

Difficult Issues in Environmental Law ~ Environmental Judicial Review

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INTRODUCTION

1. This paper intends to explore a range of issues confronting judicial review (JR) in environmental matters. The focus is essentially on procedural issues.

PROCEDURAL ISSUES CONCERNING ACCESS TO JR

Reviewable acts at European level

2. Although access to JR in the national court in challenges to national decisions or actions affecting the environment is fairly liberal and is in practice rarely restricted (save perhaps where the Court finds lack of merit in the claim itself), a real lacuna arises in relation to Community environmental measures or Community measures which have an impact on the environment. A wide variety of measures may have such an impact, for example Commission decisions on competition law and State aid matters and Council and Commission decisions or actions on trade issues. Often, such measures will involve no decision at the national level which is capable of providing the "hook" for a JR.
3. A major problem for the litigant seeking to challenge an act on environmental grounds is therefore the limited access currently available before the Court of First Instance. The CFI and the ECJ have been assiduous in their maintenance of the "direct and individual concern" test of standing in the Community

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courts, in spite of efforts on the part of at least one Advocate General to widen the scope of that test¹. The Court has consistently held that the appropriate route for challenge of Community acts is through the national court and through seeking a reference to the Court of Justice for a preliminary ruling. That approach suffers however from several flaws:

- a. As stated above, there are many decisions and reviewable acts at Community level having a potential effect on the environment which do not require national implementation or any action on the part of the national authorities such as to give rise to a reviewable act in the domestic court;
 - b. Bringing proceedings in the national court does not guarantee that the national court will refer the matter to the Court of Justice: only the House of Lords has a **duty** to refer in cases where it cannot conclude that the issue is *acte clair*, inferior courts merely have a discretion to refer. The decision to refer is largely dependant on the national court's own assessment of the merits of the contention that the Community act, decision or instrument is incompatible with Community law.
 - c. Such a procedure automatically involves considerable extra cost, delay and uncertainty;
 - d. The availability of effective interim or other relief before the national court in challenges against Community measures is limited, discretionary and can only relate to any national measure seeking to implement the Community act under challenge;
 - e. The national court procedure cannot provide an effective means of challenge against a failure to act on the part of the Community.
2. Things are however about to change, to a certain extent, with the enactment of the proposed Regulation on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental matters to EC institutions and bodies (COM (2003) 622). That Regulation essentially deems accredited entities such as NGOs as having "direct and individual concern" for the purpose of Article 230 EC where they have sought an internal review of any act which they consider to be in breach of environmental law (as defined in Article 2(1)(g)) and provided the act relates to a subject matter covered by its statutory activities. Article 11 of the proposed Regulation grants accredited organisations automatic standing before the CFI and ECJ (following a request for internal review by the relevant Community institution) to review the substantive and procedural legality of that review decision. Thus, it is open to the organisation to challenge the review decision on any ground (not simply breach of environmental law).
3. In order to enjoy that right, an organisation must be accredited by the Commission in accordance with the following criteria:
- "a) It must be an independent and non-profit-making legal person, which has the objective to protect the environment;
 - b) it must be active at Community level;
 - c) it must have been legally constituted for more than two years and, during that period, have been actively pursuing environmental protection according to its statutes;

¹ Case C-50/00P *Union de Pequenos Agricultores v Council* []

d) it must have its annual statement of accounts for the two preceding years certified by a registered auditor.

In order to be considered as active at Community level, where a qualified entity is active in the form of several co-ordinated associations or organisations with a structure that is based on membership, those associations or organisations must cover at least three Member States.”

4. An accreditation decision is of course a reviewable decision in itself. The proposed Regulation is therefore a major breakthrough for NGOs with an environmental remit and accreditation is not necessarily a status reserved for larger NGOs but may also be extended to coalitions of smaller NGOs provided they can satisfy the criteria contained in Article 12.
5. The benefits of exploiting such an avenue are manifold and, for those who are accredited, overcomes many if not all of the problems highlighted in paragraph 3] above.
6. The difficulties and limitations of challenging Community acts through national courts remain a significant bar to access to justice however for litigants outside the scope of the accreditation provisions.

Costs in domestic proceedings

7. Leaving aside the potential impact of the Aarhus Convention on costs in domestic proceedings, developments have been taking place in relation to pre-emptive costs orders in public interest litigation. Such an order allows the Court, at an early stage in proceedings, to assess the likely level of costs to be incurred by the Defendant and to cap their costs at a reasonable sum (or indeed make an order that the Defendant bear its own costs). The benefit to the Claimant therefore is certainty in relation to the maximum costs exposure it faces, should it be unsuccessful.
8. The principles guiding the court on an application for a pre-emptive costs order were established by Dyson J in *R v Lord Chancellor ex parte Child Poverty Action Group* [1999] 1WLR 347; a decision that has subsequently secured at least the apparent approval of the Court of Appeal in *Hodgson v Imperial Tobacco* [1998] 1 WLR 1056, 1068A. Those principles were also affirmed, following the advent of the CPR, by Richards J in *R v London Borough of Hammersmith and Fulham, ex parte CPRE London Branch* (unreported, 26 October 1999). Richards J accepted that he should:

“ ... seek to give effect to the overriding objective and should have particular regard to the need, so far as practicable, to ensure that the parties are on an equal footing and that the case is dealt with in a way which is proportionate to the financial position of each party.”

9. He then stated the effect of ex parte CPAG, namely that it:

“sets out the following criteria or conditions for the making of a pre-emptive costs order in a public interest challenge case. First, that the court is satisfied that the issues raised are truly ones of general importance. Secondly, that it has a sufficient appreciation of the merits of the claim that it can conclude it is in the public interest to make the order. Thirdly, the court should have regard to the financial resources of the applicant and the respondent and the amount of the costs likely to be in issue and it would be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant and where it is satisfied that unless the order is made the applicant would probably discontinue the proceedings and will be acting reasonably in so doing.”

10. These decisions have emphasised that the discretion to make such an order, even in cases involving public interest challenges, should be exercised only in the most exceptional circumstances.
11. In the *CND* case² the Claimant relied on the following matters and succeeded in making out an exceptional case:
- a. They are a private company limited by guarantee of modest resources, which, in the event of a large adverse costs order, would be at risk either of going into liquidation or of having to curtail severely their activities; those, in essence, are campaigning against nuclear weapons and other weapons of mass destruction, and in favour of a peaceful resolution of conflict. They stated that unless the court provides them with the certainty of a costs cap they would not be able to proceed with the challenge. The time-frame for the challenge was necessarily so short that it afforded them no opportunity to seek to raise funds elsewhere;
 - b. The obvious public importance of the issues they seek to bring before the court
 - c. If the defendant's argument that the challenge is and will be found to be clearly without merit and non-justiciable be right, then the proceedings may be expected to end at the preliminary hearing, in which event £25,000 would meet the defendant's entitlement to costs in any case;
 - d. If CND's challenge were to end for want of the pre-emptive costs order sought, in all likelihood some substitute applicant would be found, perhaps legally assisted, perhaps an unassisted person of limited means, with or without some private funding, in which event, the Crown, supposing it successfully resists the challenge, could not hope to recover even the £25,000 offered by CND.
12. In private law proceedings³ Gage J considered that the court should only consider making a costs cap order in such cases where the applicant shows by evidence that there is a real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred; and that this risk may not be managed by conventional case management and a detailed assessment of costs after a trial; and it is just to make such an order. He did not feel it necessary to ascribe to this test the heading of "exceptional circumstances" as he considered that it would be rare for the test to be satisfied and that it was impossible to predict all the circumstances in which it might arise. He also thought it would be quite wrong to attempt to set a specified ratio of costs to value for any particular type or class of case, as each must be considered on its own facts. In his judgment, costs cap orders could have a significantly beneficial effect in keeping costs within bounds and concentrating minds on keeping costs proportionate throughout the litigation. He considered that there should be a provision in a costs cap order for the order to be reviewed which, along with the general liberty to apply, would avoid the danger of the costs cap being set too low and would enable a party to apply where unforeseen circumstances meant unforeseen costs were to be incurred, or where the cap was too low so that necessary costs could not be incurred without the cap being exceeded.
13. Gage J's approach might be seen therefore to be a far more pragmatic and sensible approach to pre-emptive orders and there is no reasons to confine his reasoning to public interest claims.

² *CND v Prime Minister et al* [2002] EWHC 2759 QB

³ *Smart v East Cheshire NHS Trust* [2003] EWHC 2806 (QB)

14. A pre-emptive costs order in public law proceedings appears to remain unusual (although likely to have a greater success if an amount of costs is offered on a costs-cap basis). They remain unusual of course because they are rarely applied for and they are rarely applied for owing to the costs exposure of an unsuccessful application.
15. A recent case in the Court of Appeal may however signify a change of approach. In the case of *The Queen on the application of Corner House Research v Secretary of State for Trade and Industry*, the Court of Appeal recently overturned (on 22 December 2004) a decision of Davis J (of 20 December 2004⁴) denying the Claimant a pre-emptive order to the effect that it would not be liable to pay the successful defendant's costs (whilst preserving its right to claim costs in the event of it being a successful Claimant). One of the principal grounds on which Davis J refused the order appeared to be that the Claimant's case, though it was arguable, did not have a sufficiently strong public interest element to justify departure from the norm. We await the reasoning of the Court of Appeal but it is believed that it may provide useful guidance on less restrictive criteria applicable to such orders in public interest cases.

Interested Parties and Interveners

16. There is a requirement on a Claimant in JR to serve a copy of the claim form on any person the Claimant considers to be an interested party. Generally, if the pre-action protocol for JR proceedings has been followed, the Claimant will have been made aware, if not already aware, of any parties affected by the challenge.
17. The involvement of interested parties does give rise to difficulties however in relation to costs. Although it is considered to be an exceptional course to award more than one party's costs against an unsuccessful Claimant, it is ultimately at the Court's discretion. That discretion may be exercised in favour of awarding the interested party's costs where the interested party has dealt with separate issues not dealt with by the Defendant or where the interested party has a distinct interest to that of the Defendant which requires separate representation⁵.
18. Ordinarily, an interested party who has intervened on the losing side will not have to bear the winning side's costs but it remains within the power and discretion of the Court to order costs against an interested party if it sees fit. One possibility of eliminating costs risks associated with interested parties is to seek a pre-emptive order from the Court that the interested party is to bear its own costs in the event of the Claimant being unsuccessful.
19. As regards interveners (who are not necessarily affected by the challenged decision as interested parties), the Court has a very broad discretion to hear any person in a JR. Permission to intervene may be given on terms and thus may restrict to scope of the intervention to specific issues in the claim.
20. An application to intervene must be made by letter at the earliest reasonable opportunity. The Practice Direction under Part 54 (Judicial Review) specifically refers to prospective orders as to costs and requires the intervener to specify the order it seeks and on what grounds. The usual order would be for the intervener to bear its own costs in any event and it is unlikely that the court would be persuaded to make any other order save in exceptional circumstances. In order to place itself in a better position to obtain its costs however, the intervention ought if at all possible to focus on arguments or matters which have not been covered or sufficiently covered by the main parties as opposed to merely endorsing or repeating the contentions of others. It is more likely to win its costs if it has brought something to the arena from its own unique perspective and has materially assisted the court in reaching its conclusions.

⁴ [2004] EWHC 3011 (Admin)

⁵ *Bolton Metropolitan DC v Secretary of State for the Environment* [1995] 1 WLR 1176.

PROCEDURAL ISSUES: THE ROLE OF EXPERT EVIDENCE

21. A particular problem of JR in dealing with environmental disputes is that they tend to concern differences of opinion over assessment of fact. The threshold of demonstrating that a decision is irrational is high and is often difficult to overcome, even with the assistance of expert evidence. A different approach to challenging a decision which is perceived to fall short of environmental requirements or indeed to challenging a decision refusing to act in circumstances where it is perceived that evidence demands action, is perhaps by reference to the precautionary principle. Perhaps the best and most effective use of expert evidence therefore is in relation to the identification and assessment of risk, for the purpose of arguing that the approach taken by the decision-maker fails to apply or fails properly to apply the precautionary principle.
22. On the issue of risk and the precautionary principle, the main propositions of law that come out of one of the leading EC cases, Case T-13/99, **Pfizer Animal Health SA v. Council of the European Union** [2002] ECR II-3305 are:
- a. The precautionary principle applies in a situation of scientific uncertainty, when a risk assessment cannot provide the decision-maker with conclusive scientific evidence of the reality of the risk or the seriousness of the potential adverse effects were that risk to become a reality (paragraph 142);
 - b. In such a situation, the decision-maker may, by reason of the precautionary principle, take preventive measures (e.g., by refusing to grant a permit to the operator of an industrial process) without having to wait until the reality and seriousness of the risks become fully apparent (paragraph 139);
 - c. However, a preventive measure cannot properly be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified; nor should a preventive measure be based on the aim of achieving "zero-risk" (paragraphs 143, 145 and 152);
 - d. Rather, a preventive measure may be taken only if the risk (notably to human health), although the reality and extent thereof have not been fully demonstrated by conclusive scientific evidence, appears nevertheless to be adequately backed up by the scientific data available (paragraphs 144 and 146).
23. The European Court of Justice has recently emphasised that the precautionary principle is "one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC....": *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Lanbouw, Natuurbeheer en Visserij*, C-127/02, Judgment of 7 July 2004 at para 44. The Court considered in the context of the Habitats Directive that the risk that a plan or project will have significant effects on the site concerned must be deemed to exist **if it cannot be excluded on the basis of objective information** that those effects will occur. In that case therefore the precautionary principle arguably applied to the effect that a duty to act arose except where there was certainty that no effect on the environment would occur.
24. An interesting development in domestic JR is marked by the Court of Appeal case of *E v Secretary of State for the Home Department*⁶ and may provide Claimants with limited scope for factual challenges on the basis of expert or other objective evidence. The Court of Appeal accepted that mistake of fact was in principle a separate head of challenge in JR if that mistake gave rise to unfairness. The Court was doubtful that the traditional grounds of review such as

⁶ [2004] EWCA Civ 49

"failure to take account of a relevant consideration" were sufficient to cover the circumstances in which a decision could be impugned on the basis of error of fact. It referred to a previous House of Lords decision⁷ and stated:

"In our view, the *CICB* case points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between "ignorance of fact" and "unfairness" as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that "objectively" there was unfairness. On analysis, the "unfairness" arose from the combination of five factors:

i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case); ii) The fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence; iii) The claimant could not fairly be held responsible for the error; iv) Although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result; v) The mistaken impression played a material part in the reasoning.

64. If that is the correct analysis, then it provides a convincing explanation of the cases where decisions have been set aside on grounds of mistake of fact. Although planning inquiries are also adversarial, the planning authority has a public interest, shared with the Secretary of State through his inspector, in ensuring that development control is carried out on the correct factual basis. Similarly, in *Tameside*, the Council and the Secretary of State, notwithstanding their policy differences, had a shared interest in decisions being made on correct information as to practicalities. The same thinking can be applied to asylum cases. Although the Secretary of State has no general duty to assist the appellant by providing information about conditions in other countries (see *Abdi and Gawe v Secretary of State* [1996] 1 WLR 298, he has a shared interest with the appellant and the Tribunal in ensuring that decisions are reached on the best information. It is in the interest of all parties that decisions should be made on the best available information (see the comments of Sedley LJ in *Batayav*, quoted above).

.....

66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the [Tribunal's] reasoning".

25. The decision appears to establish therefore that a mistaken impression or as to or a mistaken appreciation of a fact as well as a failure to take account of a relevant fact may constitute a mistake of fact for the purposes of review. The case would seem therefore to provide an opening for further limited factual argument in the context of environmental judicial review under a ground which is distinct from irrationality or failure to take account of a relevant consideration and is more akin to a ground of manifest error of assessment found in judicial review of Community acts before the CFI and ECJ.

⁷ *Criminal Injuries Compensation Board* [1999] 2 AC 330.

COMMERCIAL VERSUS ENVIRONMENTAL INTERESTS

26. In many JR cases, competing interests are at stake and this is perhaps more frequently the case in environmental cases. In many cases those competing interests will affect the interpretation the Court gives to the legal provisions at issue. Commercial certainty is a particularly powerful influence on construction for many Administrative Court and Court of Appeal judges, most of whom will have come from a commercial or planning based practice.
27. A notable example of the tension between commercial versus environmental interests and the manner in which those tensions coloured the interpretation placed on the provisions at issue is to be found in the case of *R on the application of Greenpeace v Secretary of State for Environment and Commissioners of Customs and Excise*⁸.
28. The case concerned the application of directly enforceable provisions contained in Council Regulation 338/97 ("the Regulation") which implements the provisions of the Convention on International Trade in Endangered Species of Flora and Fauna ("the Convention") throughout the Community. In particular, the claim concerned:
- a. the requirement of Article 4(3) of the Regulation that all imports of endangered species are accompanied by an export permit issued by the relevant authority of the exporting State **in accordance with the Convention**;
 - b. the requirement of Article 5 of the Convention that export permits are to be issued only when the relevant authority of the exporting State is satisfied that the goods have not been obtained contrary to relevant national conservation laws; and
 - c. the duty upon Member States, imposed by Article 14 of the Regulation, to ensure that the provisions of the Regulation (and the Convention) are being complied with.
29. These issues arose out of an import of Brazilian mahogany (protected under Appendix III of the Convention) made in the face of a complete moratorium imposed by the Brazilian Environment Agency ("IBAMA") on 19 October 2001 prohibiting the commercialisation and export of such mahogany in order to protect the forest environment. That moratorium was imposed by IBAMA on the strength of evidence of widespread illegal logging.
30. The shipments were accompanied by apparently authentic export certificates obtained by the exporters following successful ex parte applications before the local Brazilian court. Greenpeace contended however that there was coherent and objective evidence emanating from IBAMA and available to the First and Second Respondents that it considers the mahogany shipment imported constituted timber which was in all probability logged contrary to Brazilian law and that future shipments similarly constitute such timber.
31. The Lord Justices Dyson and Mummery were both heavily influenced by the need for certainty in international trade and the perceived impact that the Claimant's argument would have for traders importing on the basis of an apparently authentic certificate. They therefore rejected the Claimant's contention that the relevant certificates were not **issued in accordance with the Convention** such as to give rise to responsibilities on the part of the UK in Community law. Mummery LJ's position was thus:

"There is nothing surprising in this result as a matter of legal policy. The specimens of a species for which an export permit has been issued are intended to be traded in the international market. Contracts will be made between exporters and importers. Arrangements will be made for the transportation of the specimens to another country thousands of miles away. In situations of this kind legal and commercial certainty are paramount considerations. Certainty is supplied by the mechanism for issuing documentary evidence in the form of an export permit "in accordance

⁸ [2002] 1 WLR 3304

with the Convention". If the authority in the state of export issues an export permit in accordance with Article VI it must be taken to have known and intended that it would be acted upon by third parties in entering into and performing obligations in commercial transactions and by the competent authorities of the importing state. I see no objection to the import authority being entitled to act upon a subsisting authentic export permit presented to it, even if it is told that the issuing authority was not satisfied that the required conditions had been met. The need for commercial certainty is as great in the case where the permit has been, for whatever reason, incorrectly or unwillingly issued, as in the case where it has been correctly and willingly issued."

32. Laws on the other hand took the opposite view in his dissenting judgment:

"33. The interpretation of statutes is hardly ever entirely value-free. It is neither surprising nor regrettable that in confronting their task of interpretation, the judges have to a greater or lesser degree been moved by the aspirations of their time. Such a process does no more than bring to life the plain fact that the law – perhaps especially the common law – will reflect contemporary influences, even though it is not a creature of them; it must do so, or it would ossify. In the century before last, the sanctity of contract, with all that said for trade across the British Empire and beyond, was a powerful engine of statutory construction. Now, the world is a more fragile place. Considerations of ecology and the protection of the environment are interests of high importance. The delicate balances of the natural order are continuously liable to be disturbed by human activity, which in particular threatens the survival of many flora and fauna. These concerns are today well known and well accepted. Within the proper limits of the courts' role, and in appropriate contexts, I think we should now be ready to give them special weight.

34. The Convention, though certainly it seeks to support viable international trade, is first and foremost intended as a legal antidote to some of the damage done by man's exploitation of nature's resources. That purpose must, in my judgment, serve as the most influential factor in the interpretation of the Regulation, given Article 1 of the latter, which I have set out. For these reasons I prefer the construction advanced in Greenpeace's modified argument, as I have described it in paragraphs 22 and 32. Thus I consider that the words in Article 4(3)(a) "in accordance with the Convention" exact compliance with the Convention's requirement that a permit has to fulfil both the condition stipulated at Article V(2)(a) and the formal requirements of Article VI.....

38. I greatly doubt whether in the real world these possible scenarios are likely to offer serious disruption to international trade, given the relatively narrow basis upon which (as I see the matter) the courts might uphold a legal challenge. But in the end I have to say that I regard it as an incident of trade in flora or fauna of the kind in question here that the trades people take the risk of inconveniences and disruptions to their legitimate business, so far as they are a necessary incident of a robust environmental law."

33. This is clearly a useful Court of Appeal dicta for environmental organisations. The case demonstrates however that a purposive approach to construction demanded by Community law does not necessarily overcome the tensions between competing interests before the Court.

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