



AARHUS CONVENTION UK GOVERNMENT CONSULTATION

UK Centre for Animal Law Submission
December 2024



Aarhus Convention UK Govt Consultation

Submissions by the UK Centre for Animal Law, 8th December 2024

Question 1: How effective is the ECPR in ensuring that environmental claims are not prohibitively expensive to bring?

We submit that cases involving poor conditions for animals in industrial farm settings which risk zoonotic spillover and consequent impacts on human-animal-environmental health are in practice environmental claims, yet they are prohibitively expensive to bring because they are not currently covered by the costs protection of the ECPR. For more explanation of this please see our response to (6) below. As such we would submit the ECPR is not adequately effective in ensuring claims are not prohibitively expensive.

Question 5: Please provide your views on the courts using judicial discretion to determine whether a private nuisance claim should benefit from the ECPR. What are the likely benefits and potential risks of doing so?

Costs are a prohibitive factor for an individual or small organisation bringing a case against a large corporation or public body. The lack of certainty as to the costs outcome is highly likely to inhibit an individual from bringing a JR. It is also likely to lead to further litigation about costs in cases which are brought. Judicial discretion is therefore likely to lead to legal uncertainty and undermine the fundamental principle of the Aarhus Convention of access to justice.

Question 6: What particular private nuisance claims should benefit from costs protection under the Aarhus convention?

Summary:

The costs protection under Article 9(4) should not be limited to particular nuisance claims but be extended to any claim related to environmental harm entailing a public benefit brought by anyone against an individual.

Cases involving poor conditions for animals in industrial farm settings which risk zoonotic spillover and consequent impacts on human-animal-environmental health are in practice environmental claims, yet they are prohibitively expensive to bring because they are not currently covered by the costs protections of the ECPR. The definition of environmental claims under Aarhus is broad, with case law in other jurisdictions demonstrating it incorporates some wild animals. We submit that the UK government should recognise that the theoretical distinction between farmed, wild and companion animals is an unscientific one, which leaves open a critical risk of pathogen spillover, as exemplified in the Covid-19 pandemic. The animal-human-environment nexus is a scientific reality. This intersection is recognised in the proposed WHO Accord on 'pandemic prevention, preparedness and response' and Kunming-Montreal Global Biodiversity Framework. As such, we urge the UK to start incorporating this into the scope of cases protected under the ECPR. If the definition of such cases were understood in this way, cases involving biosecurity emanating from conditions in farming would benefit from costs protection – currently the risk of costs is so high that cases cannot feasibly be brought. This creates significant risks to the environment and to human and animal health. In doing so, the UK government will be advancing progress under the Kunming biodiversity treaty and forthcoming WHO pandemic treaty.

Detailed response:

Definition of environmental claims

The definition of environmental claims under Aarhus is broad.

Article 9(3) of the Aarhus Convention sets out that Access to judicial procedures to challenge “acts and omissions of private persons and public authorities which contravene provisions of national law relating to the environment” and Article 9(4) sets out that these must not be prohibitively expensive.

On the question as to what constitutes law “relating to the environment”, the term environment is not defined in the Aarhus Convention. However, Article 2(3) suggests it may include, “3(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.”

Case law in other jurisdictions indicates that it can incorporate certain protected animals (eg. The case of the Slovak Brown Bear, C-240/09) and wildlife living in an environment that is damaged.

Why it should be understood to be wider

To date, we are not aware of any cases which have recognised the definition to include animals living in a ‘non-wild’, eg. farmed, setting. This is problematic as the distinction between ‘wild’ and ‘non wild’ is an unscientific construct and does not stop pathogens from mixing between the two, creating clear biosecurity risks. As has been seen on multiple occasions, there is a severe risk of pathogen spillover from farmed animals to the wider environment.

The present conditions in which some farmed animals live may give rise to significant threats to human health and the health of wildlife through the release of pathogens caused by conditions of farming.

Examples of pathogen spillover

Avian influenza is on the rise, with 200 million birds being killed by or because of it between 2022 and early 2023. The Scientific Task Force on Avian Influenza stresses that wild birds are not the cause but are the victims of highly pathogenic bird flu which evolves in industrial poultry sheds, as it can move very quickly among birds mutating into highly virulent strains. While this does not commonly spread to humans directly, recently highly pathogenic avian influenza has spread to other mammals. Pigs, in particular, can act as ‘mixing vessels’, hosting both bird, pig and human viruses. The U.S. Centres for Disease Control and Prevention states that “the resulting new virus might then be able to infect humans and spread easily from person to person”. In light of this, both the poultry and pig sectors need to be restructured, a matter which is arguably an environmental issue but does not currently seem to be understood as falling within the definition of the environment under the Aarhus Convention, and thus does not benefit from costs protection and access to justice measures under the same, because the animals in question are not wild nor living in a wild setting. Pathogens do not respect the categorisation of animals or settings as wild or domesticated and thus the distinction may have become an unhelpful one in the context of public and environmental health.

The broad definition in the Aarhus convention arguably already incorporates this, in so far as it breaches domestic law, but it is not being understood as such and accordingly this has restricted people from bringing cases because of the risk of costs orders.

A more inclusive understanding of the environment under the Aarhus Convention, incorporating ecosystems created by humans which interplay with the natural environment, would be a practical way of grappling with these challenging and addressing the rising risk of public health concerns.

Recognising that the definition of the environment includes such contexts would also be a way of supporting the UK's commitment to the successful achievement of the Kunming-Montreal Global Biodiversity Framework and the proposed WHO Accord on Pandemic Prevention.

Kunming-Montreal Global Biodiversity Framework

An understanding of the definition of the environment to include all species, not just wild ones, would advance implementation of commitments made under the Kunming-Montreal Global Biodiversity Framework. Outcome 3(d) of the meeting of the Aarhus Convention Task Force on Access to Justice of 4-5 April 2023 noted that 'that the effective implementation of the (Aarhus) Convention's access to justice provisions can underpin the achievement of the relevant targets under the Kunming-Montreal Global Biodiversity Framework...'

The Kunming Framework envisages:

Goal A 'The integrity, connectivity and resilience of all ecosystems are maintained, enhanced, or restored';

Target 5 'Ensure that the use, harvesting and trade of wild species is sustainable, safe and legal, preventing overexploitation, minimizing impacts on non-target species and ecosystems, and reducing the risk of pathogen spillover, applying the ecosystem approach.'...

Target 10, 'Ensure that areas under agriculture, aquaculture, fisheries and forestry are managed sustainably, in particular through the sustainable use of biodiversity, including through a substantial increase of the application of biodiversity friendly practices, such as sustainable intensification, agroecological and other innovative approaches, contributing to the resilience and long-term efficiency and productivity of these production systems, and to food security, conserving and restoring biodiversity and maintaining nature's contributions to people, including ecosystem functions and services.'

A more inclusive definition of the environment by the Aarhus Convention, incorporating ecosystems created by humans in this way which interplay with the natural environment, would thus be a practical way of supporting the successful achievement of the Kunming-Montreal Global Biodiversity Framework, as potential litigants would be able to bring cases in line with those ambitions set out under targets 5 and 10, which would otherwise not be possible because of the risk of costs.

The WHO Agreement Pandemic Prevention

The question of the definition of the environment is particularly critical in light of the wider global concern as to the spread of pathogens and reducing the risk of another global pandemic, as enabling access to justice on cases involving conditions which could lead to pathogen spillover would assist with prevention and preparedness. This is one of the key purposes of the upcoming WHO instrument on 'pandemic prevention, preparedness and response'.

The draft of the WHO Agreement as of 13 March 2024¹ recognises the central role played by zoonotic spillover, a commitment to a one-health approach including humans, domestic and wild animals, and incorporates commitments to include communities in prevention and detection.

¹ Revised draft of the negotiating text of the WHO Pandemic Agreement, Ninth meeting of the intergovernmental negotiating body to draft and negotiate a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response 13 March 2024
https://apps.who.int/gb/inb/pdf_files/inb9/A_inb9_3-en.pdf

Chapter 2, Article 4: Pandemic Prevention and Surveillance states at (3). *Each Party commits to progressively strengthen pandemic prevention ... including through: (e) zoonotic spill-over and spill-back prevention: (i) identify settings and activities that create or increase the risk of disease emergence and re-emergence at the human–animal–plant–environment interface; (ii) take measures to reduce risks of zoonotic spill-over and spill-back associated with these settings and activities, including measures aimed at safe and responsible management of wildlife, farm and companion animals, in line with relevant international standards and guidelines;*

Under Chapter 2, Article 5, the parties commit to promoting a 'One Health approach to pandemic prevention, preparedness and response'. The One Health approach is defined in Chapter 1, Article 1 (e), to mean *'an integrated, unifying approach that aims to sustainably balance and optimize the health of people, animals and ecosystems. It recognizes that the health of humans, domestic and wild animals, plants and the wider environment (including ecosystems) is closely linked and interdependent;*'. This includes a commitment at Article 5 (2)(b) to *'promote the effective and meaningful engagement of communities in the development and implementation of policies, strategies and measures to prevent, detect and respond to zoonotic outbreaks;*'. Under Article 5 (3) the parties also commit to contributing *'to the further development and updating of international standards and guidelines to detect, reduce risks of, monitor and manage zoonotic spill-over and spill-back...'*

The draft envisages that existing instruments such as the Aarhus Convention should be used to support this issue: Article 4, point 5 states, *'The Parties recognize that environmental, climatic, social, anthropogenic and economic factors increase the risk of pandemics and endeavour to identify these factors and take them into consideration in the development and implementation of relevant policies, strategies and measures, including by strengthening synergies with other relevant international instruments and their implementation.'*

If the UK government could be clear that environmental matters involving unlawfully poor conditions in farming with potential for zoonotic spillover fall under the Aarhus Convention it would support implementation of the forthcoming WHO Agreement on Pandemic Prevention, in a practical and action-oriented manner. It would enable communities to take part in and assist in pandemic prevention by enabling them to act on identified risks, bringing legal actions without the risk of incurring impossibly heavy legal costs, and thus improving standards and reducing risks overall.

Submission

Accordingly we urge the UK government to acknowledge that the distinction between wild and domestic animals is unscientific, and recognise the animal-human-environment nexus in its understanding of the definition of the environment under the Aarhus Convention and thus into the scope of cases protected under the ECPR. This will allow many concerning environmental cases to be brought which cannot currently because of the risk of costs.

Question 7: Please provide your views on mediation or other forms of dispute resolution as a means to resolve private nuisance disputes.

Mediation is not an effective form of dispute resolution. The discrepancy in power and finance between the parties is usually too wide, as cases very often involve a large corporation against a comparatively poorer charity. Further, a meaningful threat of litigation (because costs are protected)

is necessary to ensure that individuals are able to take action as a last resort if mediation fails. This is also a strong bargaining tool within an unequal relationship.

Question 20: In your view, are indemnity costs dissuading claimants from bringing forward Aarhus claims? Please provide evidence.

Yes. At the UK Centre for Animal Law, several times a year we have discussions with counterparts in interested non-governmental organisations who are keen to bring legal actions, for example involving intensive pig farming, but they are unable to bring cases because of the risk of costs.

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