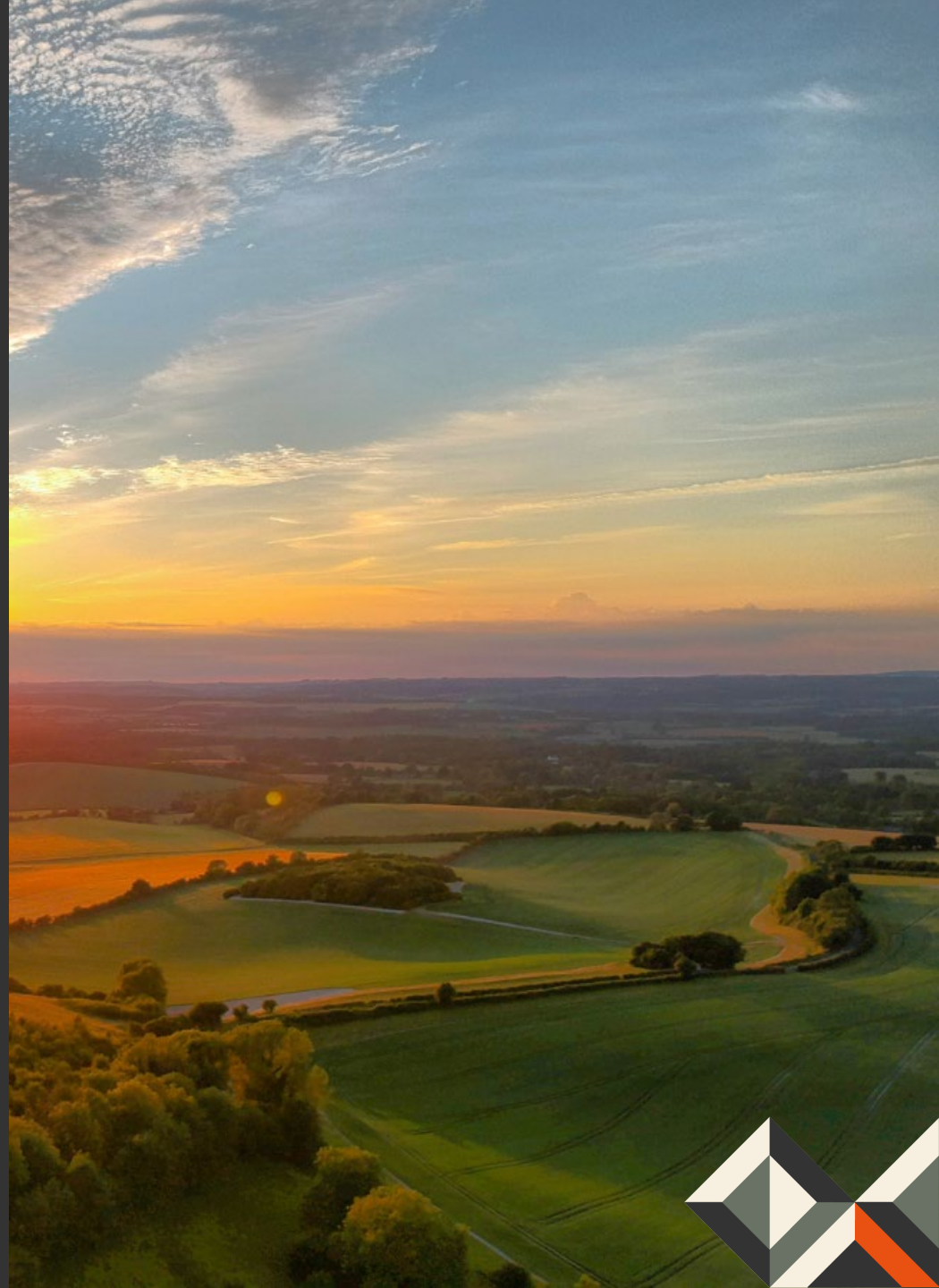
The role of the Aarhus Convention in EIR case-law

James Maurici KC



Contents

Will cover:

(1) The status of the Aarhus Convention in domestic law;

(2) The role of the Aarhus Convention in EIR case-law to date;

(3) Ask whether given the likely diminishing future role for EU law if that could mean an increasingly important role for the Aarhus Convention instead?

Start by looking at perhaps the leading case – and certainly the most oft cited - on the Aarhus Convention and its role in relation to the interpretation of the EIR

Introduction (1)

Department for Business, Energy and Industrial Strategy v Henney [2017] P.T.S.R. 1644, per Beatson LJ

"4 … The EIR gave effect in domestic United Kingdom law to Parliament and Council Directive 2003/4/EC of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003, L41, p 26). That Directive in turn gave effect to international obligations under the 1998 UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, the "Aarhus Convention".

"14. The starting point is that the EIR must be interpreted, as far as possible, in the light of the wording and the purpose of the Directive, which itself gives effect to international obligations arising under the Aarhus Convention …."

"15. The importance of the obligation to provide access to environmental information is seen from the recitals to the Directive and the Aarhus Convention … The recitals to the Aarhus Convention include: "citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters …" And: "improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns."

Introduction (2)

The case was about whether information concerning a project assessment review of the communications and data component of the Government's smart meter programme was *"environmental information"* under the EIR. Defined as "*any information . . . on . . . measures . . . affecting or likely to affect*" the state of the elements of the environment or factors affecting those elements.

43 *"It was not in dispute that, when identifying the measure, a tribunal should apply the definition in the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1)."*

47. *"In my judgment, the way the line will be drawn is by reference to the general principle that the Regulations, the Directive, and the Aarhus Convention are to be construed purposively. Determining on which side of the line information falls will be fact and context-specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information "on" the project for the purposes of section 2(1)(c) because it is not consistent with or does not advance the purpose of those instruments."*

Introduction (3)

48. My starting point is the recitals to the Aarhus Convention and the Directive, in particular those set out at para 15 above. They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as "on" a given measure."

54. "As I have stated, the application of the definition in regulation 2(1) of the EIR is informed by the purpose of the Aarhus Convention and the Directive. In the present case, since the objectives of the Project Assessment Review include assessing the progress of the communications and data component, it is clear the public may be better informed and better able to contribute to environmental decision-making if they are able to have access to the Project Assessment Review. The evidence before the FtT made clear that the Project Assessment Review considered a choice between two models. Those with experience of the electricity industry such as Mr Henney may be well placed to comment on the conclusion as to which model is most appropriate, or most likely to achieve the smart meter programme's environmental objectives."

Introduction (4)

- So the Aarhus Convention, along with the EID, have played an important role in interpreting the EIR in domestic law.
- But the role of the EID in this regard, while preserved, by the EU Withdrawal Act 2018 ("the EUWL") is likely to be reduced by the Retained EU Law (Revocation and Reform) Act 2023 ("the REUL Act").
- While as a result of REUL the EIR remains what is now called "*assimilated law*":
- **EU supremacy – retained by the EUWL – is ended;**
- **The *Marleasing* principle also said to be gone according to the Explanatory Notes, para. 84;**
- **Very wide powers introduced to restate/reproduce/revoke or replace assimilated law (powers expire on 23 June 2026);**
- **Under EUWL the Courts not bound by post-Brexit CJEU case-law – with an ability for Higher Courts to depart from pre-Brexit case-law;**
- **Under the REUL Act made easier to depart from both CJEU and domestic retained case-law – see sections 6(2) –(7):**

(1) New test for departing from pre-Brexit case-law;

(2) Lower courts can make a reference to higher level court on whether to depart; test of general public importance; initiated by court or parties;

(3) Attorney General and other Law Officers in the UK and devolved governments the power to intervene in and refer cases to the courts, so that they may be invited to exercise their new discretion to depart from retained EU.

- **NB s.6 subject to commencement provisions**

Introduction (5)

Marleasing important in this context - if gone re purposive interpretation see e.g. *Vesco v Information Commissioner and another* [2020] P.T.S.R. 179 at [13]:

> "*Another aspect of public participation is that the public should have access to information, so they can be informed about matters relevant to the environment and be able to take decisions accordingly. These public participation obligations arise under the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998) ("Aarhus"), which led to adoption of the Directive. The EIRs are part of the United Kingdom's implementation of its obligations under the Directive. The EIRs fall to be interpreted purposively in accordance with the Directive: Marleasing SA v La Comercial Internacional de Alimentación SA (Case C-106/89) [1990] ECR I-4135 , para 8; Attorney General for the Prince of Wales v Information Comr [2016] UKUT 154 (AAC) at [15]. In turn, although not material to this particular case, account is taken of Aarhus when interpreting the Directive: Fish Legal v Information Comr (Case C-279/12) [2014] QB 521 , paras 35–38.*"

Note under REUL new s. 5(A2) EUWA 2018 new priority rule: requiring RDEUL to be read and given effect in a way which is compatible with standard domestic legislation and, where the two conflict, for domestic legislation to take priority over RDEUL (reverse *Marleasing*?)

Status (1)

The Aarhus Convention is an international treaty. It entered into force 30 October 2001. The UK ratified it on 23 February 2005.

International treaties have traditionally had restricted use in domestic law *unless* they have been *incorporated* into domestic law.

This, of course, is a consequence of our strictly dualist system of law

And is a result of two principles of "*constitutional orthodoxy*", namely:

(i) Domestic courts have no jurisdiction to construe or apply treaties which have not been incorporated into national law; that they are effectively non-justiciable; and

(ii) Such treaties, unless incorporated into domestic law, are not part of that law and therefore cannot be given direct effect to create rights and obligations under national or municipal law.

> **See e.g. *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 (SC) and *R (Spurrier) v SST* [2020] PTSR 240 para 606.**

In relation to (i) above where it is nonetheless necessary to consider the proper construction of an unincorporated treaty the test to be applied by the Court is whether the view taken by the decision-maker is a tenable one: see R. (Friends of the Earth Ltd) v Secretary of State for International Trade [2023] EWCA Civ 14.

Status (2)

In Morgan v Hinton Organics (Wessex) Ltd [2009] C.P. Rep. 26, per Carnwath LJ on the Aarhus Convention:

> *"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 ... Ratification by the European Community itself gives the European Commission the right to ensure that Member States comply with the Aarhus obligations in areas within Community competence (see* **Commission v France** *case C-239/03 (2004) ECR I-09325 [25]–[31])"*

Carnwath LJ also noted that the provisions of the Convention had been reproduced in various EU Directives, giving the examples of Environmental Assessment and Integrated Pollution Control.

This was, of course, the pre-Brexit position.

Plus, Carnwath LJ was not considering position under EIR. Case was about costs.

Status (3)

There is a presumption of compatibility of domestic legislation with international law: see e.g. Assange v Swedish Prosecution Authority [2012] AC 471 (SC) where, at para 122, Lord Dyson said: "*there is no doubt that there is a 'strong presumption' in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations*".

That especially powerful where - as here with the EIR - the domestic legislation in question is introduced to give effect to international law.

But where legislation is clear and unambiguous it must be given effect to irrespective of any international treaty obligations: see Salomon v Commissioners for Customs & Excise [1967] 2 QB 116 (CA).

Seen above that in Morgan v Hinton Organics per Carnwath LJ at para. 22 in respect of the Aarhus Convention itself that "*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*" albeit that it could (see further below) "*be taken into account in resolving ambiguities in legislation intended to give it effect*".

The Convention in EIR case-law

There are a number of things to cover re Aarhus and the EIR:

(1) Cases on the scope of environmental information such as *Henney*;

(2) Cases on public authorities under the EIR;

(3) Cases on the exemptions under the EIR;

(4) Cases on territorial application;

(5) Reliance on the Aarhus Implementation Guide;

(6) Reliance on ACCC decisions;

(7) Article 9 cases;

(8) EIA case-law.

The Convention in EIR case-law – scope of environmental information cases

Looked at *Henney* already;

See also:

***Department of Transport v Information Commissioner* [2202] 1 P&CR 19;**

***Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] P.T.S.R. 1644;**

Case C-71/14 *East Sussex CC v Information Commissioner* [2016] P.T.S.R. 179

The Convention in EIR case-law – public authorities

Largest number of cases:

Leading case is *Fish Legal* [2015] UKUT 52 (AAC), following the reference to the CJEU in Case C-279/12 [2014] QB 521 (which itself referred to the Aarhus Convention and the Guide, see e.g. the AG at [3]-[5], [51]-[52], [68] and the CJEU at [3]- [5], [25], [35] – [38], [41], [44], [46], [48] – [50], [60] – [61] and [76] – [78]). The UT refers to the Aarhus Convention at [3]–[4], [21], [56], [88], [89], [92] – [94], [130], [139] and the Implementation Guide at [57]

But extensive reference to and discussion of the Convention, and the Implementation Guide, in this context also in:

(i) *Information Commissioner v Poplar Housing Association and Regeneration Community Association* [2020] P.T.S.R. 2081 (UT);

(ii) *Cross v Information Commissioner* [2016] UKUT 153 (UT) – also housing association case;

(iii) *Heathrow Airport Ltd v Information Commissioner* [2021] 6 WLUK 373 at [43];

(iv) *Bruton v Information Commissioner* [2011] 11 WLUK 119 – re Duchy of Cornwall – see [11], [17], [18], [58], [86], [91] -[92], [102], [109];

(v) *Smartsource* J.P.L. 2011, 4, 455-477 overturned by *Fish Legal:* see [23]-[27], [30]-[31], [36]-[42], [49], [83], [87], [94], [99], [107]-[108];

(vi) *Network Rail v Information Commissioner* [2007] 7 WLUK 464 at [21], [24] and [27].

The Convention in EIR case-law – exemptions

See e.g.:

Breckland DC v Information Commissioner **[2023] UKFTT 103 (GRC): concerned reg. 12(5)(e) "*confidentiality of commercial and industrial information*". FTT referred to Article 4.4 (d) of the Aarhus Convention on which exemption based.**

South Gloucestershire DC v Information Commissioner **[2022] UKFTT 445 (GRC): concerned 12(4)(d) "*the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data*" and 12(5)(e) (see above). Refers to the Aarhus Implementation Guide and the guidance it gives on following guidance on legitimate economic interests: [40].**

Pinkerton v Information Commissioner **EA/2020/0071(P) (GRC) "*52. We turn now to the public interest balance. We take account of the fact that disclosure is to the world, not to this individual and that this information is environmental. Taking into account the backdrop of the Directive and Aarhus discussed above, and the policy behind the recovery of environmental information, we find that there is a general public interest in transparency in relation to environmental information held by public authorities …"**

NB though *Department of Transport v Information Commissioner* [2020] 1 P. & C.R. 19, CA, saying at [15] "*The judge also added, as an additional reason (by reference to the recitals to the Aarhus Convention) that: "Greater public access to environmental information is thus an end in itself." (With respect, I think Mr Dunlop was correct in his submission before us that this last reason involves some circularity of reasoning.)"*

The Convention in EIR case-law – exemptions

Dransfield & Craven v Information Commissioner and another **[2015] 1 W.L.R. 5316 on manifestly unreasonable and reg. 12(4)(b):**

"54. Mr Cross took the court to the published guidance on section 14 FOIA and regulation 12 EIR. In the end, he accepted that none of it assisted. Mr Cross also referred us to a provision in The Aarhus Convention : An Implementation Guide , 2nd ed (2013), which Mr Cross submits may be taken into account in interpreting the Aarhus Convention. It must, therefore, also be relevant to the interpretation of regulation 12 (which is ultimately derived from that Convention). The Implementation Guide states that an extension of time for a reply to an authority's reply to a request may be appropriate where the volume and complexity of the information sought justifies it, stating that the volume and complexity alone could not justify withholding information on the grounds that the request is "manifestly unreasonable". The same point can be made on the basis of regulation 7 EIR : see the Annex to this judgment.

84. I would add the point, not made by the UT, that the Aarhus Convention : an Implementation Guide referred to in para 54 above, states that "the volume and complexity alone could not justify withholding information on the grounds that the request is 'manifestly unreasonable'." There is no equivalent guidance in relation to section 14 . This may mean that a higher hurdle has to be passed before a decision maker can conclude that a request should be rejected on the grounds of the costs of compliance under the EIR than under FOIA . That in turn may depend on the precise status of the Implementation Guide . These points were not fully argued and so I express no concluded opinion on them."

The Convention in EIR case-law – exemptions

Department for the Environment, Food and Rural Affairs v Information Commissioner and Birkett [2012] P.T.S.R. 1299

CA holding that where a public authority refused a request to release environmental information on the basis of a particular exception to its duty to disclose in reg. 12 of the EIR did not preclude the authority from relying on different or additional exceptions in proceedings regarding the request before the Information Commissioner or in a subsequent appeal to the FTT; that a public authority was entitled as of right to rely on such new exceptions in appeal proceedings in the FTT, provided that they were identified in the grounds of appeal or in the grounds of opposition in response to an appeal within the time scale prescribed by the tribunal's procedure rules

See on Aarhus: [10], [12] and [13] – holding that this did not compel a different result.

Case C-71/10 *Office of Communications v Information Commissioner* [2011] PTSR 1676 relying on Aarhus in rejecting view that under the EID there could be additional exemptions to those provided: see AG at [6], [8], [20] – [21], [33], [47] *("[a]dditional exceptions would also conflict with the Aarhus Convention , which in article 4(3) and (4) similarly makes provision for certain expressly stated exceptions only*")

And same case in the SC at [2010] Env LR 20 at [2], [13].

The Convention in EIR case-law – territorial scope

Maurizi v Information Commissioner EA/2020/0087 (GRC)

Scope of FOIA regime when a person seeking information outside the UK

"30. There are other good reasons not to imply a territorial limitation into section 1(1). First, we see force in Mr Kosmin's submission that to do so would bring inconsistency with associated legal regimes, in particular the EIR, which implement Council Directive 2003/4/EC on public access to environmental information, which in turn gives effect to the Aarhus Convention (i.e. The United Nations Economic Commission for Europe Convention on Access to Information , Public Participation in Decision-making and Access to Justice in Environmental Matters – to which the United Kingdom remains a party).

31. In summary, and we intend no injustice to Mr Kosmin's comprehensive submissions on this point, it is submitted that although the EIR does not have express provision relating to its territorial reach, the applicable construction tools to be deployed where its terms are reasonably capable of bearing more than one meaning include the premise that, if one of the meanings which can reasonably be ascribed to the legislation is consonant with the United Kingdom's international obligations and the others are not, the meaning which is consonant is to be preferred. Attention is subsequently drawn to Article 3(9) of the Aarhus Convention which provides that: "the public shall have access to information…without discrimination as to citizenship, nationality or domicile, and in the case of a legal person, without discrimination as to where it has its registered seat or its effective centre of its activities" . The point is thereafter made that, should there be a dispute as to the territorial reach of the EIR of the type which we are now considering in relation to FOIA, the outcome, consistently with Article 3(9) of the Aarhus Convention, would be that the EIR did not have any territorial limitation."

The Convention in EIR case-law – The Implementation Guide

What is it?

The United Nations Economic Commission for Europe ("UNESC") has published an Implementation Guide to the Aarhus Convention which seeks to explain the meaning and purpose of the Convention

It is an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention.

However, the observations in the implementation guide have no binding force and they do not have the normative effect of the provisions of the Convention.

Therefore, the implementation guide is a relevant aid to interpretation of the Convention and hence the EIR in implementing it, albeit it is not binding on the courts.

See CJEU approach: Case C-71/14 ***East Sussex County Council v Information Commissioner*** [2016] P.T.S.R. 179; Case C-182/10 ***Solvay v Region Wallonne*** [2012] 2 C.M.L.R. 19 ([27] and [28]"*While the Aarhus Convention Implementation Guide may thus be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention, the observations in the Guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention*") and Case C-204/09 ***Flachglas Torgau GmbH v Germany*** [2013] Q.B. 212 (where the A-G said that "*while not entirely valueless, therefore, the evidence derived from the Implementation Guide should not be viewed as in any way decisive.*")

The Convention in EIR case-law – The Implementation Guide

Domestic EIR cases citing the Guide, extensive see:

South Gloucestershire [40]

Heathrow Airport [43]- [44]

Poplar UT [13] – [14], [75] and FTT [29]-[31], [36], [45], [67]-[69], [103], [106]-[107], [117]-[118] and [124]

Evans Div Crt at [123] and [131] and CA at [71]

Fish Legal in the UT at [57]

Dransfield [54] and [84] and [109]

Bruton [17], [86]

Elmbridge v Information Commissioner [2011] 1 WLUK 11 [6], [19], [37]

Smartsource [30]-[31], [39], [83], [94] and [107]

Network Rail [24] and [27]

Henney in UT [34] an [37]

The Convention in EIR case-law – ACCC decisions

Not binding;

Lord Carnwath in ***Walton v Scottish Ministers*** [2013] P.T.S.R. 51 at [100] decisions entitled to *"great respect"* – context public participation not information

See further https://www.landmarkchambers.co.uk/news-and-cases/15-the-status-of-decisions-of-the-aarhus-compliance-committee-in-english-law-respect

Not many ACCC cases from UK on information – most on costs

And so not many domestic cases in information context citing ACCC decisions, only ones I could find:

Evans **in Divisional Court [123] and [132];**

Royal Society for the Protection of Birds v Scottish Ministers **[2017] CSIH 31 at [171].**

The Convention in EIR case-law – Article 9 cases

Article 9(1) and (3) of the Convention and the *"substantive legality"* requirement:

> **"1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law. In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access 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. Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph**
>
> **…**
>
> *3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."*

R (Evans) v Attorney General the Prince Charles letters case.

Concerned a certificate under section 53(2) of FOIA seeking to override UT decision re breach of FOIA/EIR.

SC: [2015] A.C. 1787 Lord Neuberger's judgment considers Aarhus Convention at [21] - [22];

CA: [2014] QB 855 at [9] –[12], [49, [69], [71] and [73].

Div Court: [2014] QB 855 at [33], [121] – [123], [130] – [133], [135] and [138].

UT: [2012] UKUT 313 (AAC) at [17] and [133].

EIA case-law

See *R (Corbett) v Cornwall Council* [2014] PTSR 7272 relying on the Convention in interpreting the meaning of *"other information"* under the EIA Regulations.

Cites ad relies on the Convention at [52] and [74] interpretation *"fully in accordance with the policy underlying both the regime governing access to environmental information, broadly defined, and the regime governing assessment of the environmental impacts of particular projects. The aim, broadly, of the former regime is to ensure access to information and public participation in decision-making as appears from the recitals to the Aarhus Convention and the recitals to the Information Directive . The recitals to the Amending Directive similarly refer, amongst other things, to the importance of effective public participation in decisions taken which may have a significant effect on the environment".*

Thank you

180 Fleet Street
London
EC4A 2HG

clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk
+44 (0)20 7430 1221

Landmark Chambers
@Landmark_LC
Landmark.Chambers
Landmark Chambers