) and (5).[62] According to the Convention's preamble, "the right to live in an environment adequate to [an individual's] health and well-being" and "to protect and improve the environment for the benefit of present and future generations" is a right that pertains to "every person", i.e. any interested party. Nonetheless, the design of a legal costs system proves inconsistent with the overall aim of the Convention when access to justice results prohibitively expensive to some objectors.[63]

In practice, higher administrative authorities often decide on the development of large-scale construction projects, leaving interested parties in a weak position *vis-á-vis* the wider public benefit of the development.[64] While some EU countries allow the exemption of court fees to individuals and ENGOs in certain

55 Samvel (n 51) 225.

56 C-216/05 *Commission v. Ireland* ECLI:EU:C:2006:706.

57 Jan Darpö, 'Effective Justice?: Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union' (*European Commission*, 11 October 2013) <https://ec.europa.eu/e nvironment/aarhus/pdf/synthesis%20 report%20on%20access%20to%20justice.pdf > accessed 5 May 2021, 39.

58 ibid.

59 ibid.

60 ibid 39, 40.

61 Knibbe (n 24) 5.

62 ibid; Ryall (n 34) 124.

63 Knibbe (n 24) 5.

64 Darpö (n 58) 10.

environmental cases, others, such as the UK, have gained special international attention because of the high court fees underlying environmental litigation.[1] Even though CPR rr.45.44(3) and (4) have incorporated the CJEU's approach to litigation costs, such rules offer interested parties limited guidance on the likely outcome of their case and legal expenditure.[2] Even more worrying is the fact that there is not a specific procedure for interested parties to challenge the level of costs limits. Consequently, by seeking a variation in the applicable cap, the level of costs of an individual case can be increased at the final stage of court proceedings, putting interested parties at financial risk in their litigation process from beginning to end.[3] According to the ACC, the fairness requirement in Article 9(4) primarily focuses on the claimant and not the public authority. Against this background, it is worth questioning if such financial risk is fair for interested parties, especially for individual claimants. At the surface level, the practical implications to bring a case before the court of first instance produce a dissuasive effect on potential claimants; however, once claimants have engaged in a planning challenge, they find themselves walking on thin ice.

The degree of compliance with the Convention by a contracting party can vary as a result of uncertainty in litigation costs and judicial discretion. In the *Irish costs* case,[4] it was decided that the possibility of not putting in place a costs order by way of judicial discretion did not meet the requirement of not prohibitively expensive access to justice under Aarhus. The mere possibility of exempting claimants from paying their litigation costs and other legal expenditures on a case-by-case basis could not be equated with a not prohibitively expensive access to justice.[5] It follows that there is not an easy answer to ensure minimum uncertainty to interested parties. Minimum uncertainty or zero uncertainty would only be achieved with a complete relief of costs, a scenario far from reality. While in Sweden, the challenge of environmental decisions is free of costs, the costs of judicial proceedings in the UK continues to be a barrier for environmental justice.[6] In 2008, the ACC concluded that the UK was in breach of Article 9(5) as a result of the absence of a clear and legally binding direction for the legislature and the judiciary to guarantee not prohibitively expensive access to justice.[7] After legal reforms, the implementation of the hybrid costs model in 2017 left the law on litigation costs in a similar state. Even though there is a clear starting point,

1 ibid 17.
2 Knibbe (n 24) 4.
3 ibid.
4 C-427/07, *Commission v. Ireland*, ECLI:EU:C:2009:457.
5 Darpö (n 58) 38.
6 ibid 17.
7 Ryall (n 34) 136.

the variation in cost limits once again has resulted in considerable uncertainty for interested parties who genuinely wish to protect the environment. Moreover, according to Article 3(8), national courts are allowed to "award reasonable costs in judicial proceedings"; however, the reasonableness behind adverse costs orders and financial risks is far from clear-cut.

Although authoritative interpretations have been developed, the lack of specific standards to define not prohibitively expensive access to justice has left a broad margin of interpretation to the practical meaning of the Convention's provision.[1] As a result, the effectiveness and practical implementation of Article 9(4) and (5) are largely influenced by the national arrangements of each contracting State and the character of its legal costs system.[2] Notably, the standards to achieve full compliance of Article 9(4) and (5) must be articulated with more specificity. Loose ends not only have a negative impact on the prohibitively expensive nature of environmental litigation but also have given way to other procedural hurdles, namely limited judicial standing and undue delays with ambiguous wordings such as "wide" access to justice and "timely" review procedures as stated in Article 9(4).[3] In addition, regarding litigation costs, it is useful to raise the question on the practical meaning under Aarhus of the wording "judicial review procedures" and the access afforded to members of the public or, more specifically, to interested parties. In the UK, while there is a degree of financial protection to interested parties in the court of first instance, the limited access to judicial review at the higher appellate courts, namely the Court of Appeal and the Supreme Court, gives the impression of placing such courts beyond the scope of the 'judicial review procedures' that are generally referred to in Article 9. Further clarification by Parliament in this particular matter would be of great convenience to an interested party when assessing the financial risks attached to their individual case and the potential of the case to be appealed after a decision has been reached in the High Court.

As a last point, the legal costs system has key implications in the public interest character of Aarhus claims. In *Venn,*[4] even though the applicant had a private interest, Lang J in the High Court considered the fact not to be of major importance since the claim clearly was an environmental one.[5] Nonetheless, in *Austin v Miller,*[6] the Court of Appeal refused to make a PCO since the appeal

1 ibid 125.
2 ibid.
3 ibid.
4 *Venn v Secretary of State for Communities and Local Government* [2013] EWHC 3546 (Admin).
5 Sarathy (n 55) 315, 316.
6 *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012.

involved a strong element of private interest.[7] Although the judgment of Lang J is not good law anymore as it was reversed in the Court of Appeal, it is useful to discuss further the legal weight given to the environmental matter engaged in the planning challenge in *Venn*. The public-private interest divide of applicants and appellants is a decisive factor for a judge to grant a PCO. In effect, the environmental dimension of an appeal is likely to be sidelined by the public-private interest divide. As a consequence, individuals who apply to quash a planning permission that has an inherent private interest are likely to be subjected to prohibitively expensive access to justice. In this regard, it is worth noticing how as a case moves forward throughout the appeal process, from the court of first instance to the Supreme Court, the number of appellants decreases because of litigation costs.[8] Arguably, the public interest loses force when an appeal originally brought by a group of individuals reaches the highest appellate stage with a single individual bearing the entire financial burden. Ultimately, the design of the legal costs system in the appeal process affects the character of an appeal. At the higher appellate stage, the only appellant left may give the impression of having a private interest instead of a public one, and thus, be denied adequate protection.

IV. Towards Reform

Discussions on the reform of legal costs systems have been put forward since 1999 with the attempt by Mr Justice Dyson to issue the first PCO.[9] Nonetheless, as it has been noted, the financial risks faced by interested parties in appeal proceedings is manifestly unfair. Sullivan LJ in *Venn* stated that "the [Aarhus] Convention is arguably broad enough to catch most, if not all, planning matters".[10] Accordingly, it is understood that the Convention has and will continue influencing litigation costs in the appeal process of planning challenges and environmental claims. In the years to come, planning law may become less prohibitively expensive by the impact of the Convention and the increasing pressure by civil society to afford environmental justice. It should be noted that legal precedent exists in other jurisdictions. In *New Zealand Maori Council v AG of New Zealand*,[11] the Privy Council decided not to award a costs order against the Maori Council since the proceedings concerned "an important part of the heritage of New Zealand".[12] Even though this case is only persuasive, the judgment reflects on the necessity to hear and decide

7 ibid.
8 See *Edwards* (n 34); Stookes (n 45).
9 Brooke LJ (n 1) 353.
10 *Venn* (n 52) [11]; Sarathy (n 55) 317.
11 New Zealand Maori Council v Attorney General of New Zealand [1994] 1 AC 466.
12 Brooke LJ (n 1) 347.

cases whose fundamental motive is the public interest,[13] but more importantly, to ensure effective protection to the environment and a country's natural heritage.

With respect to public funding, in *Steele Ford and Newton v CPS (No. 2)*,[14] the House of Lords decided that a court could not order the payment of litigation costs from the central funds even if it considered it to be just. Despite recommendations by former judges to give courts the power to order the payment of costs of public law litigation with sufficient public interest from the central funds, these have been ignored for almost 20 years.[15] Therefore, it is for Parliament to discuss and amend the costs rules, namely rule 46(1) of the Supreme Court Rules 2009, in light of public interest cases relating to planning challenges. Alternatively, Parliament could make provision for the application and grant of PCOs in the Court of Appeal and Supreme Court. Consultation papers would have to be produced to assess the impact of potential reform. Still, as it has been discussed, public funding concerns are ill-founded. It follows that there are workable proposals to afford fairer access to justice to interested parties to seek judicial review of planning decisions affecting their environmental rights as guaranteed under Aarhus.

V. Conclusion

The CPR (Amendments) 2013, 2017, and 2018 have afforded a degree of financial protection to interested parties in light of Article 9(4) of the Aarhus Convention.[16] Before the first amendments were introduced, there was neither predictability nor proportionality as to litigation costs for claimants undertaking planning challenges. Against this background, significant progress has been achieved in the last years as a result of the radical reform in the UK's legal costs system as a result of the amendments.[17] Still, judicial review of planning decisions remains prohibitively expensive. The discretion given to the courts after the 2017 amendments has left interested parties without sufficient protection. For the most part, appellants discontinue proceedings *vis-à-vis* financial hardship and significant uncertainty as to the outcome of their case. Comparatively, the UK's minimum compliance with the Aarhus Convention has left interested parties in a manifestly unfair position. The fact that PCOs cannot be granted in the highest appellate courts is one of the many difficulties underlying the limited effectiveness of the Convention in the UK. Thereupon, planning challenges and environmental claims are fair to the extent an interested party is willing to bear the financial burden of

[13] ibid; see also *Oshlack v Richmond River Council* [1998] HCA 11.
[14] *Steele Ford and Newton v CPS (No 2)* [1994] 1 AC 22.
[15] Brooke LJ (n 1) 346.
[16] Darpö (n 58) 12.
[17] Ormondroyd (n 22) 255.

litigation and does not wish to appeal against the decision of the court of first instance. Markedly, while access to justice remains prohibitively expensive there is scope for legal reform.