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The Aarhus Convention in England and Wales

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The influence of the Aarhus Convention on the law in England and Wales has been significant and continues to grow. It is remarkable for a number of reasons.

The main body of the Convention does not contain a single limit value, pollution reduction target or substance ban. Its focus is procedural rather than substantive procedural rights.[2] Yet since the Convention was ratified we have seen developments that have influenced the way in which environmental law is both written and applied in England and Wales. This includes the entrenchment of public rights of access to a wide range of environmental information held by public authorities throughout England and Wales, the cementing of public involvement in environmental decision-making at various levels and the development of a significant body of case law on access to justice, notably in relation to costs.

Drivers for these changes have been both the domestic and European courts, as well as EU legislation adopted to implement aspects of the Convention (the EU is also a Party to the Convention). These drivers are not in themselves surprising. There are plenty of examples of them having a significant impact on the law of England and Wales in other areas, both environmental and non-environmental. What is remarkable is the way in which the Convention has enabled the influence of others, most notably the Aarhus Convention Compliance Committee, environmental non-governmental organisations (NGOs) and individual members of the

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[2] Upon signature in 1998 and ratification in 2005, the United Kingdom's declaration confirmed the view that the Convention provides procedural rather than substantive environmental rights: 'The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the "right" of every person to "live in an environment adequate to his or her health and well-being" to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.' Depositary notification C.N.124.2005.TREATIES-2(XXVII.13).

public, to also have a significant impact on the ways in which environmental law in England and Wales is shaped.

As the Supreme Court noted in *Walton*,[3] 'the Convention is not part of domestic law as such (except where incorporated through European directives)'.[4] The effect of this, where no directly effective EU law rights are engaged, was explained by the Court of Appeal in *Morgan*:[5]

> For the purposes of domestic law, the Convention has the status of an international treaty, not directly incorporated. Thus its provisions cannot be directly applied by domestic courts, but may be taken into account in resolving ambiguities in legislation intended to give it effect.[6]

The influence of the Compliance Committee's findings is persuasive but not binding, reflecting its non-judicial status. In *Walton*, Lord Reed held that 'the decisions of the Committee deserve respect on issues relating to standards of public participation'; sentiments echoed in the opinion of Advocate-General Kokott in *Edwards*,[7] which drew heavily on the Compliance Committee's findings. More recently, however, the Court of Appeal has appeared reluctant to follow the Compliance Committee unquestioningly. In *Evans*[8] it held:

> The Committee's view and concern is undoubtedly worthy of respect. But, even if it had reached the view that the *Wednesbury* approach does not enable the court to assess the substantive and procedural legality of the Secretary of State's decision, its view would have had no direct legal consequence.[9]

It is also notable that similar views were expressed by the Court of Appeal with regard to another UNECE body, the Espoo Convention Implementation Committee, in *An Taisce*.[10] Sullivan LJ said: 'While I respect the Committee's view, it is not the function of the Committee to give an authoritative legal interpretation of the Convention.'[11]

The most logical way of looking at the legal framework by which the United Kingdom's core obligations under the Convention are met in England and Wales is by reference to the three pillars of the Convention: access to environmental information; public participation in environmental decision-making; and access to justice in environmental matters.

[3] *Walton v Scottish Ministers* [2012] UKSC 44, [2013] 1 CMLR 858.
[4] ibid [100].
[5] *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, [2009] 2 P & CR 30.
[6] ibid [22].
[7] Case C-260/11 *Edwards v Environment Agency* [2013] 1 WLR 2914.
[8] *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114.
[9] ibid [38].
[10] *R (on the application of An Taisce (The National Trust for Ireland)) v Secretary of State for Energy and Climate Change* [2014] EWCA Civ 1111.
[11] ibid [44].

Access to Environmental Information

Introduction

Articles 4 and 5 of the Convention require Parties to provide a system for the provision of environmental information by public authorities to the public. This includes both the provision of information in response to a request and more general requirements to disseminate environmental information. The Convention also allows Parties to refuse requests for environmental information in certain circumstances.

The Environmental Information Directive[12] implemented these requirements in EU law. These, in turn, have been transposed in England and Wales by the Environmental Information Regulations 2004, SI 2004/3391 ('the 2004 Regulations').

Rights of access to environmental information are nothing new in England and Wales. EU legislation (Directive 90/313/EEC),[13] transposed in England and Wales through the Environmental Information Regulations 1992, SI 1992/3240, provided such rights. However, the Convention re-shaped the rights and obligations in this area, leading to wider definitions of 'environmental information' and the 'public authorities' to which the information obligations apply.[14] It also limited the exceptions that could be cited in refusals to disclose environmental information in the revised Environmental Information Directive and domestic implementing legislation.[15]

The 2004 Regulations sit within a wider framework of freedom of information legislation, namely the Freedom of Information Act 2000 ('the 2000 Act'). Despite the subsequent misgivings of the Prime Minister whose government introduced it,[16] this Act has resulted in a cultural change across public authorities throughout England and Wales in terms of how information is recorded and presented, and

[12] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L41/26 (Environmental Information Directive).

[13] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment [1990] OJ L158/56.

[14] The definition of 'information relating to the environment' in Directive 90/313/EEC was considerably shorter than the definition of 'environmental information' in the Convention and less open-ended. For example, it only referred to measures adversely affecting, or likely so to affect, specified aspects of the environment rather than 'activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment' mentioned in a non-exhaustive list. The definition of 'public authorities' in Directive 90/313/EEC did not include specific reference to persons performing public administrative functions or those under their or government control providing public services in relation to the environment.

[15] J Macdonald, R Crail and CH Jones (eds), *The Law of Freedom of Information*, 2nd edn (Oxford, Oxford University Press, 2009) 310.

[16] T Blair, *A Journey* (London, Arrow, 2011) 516.

how officials in public authorities interact with the public. A request for information may, for a public authority, also be a warning signal that an administrative or judicial challenge is on its way. This shift is compounded by the explosion of information resulting from the proliferation of electronic information platforms.

Nevertheless, the rights provided by the Convention in respect of environmental information go further than those under the 2000 Act. The 2004 Regulations of course reflect this distinction. The Code of Practice issued by the Information Commissioner's Office (ICO) under regulation 16 lists these differences, which include the wider range of public bodies subject to the environmental information requirements and the application of the public interest test to all exceptions as opposed to the 2000 Act under which certain exemptions are absolute, without regard to the public interest in disclosure.[17] Some have suggested that the existence of these requirements within a larger framework on information provides potential for the Convention's influence to reach beyond the environmental sphere,[18] but the distinction between the environmental and non-environmental regimes remains.

Environmental Information

Given these differences, a crucial issue will often therefore be the question of whether information is 'environmental information' or not.

The Convention (Article 2(3)), Environmental Information Directive (Article 2(1)) and 2004 Regulations (regulation 2(1)) all define 'environmental information' by reference to the different media in which that information may be held (written, visual, aural, electronic or any other material form) and what the information covers. This covers information on: the state of elements of the environment and the interaction of those elements; factors, activities and measures affecting or likely to affect the elements of the environment; reports on the implementation of environmental legislation; the state of cost-benefit and other economic analyses and assumptions used in respect of those activities and measures; and the state of human health and safety, conditions of human life, cultural sites and built structures to the extent that they are or may be affected by the state of the elements or those factors, activities or measures. Examples of elements of the environment, such as air and atmosphere and biological diversity, and of factors affecting or likely to affect the environment, such as energy, noise, radiation and emissions or releases, are also given in the definition.

The Information Commissioner has a duty under the 2000 Act to provide guidance for both the public and public authorities on matters, including the meaning

[17] *Code of Practice on the Discharge of the Obligations of Public Authorities under the Environmental Information Regulations 2004* (February 2005), paragraph 14.

[18] J Macdonald (n 15) 934.

of environmental information.[19] This highlights that the definition of environmental information in the 2004 Regulations is the same as that in Article 2(1) of the Environmental Information Directive. It is of course for the courts, rather than any guidance, to provide a definitive view on the meaning of environmental information, but the Information Commissioner's guidance suggests that 'there is little to be gained from considering the subtle differences between, for example "air and atmosphere" or "discharges and releases". The examples are there to help identify what is environmental information, not to confuse.'

Public Authorities

A second crucial issue around the scope of the 2004 Regulations is the question of who may be required to disclose environmental information; who are 'public authorities' for these purposes? The 2004 Regulations define public authorities as including: government departments; other public authorities set out in line with section 3(1) of the 2000 Act (examples range from police forces to the National Gallery); other bodies or persons carrying out functions of public administration; or a body or person under the control of any of those persons that has public responsibilities relating to the environment, exercises functions of a public nature relating to the environment or provides public services relating to the environment. Notably the exceptions listed in Schedule 1 of the 2000 Act or designated under the section 5 order-making power are disapplied for the purposes of the definition in the 2004 Regulations to ensure that this is wide enough to be in tune with the Convention and Environmental Information Directive. Again, consistent with the Convention and the Environmental Information Directive, regulation 3(3) provides that the 2004 Regulations do not apply to a public authority acting in a legislative or judicial capacity.

In *Smartsource*[20] the question of whether a privatised water company was a 'public authority' under the 2004 Regulations came before the Upper Tribunal. The Information Commissioner was joined by 19 water companies—the bulk which covered England and Wales—as additional parties. The Upper Tribunal found that the water companies were not public authorities for the purposes of the 2004 Regulations. The Tribunal examined the definition in the 2004 Regulations against the background of the Convention and the Environmental Information Directive. In the absence of case law directly on the point the Tribunal considered, among other texts, the wording of the first edition of the Aarhus Implementation Guide (2000), including references to privatised utilities, now reflected in the

[19] www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Environmental_info_reg/Introductory/EIR_WHAT_IS_ENVIRONMENTAL_INFORMATION.ashx.

[20] *Smartsource Drainage & Water Reports Ltd v Information Commissioner* [2010] UKUT 415 (AAC).

2014 edition of the Guide.[21] The Tribunal's view was that the definition of 'public authority' needed to reflect the context and time in which it was being used, concluding that, within the context of the Water Industry Act 1991, the water companies could not be considered as coming within that definition.

However, in *Fish Legal* the Upper Tribunal decided to make a reference on the question of whether water companies were covered by the definition to the CJEU.[22] The Court judged that it would be necessary to examine whether the water companies are vested, under the applicable national law, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law. The Court also found that the undertakings in question, providing public services relating to the environment, are under the control of a body or person falling within Article 2(2)(a) or (b) of the Environmental Information Directive. This means that they should be classified as 'public authorities' under Article 2(2)(c), if they do not determine the way in which they provide those services in a genuinely autonomous manner. Classification as a public authority under Article 2(2)(b) or (c) makes a significant difference to how much environmental information is potentially subject to the disclosure obligations. Article 2(2)(b) must, in the Court's judgment, be interpreted as meaning that a person falling within that provision constitutes a 'public authority' in respect of all the environmental information which it holds. A commercial company capable of being considered a 'public authority' under Article 2(2)(c) only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b), would not be required to provide environmental information if the information does not relate to the provision of such services. The question of how these principles should be applied to the circumstances of the water companies in *Fish Legal* was returned to the Upper Tribunal.

The Upper Tribunal's findings in *Smartsource* were also the subject of a communication to the Aarhus Convention Compliance Committee.[23] The Committee—acting consistently with paragraph 21 of the annex to Decision I/7[24]—suspended

[21] *The Aarhus Convention: An Implementation Guide* (2nd edn) (UNECE, 2014) p 46. It should be noted that the Guide does not represent an 'official' view on the interpretation of the Convention by UNECE institutions or Parties and it is not binding. The CJEU has confirmed that it is capable of being taken into consideration, if appropriate, for the purpose of the Convention (Case C-182/10 *Solvay v Regione Wallonne* [2012] 2 CMLR 19 at [27]) but that it is not binding (the CJEU rejected a position set out in the Guide in Case C-204/09 *Flachglas Torgau GmbH v Germany* [2013] QB 212 at [35]).

[22] Case C-279/12 *Fish Legal, Emily Shirley v The Information Commissioner, United Utilities, Yorkshire Water and Southern Water* [2014] QB 521.

[23] ACCC/C/2010/55 (United Kingdom).

[24] Decision I/7 of the Meeting of the Parties (ECE/MP.PP/2/Add.8, 2 April 2004) sets out the procedures for the review of Compliance by the Committee. Paragraph 21 states: 'The Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress'. This reflects the principle under international law that a complainant must use such institutions as a last resort, having attempted to make use of any domestic remedies first. The 5th Meeting of the Parties in July 2014 reinforced the principle on domestic remedies alongside the need for the Committee to ensure transparency and due process for both communicants and the Parties concerned in respect of communications received from members of the public, in Decision V/9 (ECE/MP.PP/2014/2/Add.1).

its consideration of the issue in 2012, pending a final decision in the case. Although the Committee's activities on this issue were put on hold, its involvement at the direct request of Fish Legal—an NGO representing angling clubs and riparian owners among others—illustrates the way in which the Convention is being used to try and influence the outcome of these sorts of questions.

When Must Information be Disclosed?

Those that are considered public authorities are subject to the core duty in regulation 5 of the 2004 Regulations. This is that if the authority holds environmental information, it must make it available on request, as soon as possible and normally no later than 20 working days after the date of receipt of the request.

There are a number of circumstances in which public authorities may refuse requests for information. These are set out in Part 3 of the 2004 Regulations, and reflect Article 4(3) and (4) of the Convention. Even if one of those specific exceptions applies, each is subject to: (i) a public interest test, whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information (regulation 12(1)(b)); and (ii) a requirement for the public authority to apply a presumption in favour of disclosure (regulation 12(2)).

As to the exceptions themselves, these again echo the structure and wording of the Convention and the Environmental Information Directive. The Convention recognises that there are circumstances in which it will be in the public interest for environmental information to be withheld by a public authority, for example where relations with another country would be affected by disclosure, or where release of information would have a chilling effect on internal discussions within or between public authorities, depriving them of the space to consider and test ideas before opening them up to wider public scrutiny.

The first group of exceptions, in regulation 12(4), apply where the information falls into one of a number of classes. This covers circumstances in which the public authority does not hold the requested information and where the request is manifestly unreasonable or formulated in too general a manner. It also covers requests relating to material which is still in the course of completion, unfinished documents or incomplete data and requests involving the disclosure of internal communications.

The second group, in regulation 12(5), depend on whether disclosure of the information would have an adverse effect on a number of interests. This includes disclosure having an adverse effect on: international relations; defence; national security; public safety; the course of justice; the ability of a person to receive a fair trial; the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature; intellectual property rights; the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law; the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

the interests of the person who provided the information where that person was not under a legal obligation to supply it, they did not supply in circumstances in which a public authority is entitled to disclose it and they did not consent to its disclosure; and the protection of the environment to which the information relates.

Challenges to Non-Disclosure

The decision of a public authority to refuse to disclose environmental information on request may be challenged, in accordance with the requirements in Article 9(1) of the Convention. This article states that persons who consider that their request for environmental information has been wrongfully refused have 'access to a review procedure before a court of law or another independent and impartial body established by law'. Where the review is provided by a court, access must also be provided 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'.

The Convention also requires that an authority can be challenged where it is alleged that the authority has ignored, inadequately answered or otherwise not dealt with the request in accordance with the requirements.

Regulation 11 of the 2004 Regulations provides for a reconsideration by the public authority of its decision upon a request by the applicant within 40 days of the alleged failure to comply.

Regulation 18 incorporates the appeal provisions in Part 5 of the 2000 Act. Broadly, this includes a right to appeal the public authority's decision to the ICO, the independent authority with statutory powers to enforce the 2004 Regulations and duties to provide guidance on it. Its decision notice can include legally binding requirements for the public authority to follow. The ICO's decisions may themselves be appealed to the First-tier Tribunal (Information Rights), with further appeals to the Upper Tribunal, the Court of Appeal and the Supreme Court. Regulation 18 also incorporates the enforcement provisions in Part 4 of the 2000 Act, including enforcement notices against public authorities breaching disclosure duties.

Two cases concerning the application of the exceptions, rooted in these mechanisms, mark the influence of the Convention in relation to the access to environmental information pillar in England and Wales.

The first of these is *Birkett*,[25] in which the Court of Appeal was asked to consider whether a public authority could rely on exceptions it did not initially make use of when withholding requested environmental information. The Court of Appeal rejected the argument that allowing such exceptions to be relied on would

[25] *Birkett v Department for the Environment, Food and Rural Affairs* [2011] EWCA Civ 1606, [2012] 2 CMLR 169 [20].

be at odds with the purpose of the Environmental Information Directive and ultimately the Convention. The Court looked at the timescales for making a decision on whether to release requested environmental information and the requirements for such decisions to be subject to a review process, concluding that there may be complexities around deciding which exceptions applied at the time of the request and that their potential importance to the public interest should not mean that they become unavailable if the public authority does not get it right first time. The need for decisions to be taken quickly and for there to be safeguards through review procedures of those decisions—both key features of the Convention—set the framework for the Court's judgment.

Second, the Supreme Court, following an analysis of the text of the Convention, referred a question to the CJEU in *Office of Communications*[26] as to whether environmental information could still be withheld where exceptions, considered individually, did not provide a sufficient justification for non-disclosure. The CJEU found that it was possible to view the exceptions in a cumulative way because the concept of public interest served by disclosure was one that was broad and overarching, rather than something that needed to be applied in isolation to each exception. The suggestion that this would amount to the introduction of a new exception to the Convention was rejected, having regard to the overall interest represented jointly by the interests served by refusing to disclose.

The requirements in Article 5 of the Convention, concerned with the collection and dissemination of environmental information, are again transposed through the Environmental Information Directive and the 2004 Regulations. An overarching duty on public authorities to progressively make the environmental information it holds available is included in regulation 4. However, reflecting the way in which these requirements impact on different areas of environmental law, measures meeting them are found in a number of places. For example, regulators are placed under a general duty in regulation 46 of the Environmental Permitting (England and Wales) Regulations 2010, SI 2010/675 to maintain a public register of environmental information. This includes information on applications for environmental permits and information obtained from monitoring a permitted operation. One way some of this information is made accessible is through the Environment Agency's 'What's in your backyard?' website,[27] which allows users to find environmental information linked to their location, ranging from air quality, landfills, river basin management plans and flood risks. This includes information risks that may be associated with certain operations, the compliance record of operators and details of overarching plans for dealing with the impact of man-made activities on the environment. Providing such information is one of the means by which the public is given the tools for understanding the activities of both public authorities and those that they regulate, and how they can become involved in the environmental decisions of public authorities.

[26] Case C-71/10 *Office of Communications v Information Commissioner* [2011] ECR I-07205.
[27] www.environment-agency.gov.uk/homeandleisure/37793.aspx.