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Country Report: United Kingdom

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Introduction

This Country Report on the United Kingdom focuses on three main issues. First, a report of the Aarhus Compliance Committee regarding the United Kingdom's alleged non-compliance with article 9 of the Convention. Secondly, the publication of the *White Paper on the Reform of the English Water and Sanitation Market*. Thirdly, the case of *Badger Trust v The Welsh Ministers* regarding halting badger culling in Wales. Each of these developments is considered in turn below.

Access to Environmental Justice: United Kingdom's Breach of Article 9 of the Aarhus Convention

Overview

On 18 September 2010, the Aarhus Convention Compliance Committee released its *Final Report*[1] regarding the United Kingdom's (UK) alleged non-compliance with the Convention. The findings focused on the judicial review procedures in England and

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[1] Aarhus Convention Compliance Committee, *Findings and Recommendations of the Aarhus Convention Compliance Committee with Regard to Communication* ACCC/C/2008/3 *Concerning Compliance by the United Kingdom* (2010) (*Final Report*).

Wales and the ability of individuals and organisations to challenge environmental decision-making. The publication of the *Final Report* comes a little over a year after the release of the *Sullivan Report*,[2] which found that substantial reforms were required in England and Wales to ensure broad based access to environmental justice.[3]

Background of the Complaint

In December 2008, the complainants ClientEarth, the Marine Conservation Society and an individual Robert Lattimer submitted a communication to the Aarhus Convention Compliance Committee alleging that the UK was in non-compliance with the article 9 of the *Aarhus Convention*.[4] Specifically, the complainants argued that the judicial review procedures in England and Wales precluded their challenge of a licence allowing the disposal and protective capping of dredge materials from Port Tyne to an existing off shore disposal site. The complainants argued that in light of this failure, the UK was in breach of their obligations under article 9, paragraphs 2, 3, 4 and 5.[5] Article 9 creates a broad based right of access to environmental justice and enables individuals and Non-Government Organisations (NGOs) to challenge environmental decision making and alleged breaches of environmental legislation in circumstances where their rights have been impaired or they possess a 'sufficient interest' in the subject matter. The English Courts have held that an interest will be deemed sufficient in light of the seriousness of the alleged illegality and the strength of the case.[6]

Specifically, the complainants alleged that current legislation and procedures in England and Wales established barriers to accessing environmental justice as required by article 9 of the *Aarhus Convention*. It was asserted that in light of the

[2] Report of the Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales* (May 2008) (*Sullivan Report*).
[3] Ibid.
[4] *Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters* (1998) 38 *ILM* 517 (*Aarhus Convention*).
[5] Final Report (supra note 1) at 1-3.
[6] *R v Secretary of State for Foreign and Commonwealth Affairs; ex parte World Development Movement* [1995] 1 All ER 611. See further: P. Birnie, I. Boyle and C. Redgwell, *International Environmental Law and the Environment* (2009) 3rd edn, OUP, at 293-294.

prohibitive cost and restrictive time limits of judicial review, the absence of individual rights of actions for breaches of environmental offence and the lack of substantive review procedures, the UK failed to comply with the obligations imposed by article 9.[7]

The submissions of the communicants raised a number of important issues regarding access to environmental justice, specifically with respect to England and Wales. Comparatively, the UK Courts are an expensive forum to challenge breaches of environmental legislation. It is estimated that a single hearing day can cost in excess of £100,000. It has been argued that this level of cost combined with the operation of the 'looser pays principle' presents a substantial challenge and deterrent for individuals and organisations wishing to challenge environmental decision making.[8] Moreover, public funds are rarely allocated to support environmental applicants. The Coalition for Access to Environmental Justice (CAJE) highlighted this point in their amicus brief arguing that under the current rules, organisations were precluded from receiving legal aid and that whilst it was technically available for individuals in public interest cases, it was rarely awarded. Consequently, individuals and organisations wishing to challenge environmental decision-making are generally required to fund their actions through private means. The CAJE also noted in their submissions that mechanisms such as conditional fee agreements and protective cost orders were of limited practical value in the area, given the lack of damages and the generally high level of caps that have been imposed.[9]

The Final Report

The Compliance Committee, in its *Final Report*, determined that the UK had failed to ensure that 'the costs for court procedures subject to article 9 [were] not prohibitively expensive' especially in light of the failure of either the legislature or the judiciary to take measures to address this concern.[10] The Committee held that this failure was specifically a breach of article 9(4) of the *Aarhus Convention*, which requires parties

[7] Final Report (supra note 1) at 3.
[8] A. Vaughn, 'High UK Legal Costs Deter Challenges to Environmental Damage, UN Warns' *The Guardian* (London, 27 August 2010) (available at http://www.guardian.co.uk/environment/2010/aug/27/legal-costs-environment-un).
[9] *Final Report* (supra note 1) at 6-14.
[10] *Final Report* (supra note 1) at 30.

to: 'provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.'[11]

The Committee also found that the failure of the UK Courts to provide defined timeframes for the filing of judicial review applications was another failure under article 9(4). Moreover, it held that this failure meant that the UK was also in breach of article 9(3), which requires member countries to ensure that its citizens have access to administrative and judicial procedures to challenge environmental decision-making. The Committee also determined that the Court system in England and Wales was as a whole in contravention of article 9(5) as it had failed to 'remove or reduce financial barriers to access to justice'.[12]

In light of these failures, the Committee recommended that the UK review its present cost structure for environmental litigation and undertake 'practical and legislative measures' to overcome the present barriers. In particular, these measures are to be designed to ensure the fair, equitable and affordable access to environmental justice and enable the creation of a 'clear and transparent' framework.[13]

The UK Government's Response

In response to the Committee's initial draft Report, the Department of Environment, Food and Rural Affairs (DEFRA) asserted that the Civil Procedure Rule Committee was already drafting rules regarding Protective Cost Orders (PCO), following the release of the Sullivan Report, and that it aims to implement these reforms by April 2011. It also asserted that these reforms would address some of the Committee's areas of concern. It specifically noted that:

> 'This codification will give added clarity and transparency to the law and the procedure for making an application for a PCO, thereby providing certainty for applicants at the outset of the proceedings that the costs they will face if their claim

[11] *Final Report* (supra note 1) at 30-31.
[12] *Final Report* (supra note 1) at 31-32.
[13] *Final Report* (supra note 1) at 31.

fails will not be prohibitively expensive and certainty as to the modest costs of applying for a PCO'.[14]

With respect to the Committees findings regarding the time allowed for filing judicial review applications, the Government asserted that the requirement to file applications 'promptly' was not in breach of articles 9(4) and 3(1). It also argued that this was not 'inherently' unfair and that in certain circumstances delay may have broader implications of unfairness. However, in spite of this statement, the Government has committed itself to giving further consideration to the starting point of application time limits.[15]

Importantly, three days prior to the release of the *Final Report*, DEFRA released its own report containing an outline of the measures the British Government had taken to implement the *Aarhus Convention*. The report was open for public comment until 17 November 2010.[16] Its findings will provide an interesting and hopefully formative point for future discussion.

Way Forward

Access to environmental justice is a central issue for the attainment of precautionary and sustainable decision-making. The report of the Aarhus Compliance Committee demonstrates that established and formalised legal structures may fail to enable the realisation of the rights the systems they seek to protect. It is clear, in light of the findings of the Committee that all jurisdictions must consider whether there are structural barriers to individuals or organisations seeking the judicial review of government decision-making. As will be demonstrated below in the example of the *Badger Trust v Welsh Ministers* case, these types of applications provide an important accountability mechanism for government and have the capacity to ensure compliance with environmental legislation. Compliance with article 9 therefore, must be viewed as a priority amongst Member States.

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[14] *UK Response to Draft Compliance Committee Findings in Cases 2008/27 and 2008/27*, dated 22 September 2010.
[15] Ibid.
[16] DEFRA, 'Views Sought on Public Access to Information on Environmental Decision Making' (available at http://ww2.defra.gov.uk/news/2010/10/15/aarhus-news/).

DEFRA White Paper on the English Water Market

Overview

In September 2010, DEFRA announced it would be releasing a *White Paper* in 2011 on the future regulation of the water industry in England.[17] The *White Paper* will focus on the future of the industry in terms of 'resource needs, charging and affordability'. It will specifically consider: water resource security; improving 'choice and competitive opportunities, driving innovation, improving consumer service, and value'; developing a modern 'regulatory' system designed to protect consumers and reduce regulatory burdens; ensuring 'fair and affordable water charges'; and 'incentivising water conservation'.[18]

England (and Wales) privatised their water supply in 1989. Since then, the private water suppliers have been regulated by the Water Services Regulation Authority (Ofwat) and a number of versions of the *Water Act*, the latest being the *Water Act* (2003). In conjunction with this *White Paper*, DEFRA is also conducting a review of the regulator, Ofwat, to assess its function and success in protecting water consumers within the market. DEFRA has indicated that these conclusion will be incorporated in the final *White Paper*.[19]

Background to the White Paper

In 2009, two reports were released on 'competition and innovation' in the water and sanitation services sectors of England and Wales. The *Independent Review of Competition and Innovation in Water Markets* (*Cave Report*), undertaken by Professor Michael Cave, surveyed the current levels of competition and innovation in the English and Welsh water markets. It proposed mechanisms through which to

[17] DEFRA, 'Water White Paper' (available at http://ww2.defra.gov.uk/environment/quality/water/whitepaper/).
[18] DEFRA, 'Future Water Policy "an issue that affects all of us", says Environment Minister' (available at http://ww2.defra.gov.uk/news/2010/09/09/future-water-policy/).
[19] (DEFRA, 'Ofwat Review will Consider Future Challenges Facing Industry' (available at http://ww2.defra.gov.uk/news/2010/08/26/ofwat-review/; and DEFRA, 'Water White Paper' (available at http://ww2.defra.gov.uk/environment/quality/ water/whitepaper/).

improve these levels, in light of the challenges posed by climate change and population growth. The *Cave Report* found that there was a need to adjust the current regulatory structures in order to increase innovation and market integration. It recommended the increased adoption of market mechanisms and the reform of current abstraction licensing and discharge consent regimes.[20] In Wales, an additional report was undertaken by Anna Walker entitled, *The Independent Review of Charging for Household Water and Sewerage Services* (*Walker Report*). The *Walker Report* examined the charging structure for water and sanitation services in Wales. It concluded that there was a need to reform the current pricing structure in order to ensure that the market had the adequate capacity to adapt to future needs, including climate change. The Report also noted the importance of adopting efficiency measures throughout the network and again the need to reform the current abstracting licensing and discharge consent regimes.[21] The DEFRA *White Paper* will form part of the coalition's commitment to implementing the *Cave Report* and the *Walker Report*, in as much as the Cave Report applies to the English water market.

Community Consultation and Future Outcomes

In terms of gauging the direction of the *White Paper*, DEFRA has released a community survey, which asks consumers four questions regarding their perspectives on 'possible reforms of the water industry'. The questions are broadly focused on the issues faced by individuals and the community by water supply, water conservation proposals, water payments and proposals for future government priorities.[22] Whilst these are clearly aimed at promoting diverse responses, it is also questionable whether these questions will prompt individual consumers and households to specify their concerns regarding their individual interaction with private water suppliers.

[20] M. Cave, *Independent Review of Competition and Innovation in Water Markets: Final Report* (April 2009), at 1-14.
[21] A. Walker, *The Independent Review of Charging for Household Water and Sewerage Services* (April 2009), at 1-18.
[22] DEFRA, 'Water White Paper Survey' (available at http://www.surveymonkey.com/s/Water-WP).

In terms of the future direction of the English water market, it is clear that this review forms part of the continuing reform of the privatised water market. The regulation the of private sector has heavily evolved over the past twenty years to increasingly include a greater consumer and environmental focus. The *Cave Report* contained a number of important challenges to the Government and clearly the success of the *White Paper* must be judged by its ability to address these recommendations. The water market of England and Wales provides an important lesson and source of comparative study for states embarking on, or who have already embarked on, the path of water privatisation. It is hoped that the *White Paper* provides both direction for reform within the English water market and direction to other nations within the privatised water community.

Badger Trust v The Welsh Ministers[23]

Overview

In June 2010, the Court of Appeal of England and Wales considered an application by the Badger Trust to halt a badger cull in Wales. The purpose of the cull was to decrease current badger populations in order to mange the threat posed by badgers infecting cattle herds with bovine turberculosis (TB). The cull was initiated by the Welsh parliament under the *Tuberculosis Eradication (Wales) Order* (2009) pursuant to the *Animal Health Act* (1981) and formed part of a broader strategy aimed at managing TB in Welsh cattle. Bovine tuberculosis arises from cattle being infected by M bovis, a virus carried by a number of species, including badgers. The proposed cull was supported by the findings of the *Intensive Action Pilot Area* (IAPA), a study based upon the North Pembrokeshire badger and cattle populations.[24]

TB infections in Welsh cattle are a serious problem, having been described by the Government's Chief Veterinary Officer as being 'out of control and unsustainable'.[25] Infected animals are able to pass the disease to other species, including humans, and therefore infected herds are required to be destroyed. It is estimated that over

[23] [2010] EWCA Civ 807 (*Badger Trust case*).
[24] *Badger Trust case* (supra note 19) at 11.
[25] *Badger Trust case* (supra note 19) at 12.

the past ten years, the Welsh Government has paid over £100 million in compensation to cattle farmers for the losses associated with Bovine TB.[26]

Protection of Badgers Act (1992)

The *Badger Trust case* concerned a 'non-selective' cull of badgers across Wales. The cull was however complicated by the status of badgers as a protected species. Section 1(1) of the *Protection of Badgers Act* (1992) provides that '[a] person is guilty of an offence if, except permitted by or under the Act, he willfully kills, injures or takes, or attempts to kill, injure or take, a badger'. Consequently, it was argued that the authorities were required to justify any action that may fall under the exception category of the Act.[27] The Badger Trust in their submissions acknowledged the need to cull badgers in certain circumstances. However, it argued that in this instance that the Order was not underpinned 'by robust and up to date scientific evidence' demonstrating that the cull would achieve the 'legitimate aim' of preventing bovine TB.[28]

The Cull and Application for Judicial Review

On 13 January 2009, the badger cull commenced over an area of 288 square kilometers focused but not contained to North Pembrokshire. The Badger Trust applied to the Queen's Bench Division of the Administrative Court, arguing that the *Tuberculosis Eradication (Wales) Order* (2009) was invalid under the *Animal Health Act.* The application was rejected at first instance and the Badger Trust appealed the matter to the Court of Appeal. The issue on appeal was whether the trial judge had erred in finding that a 'substantial reduction' under the *Animal Health Act* meant that it was 'more than merely minor or trivial' and whether discretion under the Act could be exercised without considering whether the incidence of disease reduction and the extent of the badger cull would achieve this outcome.[29] Also at issue was the validity

[26] See further: Welsh Assembly Government, 'Bovine TB' (available at http://wales.gov.uk/topics/environmentcountryside/ahw/disease/bovinetuberculosis/?lang=en; and *Tuberculosis Eradication (Wales) Order* (2009).
[27] *Badger Trust case* (supra note 19) at 26-28.
[28] *Badger Trust case* (supra note 19) at 21.
[29] *Badger Trust case* (supra note 19) at 23-24.

of the application of the order to the whole of Wales based on the findings of the *IAPA*.[30]

Court of Appeal

The Court of Appeal unanimously upheld the appeal. Lord Justice Pill held that the Assembly Government had erred making an order for the entirety of Wales based upon the findings of *IAPA*, noting that, 'It cannot be said that the incidence of bovine TB is evenly spread throughout Wales…Evidence which, in my view, would justify an order for the IAPA in North Pembrokeshire does not justify the Order made [covering] all of Wales'.[31] Consequently, Lord Justice Pill held that the *IAPA* only supported action in the area of the *IAPA*.[32] His Lordship allowed the appeal and quashed the order on this basis. Importantly, his Lordship also noted that despite the statements made by the Minister to the public during the proceedings, that it was not an option for the Welsh Assembly, in light of the Court's judgment, to 'immediately make a fresh order' solely for the *IAPA* area.[33]

The decision of Lady Justice Smith also held the order to be invalid. In her judgment, Lady Justice Smith questioned whether the proposed 9 per cent reduction in bovine TB, which was to be achieved by the cull, could be considered a 'substantial reduction' under section 21 of the *Animal Welfare Act*.[34] In consideration of this issue, Lady Justice Smith asserted that 'if Parliament had intended that a reduction of that order should suffice, it would have required only that the minister be satisfied that there would be a 'reduction' in the incidence of disease'; and that a 'reduction' would have implied that there must be something more than a trivial or insignificant effect'.[35] She further held that it was important to consider 'the nature and extent of killing a large number of badgers' and whether the benefits from the cull would override the

[30] *Badger Trust case* (supra note 19) at 69.
[31] Ibid.
[32] Ibid.
[33] *Badger Trust case* (supra note 19) at 72.
[34] *Badger Trust case* (supra note 19) at 80-84.
[35] *Badger Trust case* (supra note 19) at 84.

adverse effects. Consequently, Lady Justice Smith found that the Minister had failed to consider these concerns in its submissions.[36]

Judicial Review and Conservation

The *Badger Trust case* is an important decision for biodiversity conservation. The decision of the Court of Appeal demonstrates both the weight of species conservation legislation and the willingness of the courts to consider non-economic factors when determining the validity of Government action. It also highlights the need for government agencies to provide equal weight to both economic and environmental concerns in their decision-making processes. The case also demonstrates the importance of individuals and organisation being able to challenge environmental decision-making. Furthermore, in light of the above mentioned *Final Report* of the Aarhus Compliance Committee, it also highlights that the ability for all individuals and organisations to be able to seek environmental justice is a matter of continuing importance and concern.

[36] *Badger Trust case* (supra note 19) at 91-92.