2003-053-en

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# Access to Justice in Environmental Matters

## Country Reports and Case Studies

**Part III**
**Portugal – United Kingdom**

**Darmstadt/Brest/Bingen, 2003**

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**ENV.A.3/ETU/2002/0030**

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## Portugal – United Kingdom

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# Portugal Country Report

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# 1 Legal Background

## 1.1 Characteristics of the country

The Portuguese Republic is a democratic State, based on the rule of Law, the sovereignty of the people, the pluralism of democratic expression and democratic political organisation, the respect and effective guarantees for fundamental rights and freedoms and the separation and inter-dependence of powers (article 2 of Portuguese Constitution).

The main source of Portuguese law is statutory law, which includes the Constitution, International and Community Law and legislation enacted by the Parliament, the Government and the legislative bodies of the autonomous regions of Madeira and Azores. Case Law and academic opinions work as tools to help the interpretation of statutory law but there is no such rule as the judicial precedent.

Great part of Environmental Law derives form EC Law (Nature protection, Environmental Impact Assessment, Waste Management, etc.) and falls within the scope of administrative law, since, in most cases, it establishes Environment protection as a special task of the State. Being Portugal a participatory democracy, the citizens have also a responsibility towards this goal. Participation in decision-making process is a right granted by the Code of Administrative Procedure to all having direct interest in the administrative procedure but also to those that can be affected by a threat or damage to diffuse interests (article 53 (2)). Popular Action Law (Law 83/95 of 31 August) regulates a broad public participation in decision-making procedures concerning the preparation of plans, location and execution of construction works and public investments (articles 4 to11). Several pieces of legislation concerning specific matters (*e.g.* environmental impact assessment, urban and spatial planning) establish particular mechanisms for public participation. Access to information is subject of a specific legislation (Law 65/93 of 26 August) and an independent commission (Commission on Access to Administrative Documents), working by the Parliament, hears complaints on this matter, formulating opinions (not binding) to the administrative organs holding the administrative documents requested.

Violations to Environmental Law can be brought before administrative authorities by NGOs and citizens, whenever constituting an administrative infringement (leading to the application of a fine or other administrative sanction), or to the courts of any of the three jurisdictions (civil, penal or administrative) depending on the kind of regulation being disrespected.

Almost all environmental regulations sanction the violations of its provisions with fines to be imposed by administrative authorities. Citizens and NGOs can inform the administrative authorities of any of these violations. If the administrative infringement procedure ends with the imposition of a fine, the offender may appeal to the courts to set aside the decision of the Administration. These appeals constitute great part of the judicial procedures on environmental matters, however citizens and Environmental NGO cannot become a Party in it. After giving notice of any violation to the competent administrative authority, the only admissible intervention is the presentation of technical

evidence by NGOs, reason for which these procedures will not be analysed in the present study.

Access to judicial procedures (in civil, administrative and penal jurisdiction) is broadly recognised, since 1976 by the Constitution in more general terms and since Law 83/95 of 31 August (Popular Action Law) with a more detailed regulation. Through Popular Action a citizen or NGO can enforce substantive provisions or procedural rights, such as access to information or participation in decision-making. The specific characteristics of such proceedings will be analysed in the following sections.

## 1.2 The Constitution of the Portuguese Republic

According to the Portuguese Constitution of 1976, protection of the environment is both a task of the State (**article 9 (e)**) and a fundamental right granted to everyone. Inserted in the chapter of Social Rights and Duties, the right to a healthy and ecologically balanced human environment, as set by **article 66**, also implicates for citizens the obligation not to harm the environment and the duty to prevent others from harming it.

In order to guarantee the effectiveness of all fundamental rights, **article 20** of the Constitution states the access to law and effective judicial protection as general principle. Also in the regulation of Public Service, the Constitution states the right of access to administrative courts, namely to challenge any administrative action or regulation, in order to protect each one's legally protected rights or interests (**article 268 (4) and (5)**).

The wording of both provisions mentioned above indicates they apply directly to those situations where there is an individual right to be protected: "*everyone is guaranteed access to law and to the courts in order to defend his or her rights and legally protected interests*" (article 20), "*Interested parties are guaranteed effective protection of the courts for their legally protected rights or interests*"(article 268).

But the right to a healthy environment falls into the category of the so-called "diffuse or general interests", recognised to an entire group of individuals and referring to a trans-individual and indivisible object.

Recognising this different feature of some fundamental rights, such as the right to the environment, **article 52 (3) (a)** grants the **Right of Popular Action**, extending the access to justice to any person claiming the protection of diffuse interests regarding a specific case in question.

Though existing in the Portuguese Constitution since 1976, the right of popular action was first object of a general proclamation, replaced, in 1989, by the following, much more substantive, provision:

> *"3. Everyone, personally or through associations that purport to defend the interests in issue, enjoys the right of actio popularis in the cases and under the conditions provided by law, including the right to claim compensation, on behalf of the aggrieved party or parties, the following:*
> *a) to promote the prevention, the suppression and the prosecution of offences*

*against public health, consumer rights, the quality of life, the preservation of the environment and the cultural heritage"*

This provision establishes the following main traits of Popular Action:

1. ***Locus standi***: citizens and associations
2. **Protected interests**: public health, consumer rights, the quality of life, the preservation of the environment and the cultural heritage, the property of the State, of the autonomous regions and of the local authorities.
3. **Scope of the proceedings**: prevention, suppression or prosecution of offences against the protected diffuse interests and/or claiming of compensation for damages

The right of *actio popularis* is included in the chapter of Rights, freedoms and guarantees of political participation, which means its provisions shall be directly applicable and binding on both public and private bodies, as set by **article 18**.

However, article 52 (3) (a) is still a very general provision, expressly requiring a law to further detail the conditions of exercise of the right of *actio popularis*. This regulatory legislation only came into force in 1995, with the publication of **Popular Action Law**.

In the meantime other legislation was passed, containing specific provisions that granted *locus standi* to the associations for the protection of the environment (Law 10/87 of 4 April, already replaced by Law 35/98 with a similar provision), but containing no additional procedural rules.

The lack of regulation during this time gap (1976-1995) was certainly responsible for a scarce use of the right to popular action in this period, since doctrine and jurisprudence considered Article 52 (3) (a) as not self-executing and therefore not a sufficient basis to provide a complete and operational regulation for this kind of proceedings.

## 1.3 Legislative framework

There are no extensive rules concerning specific judicial proceedings in environmental matters. **Law 83/95 of 31 August** (PAL) lays down only a fragmentary regulation to adapt existing judicial proceedings to the particular situation of general or diffuse interests, which requires a broader recognition of the *locus standi*. However this Law leaves many questions unsolved and, having been in force for a relatively short period since 1995, the courts and academics have experienced some difficulty in reaching consensual interpretations. A large number of court decisions, in the first and appeal instances, focus only on formal issues of popular action proceedings. Such discussions not only prolong considerably the proceedings, but also frequently lead to the dismissal of the cases on purely formal grounds (as it will be further analysed).

Repeating the wording of Article 52 of the Constitution, Law 83/95 defines its scope by exemplifying some general or diffuse interests to be protected through popular action: public health, environment, quality of life, consumer rights, cultural heritage and public property.

**Law 83/95** regulates not only popular action (Chapter III) but also popular participation in administrative proceedings (Chapter IV). Chapter V contains some provisions on civil and penal liability for damages to diffuse interests, which are particularly vague to

allow, by themselves, the presentation of a claim of compensation for environmental damages and its granting by the court.

**Law 65/93 of 26 August** regulates the **access to Administration's documents** and establishes a non-judicial proceeding to enforce the right to information, as it will be further described (I-3.7)

### 1.3.1 Legal standing

**Article 2 of Popular Action Law** grants the right to participate in administrative proceedings and to initiate a judicial proceeding to:

1. Any **citizen** in full enjoyment of his/her civil and political rights having or not a direct interest in the claim (acting individually or collectively);
2. Associations and foundations for the protection of the interests in issue, having or not a direct interest in the claim, as long as they fulfil the following requirements (as stated in Article 3 of Popular Action Law):
   - having legal personality (being a legal person),
   - expressly mentioning in their internal regulations the defence of the interests at issue as a goal or competence of the association or foundation,
   - having no other professional activity that comes into competition with companies or independent workers;
3. **Municipal authorities**, whenever the popular action is filed to protect the general interests of the residents of the respective area of competence.

The **Code of Civil Procedure** has, since 1995, a very similar provision (**article 26-A**) recognising *locus standi* to all the above and also to the **Public Prosecutor**.

**Law 35/98 of 18 July** (**Environmental NGOs Law**), as well as the regulation it has repealed (Law 10/87 of 4 April), also grants standing to sue to these associations, making express mention that they can initiate and become a Party in proceedings in the three jurisdictions (civil, administrative and penal). The requirements stated in Article 3 of Popular Action Law (as mentioned above) coincide with the ones set by Law 35/98 for an environmental non-governmental organization to be considered as such.

Though Law 35/98 classifies environmental NGO as national, regional or local according to their geographical scope and representativeness (number of members), all of them have equal *locus standi*. There is **no control of adequacy of representation**, nor for the NGO, nor for the citizens.

However, some doubts have aroused concerning the need of a geographical link between the plaintiff and the issue of the lawsuit, whenever the subject of the appeal does not concern the entire national territory (*e.g.* when some action causes damages/pollution in a restricted area).

Law 35/98 expressly establishes this requirement to the municipal authorities, which can only stand to sue to protect the interests of its residents. The same requirement may apply, indirectly, to NGOs, since the scope (set in the internal regulations) of local and regional NGOs will necessarily be the protection of the diffuse interests in a local or regional area. On the other hand, Article 15 of PAL determines that whenever the issue

of the lawsuit is a "geographically restricted interest" the calling of other interested parties shall be done only in that area. Based on these legal *argumenta* and on the fact that it would not be feasible to grant *locus standi* to 10 million citizens to all situations where a diffuse interest could be menaced, there are some opinions of academics upholding that a similar restriction should apply to citizens. There have not been a significant number of court decisions on this matter until now.

Popular Action Law is also unclear on the possibility of foreign citizens initiating a lawsuit. Even if the wording "citizen" points to individuals having the Portuguese citizenship, the Constitution grants the right to access to justice to "everyone", which can be used as an opposite argument. European citizens residing in Portugal have certainly the right of *action popularis* since they are granted other more significant political rights, such as the right to vote and be elected in local elections. The question, regarding other foreign people residing in national territory, has not been posed to the courts either.

The Public Prosecutor has, within Popular Action Law (**article 16**), cannot initiate a lawsuit, having its role limited to the control of legality and representation of the State (whenever it is a Party), of the minors, absents and other incompetent persons and of public legal persons whenever the law determines it. Regarding the control of legality, the Public Prosecutor may take the place of the petitioner in case of voluntary dismissal, settlement or any other action that may cause damage to the interests in issue.

However, acting in accordance to other provisions that grant legal standing to this organ (article 45 of Law 11/87 of 7 April [Basic principles of Environmental Law] and article 26-A of Code of Civil Procedure), the Public Prosecutor has initiated a significant number of lawsuits concerning the protection of environment. Previous studies and collections of court decisions put in evidence not only this fact, but also that citizens and environmental NGO have, in many situations, chosen to present a complaint to the Public Prosecutor, rather than initiate the lawsuit themselves. This situation may be explained by the fact that citizens and NGO consider the Public Prosecutor as being better prepared, in technical terms, to do so.

Such a broad *locus standi* brings some peculiarities to the judicial procedure.

**Article 14 of PAL** sets a "**special regime of procedural representation**" by stating that in popular action proceedings, the petitioner represents, on its own initiative and without needing a mandate, all other individuals having the same general interest. However, the concerned individuals have the possibility of opposing to this representation by expressly excluding themselves of the proceeding.

The exercise of this **opt-out mechanism** is regulated in **article 15**: after the filing of the petition, all individuals concerned by the interest in issue are given notice of the lawsuit, in order to be able to become a party, to declare if they want to be represented by the petitioner or to exclude themselves from the proceeding (the silence is understood as acceptance of the representation). The citation may be addressed generally to all having the same interest (not having to make a personal identification). It sets a time limit for all interested to intervene or opt-out and is served by publication in the *media*, or by posting in a prominent place if the interest in issue is geographically restricted. Until the

end of the presentation of the proof, or an equivalent phase, individuals can still refuse to be represented by the petitioner, by making a statement in the proceeding.

The possibility of opting out, intending to exclude individuals from the binding force of the final decision, suits better the so-called "uniform individual interests" (common in consumption issues) having not much significance to the "diffuse interests", such as the right to a healthy environment. In fact, in the case of uniform individual interests there is a group of persons having the same individual and separate interest affected by a common cause, so it is understandable that someone might not want to have its particular situation ruled by a court decision in a proceeding where he/she did not take part. On the other hand, a diffuse interest concerns a group of individuals but its object is not divisible and the damages caused by an offence to it cannot be individually measured, which means a ruling on such matter has necessarily to affect all individuals (*e.g.* the interdiction of an activity that causes pollution).

However, the possibility to become a party of the proceeding could be an interesting way of gathering efforts whenever it was not possible to do it before filing of the petition (given the fact that persons concerned can be spread all over the entire territory). In the lack of a more detailed provision, it has been upheld that this subsequent intervention can be used not only to support the pleading initially presented by the first plaintiff, but also to present a new petition, which would represent a deviation to general rules of accumulation of requests. This mechanism has been scarcely, almost never used.

As a consequence of this representation scheme, and bearing in mind the particular feature of diffuse interests as above-mentioned, the final decision of the court is, as a general rule, binding to all individuals concerned by the general interest that have not opted out – ***res judicata erga omnes***.

**Article 19 of PAL** sets some exceptions to avoid that a less diligent conduct of the petitioner impairs the interests of those not participating in the lawsuit. Thus, the judgment only binds the parties of the lawsuit whenever: (a) the court comes to a decision of insufficient evidence (*non liquet*) and therefore dismisses the case (the lawsuit failed because the petitioner has not met his burden of proof); (b) the judge decides differently based on special circumstances of the specific case (*e.g.* the particular situation of the petitioner). The fact of establishing a ***res judicata inter partes*** in such cases allows the presentation of further lawsuits in the same matter by whoever has not been a party in the first proceeding.

### 1.3.2 Possible judicial procedures

According to **article 12 of Law 83/95**, Popular Action can take the form of any civil or administrative judicial procedure. **Article 25** regulates the participation of citizens and environmental NGO in penal judicial procedure.

#### 1.3.2.1 Administrative popular action

The Administrative Code of 1940 establishes the so-called "corrective popular action", which can be used by any citizen with the right to vote in order to challenge any alleged illegal decision of local administrative organs of its residence. The cause of action is the

illegality of the decision and not necessarily the violation of a diffuse interest, but the subject matter of the lawsuit can only be a decision of the local administrative organs.

Article 12 of Popular Action allows the use of all administrative judicial procedures, which means a popular action can take the form of:

- a procedure against **administrative acts** (*e.g.* licences, permits) and **regulations** (plans or other general decrees of the Administration having a direct binding force) – articles 26 and 51 of Administrative and Fiscal Courts Statute (AFCS), 24 to 58 and 63 to 68 of Law of Administrative Courts Procedure (LACP),
  Any administrative final decision, being either an express or tacit administrative act, can be challenged. The so-called "judicial appeal" does not depend of a previous hierarchic appeal and has to be brought within 2 months of the notification or publication of the act (when there is a tacit act the 2 months start counting from the end of the time limit for the making of the administrative decision). If the petitioner, instead of residing in the mainland or the islands, resides abroad, the time limit is 4 months. This proceeding's aim is to obtain the **annulment of the administrative act**, but the court cannot substitute himself to Administration adopting an act that would respect the legality. The procedure does not suspend the effect of the administrative act but a provisional remedy can be requested (before or during the appeal) with that purpose.
  Regulations enacted by regional or local Administration, by legal persons with the status of public administrative utility, by concessionaires and public associations can be directly challenged at any time. Provisions of regulations enacted by any other administrative authority can only be contested if they have been already judged illegal in three specific cases (and the court has refused to apply them) or if they are self-executing. The outcome of this proceeding, if successful, will be a **declaration of the invalidity of the regulation with an *erga omnes effect,*** but only to the future. This procedure has no suspensive effect either and, in this case, there is no way to prevent the application of the regulation until the final court decision.
  The law regulating urban and spatial planning (Decree-law 380/99 of 22-9) expressly states the right of popular action to all interested, namely to directly challenge local and special spatial plans.
  The grounds to contest an administrative act or regulation can be the violation of substantive or procedural administrative law (such as the violation of the right of participation in administrative proceedings).
- a procedure to claim compensation for damages caused by the administrative activity – articles 71 and 72 of LACP
  Liability of Administration can be based either on a breach of an administrative contract or on damages caused by action of administrative organs or agents within their public function. In the first case there is no time limit to claim compensation, but in what concerns civil liability of Administration the petition has to be presented within 3 years.
- a procedure to obtain **recognition of a right or legitimate interest** – articles 69 and 70 of LACP
  Whenever no other procedure is applicable the petitioner can address the court to

request the recognition of a right or legitimate interest endangered by the Administration's action or (the Law is not clear and there is no consensus on this possibility) to obtain a condemnation of the Administration to pay a certain amount or to delivery a certain thing (it is not certainly possible to request a court order to force the Administration to adopt an administrative act). There is no time limit for this procedure.

Administrative procedural law also sets provisional remedies that can be used to obtain:

1. **Suspension of the effects of an administrative act** (articles 76 to 81 of LACP) – can be requested previously or after the presentation of the appeal against an administrative act to avoid damages caused by its immediate execution;
2. **Access to Administration's documents** (articles 82 to 85 of LACP) – whenever the Administration does not grant access to administrative documents after a direct request by a citizen or NGO, or after the opinion of the Commission for the access to Administration Documents (described below I-3.7.), a request can be addressed to an administrative court, within 30 days of the refusal or absence of decision. Since the enactment of Access to Administration Documents Law, which refers in its article 17 to this procedure as a judicial mean to assure the right of access to documents, this procedure does not necessarily have to be used as an accessory of a main proceeding;
3. **Certain conduct (action or abstention) by private persons or concessionaires** to assure the respect for administrative law provisions, which are being or are in danger of being violated (articles 86 to 91 of LACP) – can be requested previously or in the pendency of a judicial proceeding intended to protect the interests menaced by those private persons or concessionaires.
4. **Anticipation of the presentation of evidence** (articles 92 to 94 of LACP) – in cases where there is a justified concern that the later presentation (during the proceeding) of some evidence may become impossible, it can be presented even before the filing of the lawsuit.

**Article 18 of Popular Action Law** enables the judge to grant **suspensive effect to a judicial appeal**, in cases where procedural law does not provide it, in order to prevent irreparable or hardly reparable damage.

The interpretation of this provision has not been at all consensual: some courts consider it as a provisional remedy to be used as accessory to the main administrative judicial proceeding against an administrative act (this proceeding is called "appeal" though it is brought before a first judicial instance). This understanding would make the provisional remedy set by the general procedural law (mentioned above *a)*) unnecessary and, in consequence, unusable in popular action. On the other hand, according to other judgments, article 18 refers not to a provisional but to a main procedure: the request to a higher court to reverse the decision of a first instance court (an appeal in the literal sense of the word).

There are three kinds of administrative courts: the Supreme Administrative Court, the Central Administrative Court and Administrative Courts of the Circle (8). All decide as a first instance, depending on the kind administrative organ being challenged, and there

is generally only one instance of appeal (the Supreme Administrative Court decides as a full court whenever the first instance has been its Section).

A reform of administrative procedural law is underway. **Law 13/2002 of 19 February** and **Law 15/2002 of 22 February** have approved a new **Administrative and Fiscal Courts Statute** (that will replace the existing) and a **Code of Administrative Courts Procedure** (replacing Law of Administrative Courts Procedure) that will enter into force in the 1st January 2004, widening the scope of administrative judicial proceedings and clarifying some questions. There will be a common procedure, similar to the civil procedure, through which a variety of requests can be made in order to protect a right or legitimate interest. The proceedings to obtain the annulment of an administrative act and to challenge administrative regulations are classified as special procedures, along with a new procedure to force Administration to adopt a due act (the court having the possibility of substituting himself to Administration, whenever the adoption of the act does not involve a discretionary decision) or to ask the declaration by the court of illegality for omission of the Administration in enacting a due regulation. The request to access to administrative documents is set as an urgent procedure, making it clear that it is not a provisional remedy and can be used independently of another procedure. The provisional remedy requesting a certain conduct by concessionaires may be used also against Administration. The legal standing of individuals and associations protecting the environment is recognised in the first part of Code of Administrative Courts Procedure (Fundamental dispositions), and subsequently in provision relating to each of the procedures.

#### 1.3.2.2 Civil popular action

The civil procedure is to be used whenever the offence or threat to environment is caused by an action by private persons or by the State, as long as it is not acting with its powers of authority (if this is to be the case, the administrative jurisdiction is competent). **Article 12 (2) of Law 83/95** expressly states civil popular action can take any form established in the Code of Civil Procedure.

According to the principle of **article 2 of Code of Civil Procedure**, stating that to each right corresponds a proceeding adequate to its recognition, protection and/or enforcement, any citizen or environmental NGO can use a civil judicial proceeding to protect the environment asking the court, separately or in the same petition: (a) a **declaration of the existence of its right to a healthy environment**, (b) a **judgement prohibiting an activity that is damaging or threatening to damage the environment**, (c) **compensation for damages to environment**.

The general rules of the Civil Code on **non-contractual civil liability** make the following distinction:

1. **Liability for unlawful acts** (article 483-498 of Civil Code) – depends on the existence of an illegal act (violation of a right or legal duty), negligence of the agent (imputation of the act to the agent), a damage or loss and a causal link between the act and the damage or loss;

2. **Liability for risks** (articles 499-510 of Civil Code) – a person carrying a hazardous activity, regardless his negligence, can be held accountable for damages, if there is an express provision setting this kind of liability;
3. **Liability for damaging lawful acts** – (there is no general provision) in some specific cases, even though the law grants a right to act, it recognises that activity may cause damages and therefore establishes the obligation of the agent to compensate the losses.

There are several specific provisions regulating civil liability for environmental damages, both on substantive and procedural aspects.

**Article 40 of Basic Principles of Environmental Law (BPEL) and article 10 of Environmental NGOs Law** grant the right to claim compensation for damages to any citizens or environmental NGO that feel their right to a healthy environment threatened or offended by any activity.

**Article 22 of PAL** is entitled "**liability for unlawful acts**". The first paragraph repeats that whoever offends, with negligence, the interests protected by that Law, such as the environment, has to compensate the damages. The subsequent paragraphs contain some provisions concerning the compensation for damages:

- The compensation should be demanded to everyone having the same interest
  - if those interested persons are not identifiable the compensation is claimed globally,
  - if the interested persons are identified they should be presented as such;
- The court establishes the amount of the compensation in global terms and, in a later moment, the interested persons can, through a procedure of liquidation previous to judgment execution, claim their part;
- The compensation has to be claimed within a time limit of three years from the transit *in rem judicatam*;
- The amounts not claimed are entrusted to the Department of Justice that will allot them for access to justice by people having the right to popular action.

**Articles 41 of BPEL and 23 of PAL**, with a very similar wording, establish a **liability for risks** whenever someone carrying a hazardous activity causes damages to the environment (or any other interest protected by Law 83/95), regardless the negligence of the agent. Using expressions such as "especially hazardous" or "objectively hazardous", none of these provisions allows precise identification of the activities that will originate liability for risks.

The same lack of preciseness exists regarding the activities requiring an obligatory insurance against civil liability. **Article 43 of BPEL** and **article 24 of PAL** establish such obligation for whoever carries activities with a high degree of risk to the environment but both require further regulation, namely to classify those activities.

Once again these provisions have been subject to the same critics on its lack of feasibility:

1. Substantive and procedural rules are mixed in the same provision, setting an unclear regime;

2. The rules concerning compensation are applicable in cases of uniform individual interests but not in cases of diffuse interests, such as the environment – a damage to the environment does not give a right to each one to claim for himself a part of the compensation, the compensation should instead be allotted for a collective fund to protect environment (or any other diffuse interest in issue) [its entrusting to Department of Justice is a solution is this sense, but only applicable when the compensation is not claimed and not as closely connected with the interests protected by this law];
3. There is no provision on how to calculate the economical value of an environmental damage;
4. There is no provision determining the specific activities that are subject to liability for risks.

The filing of a petition has no immediate effects on the subject of the lawsuit. However, the **Code of Civil Procedure** establishes **provisional remedies**, which can be used to obtain a preliminary ruling to prevent environmental damages before the final decision of the judge.

These are urgent procedures - the decision has to be issued within 2 months, or 15 days whenever the defendant is not heard. The request can be presented in the pendency of the main proceeding or previously (in this case its effects will expire if the respective petition is not filed within 30 days, or 10 days if the defendant has not been heard). The basic requirements to the granting of a remedy are: a justified concern of an offence (*periculum in mora*) and circumstantial evidence of the menaced right or interest (*fumus bonus iuris*).

The danger to the environment can, in most cases, be prevented by the immediate suspension of an activity. **Articles 412 to 420 of Code of Civil Procedure** regulate a procedure that allows the **immediate suspension of a new work**. It was designed to protect the right to private property and it is not usable against the State.

However, **article 42 of BPEL**, establishing the so-called "**administrative embargos**", seems to have extended its use to protection of the environment by determining that whoever feels offended in his/her rights to a healthy environment may request the immediate suspension of the activity causing the damage. The only additional reference made to this procedure is in **article 45 of BPEL**, which grants the competence to judge these "embargos" to civil courts.

Not being a consensual opinion, some there is some doctrine and jurisprudence considering these provisions as to allow an extended use of the provisional remedy set in the Code of Civil Procedure to the cases where the petitioner claims the protection of environment and also whenever the work is being conducted by the State and there is no administrative act that can be suspended (which was not possible under article 414 of Code of Civil Procedure). However, there have been a number of contradictory court decisions (mainly on formal aspects), around the competent jurisdiction (whenever it asked the suspension of a work by the Administration) and the specific procedural rules that should be applicable to regulate the way the request should be addressed or ruled by the court. **Law 13/2002 of 19 February**, that will reform administrative procedural law, also modifies article 45 of Law 11/87 recognising that both jurisdictions are competent,

according to the issue discussed (the use or not by the Administration of powers of authority), which hopefully will bring some clarification to this controversy.

Whenever there is no specific provisional remedy adequate to prevent damage in a given situation, it is possible to use the so-called "**non specified provisional remedies**" to request a particular provisional solution that is effective in that case.

Civil (as well as the penal) courts are organized in three instances. There are 5 second instance courts (Tribunais da Relação) and a third instance court (Supremo Tribunal de Justiça) all of them hearing only appeals (in both civil and penal matters). The possibility of appeal exists whenever the issue of the lawsuit is given a value that exceeds the one of the court one is appealing to.

#### 1.3.2.3 Penal popular action

The Penal Code typifies as crimes against the environment the following: damage against nature, pollution and dangerous pollution. Other legislation, regulating specific matters such as hunting also typifies some conducts as crimes. The penalties are punishment by confinement or a fine. There is no penal liability for legal persons.

Citizens or environmental NGOs can intervene in criminal procedure by informing the Public Prosecutor of any acts that may constitute an environmental crime, regardless having suffered a direct damage. After an investigation of these facts the Public Prosecutor may or may not sue. Citizens and NGOs can also become a private prosecutor, which means they can participate in the enquiry and the instruction (a stage of the procedure at which a judge controls the decision to prosecute or dismiss the case made by the Public Prosecutor) presenting and requiring evidence; accuse (subordinated to the accusation of the Public Prosecutor); require the opening of the instruction (whenever the Public Prosecutor decides not to sue) and also appeal against a decision that affects them, even if the Public Prosecutor has not done it.

Though by the general rules of Penal Procedural Law it is possible, under some conditions, to claim compensation for damages in the penal proceeding, there have been some court decisions making use of a provision of Code of Penal Procedure (article 82 (3)) that allows the penal judge to refer the parties to civil courts whenever the deciding of the claim excessively delays the penal proceeding.

### 1.3.3 Powers of the court

Taking into account the supra-individual feature of the interests in issue, the legal obligation of assuring equal substantive positions for all parties (usually difficult to attain in environmental disputes against big companies or even the State) and the danger of abusive representation, Law 83/95 provides an especially active role for the judge in popular action proceedings, creating exceptions to the general rules of civil, penal and administrative procedural law.

Immediately after the filing of the lawsuit the judge analyses it, making a preliminary inquiry and hearing the Public Prosecutor. According to **article 13 of Popular Action Law**, already in this early stage the judge will make a decision on the merits, based on a prognosis, and can decide to reject the petition whenever he considers it is clearly unlikely that the plaintiff will win the case.

The judge has own initiative regarding evidence. **Article 17 of PAL** determines that, within the scope of the fundamental issues raised by the parties, the judge should not be limited to the evidence presented by them being able to collect any other.

Even though there is no control of adequacy of representation in the beginning of the proceeding, the judge can, when making the final decision, dismiss the case based on special circumstances of the specific case, namely the lack of representation or abusive representation by the plaintiff. In these cases, the judgment will not bind all other interested persons that were not parties in the proceeding, which allows them to present another lawsuit on the same matter.

Finally, as mentioned above (I-3.2.1), the judge can grant suspensive effect to an appeal, even if procedural law does not provide it. **Article 18 of PAL** has been interpreted in different senses by the courts, as already referred: some judges see here a specific provisional remedy while others uphold it applies to appeals of court decisions to higher courts.

### 1.3.4 Legal representation

In administrative judicial proceedings parties have to be always represented by an attorney, according to **article 5 of Law of Administrative Courts Procedure**.

Regarding civil jurisdiction, legal representation is compulsory whenever the value of the matter in controversy exceeds the limit of the respective jurisdiction (3 740,98 euros for the first instance). Whenever it is not possible to give an economical value to the interest to be protected by the lawsuit, it is considered to have the value of the limit of jurisdiction of the second instance (14 963,93 euros) plus one cent, requiring consequently the presence of an attorney.

If a citizen or NGO decides to become a party in a criminal proceeding as a private prosecutor, legal representation is also compulsory.

Court costs, to be supported by the loosing party, can include attorney or expert's fees. According to **article 21 of PAL** it is the judge who decides the amount, within the costs, that will cover attorney's fees. In the lack of a clear and precise criterion to determine the expenses the loosing party has to support, the courts have been very restrictive not allowing, in most cases, an effective payment of all expenses.

There is, however, a mechanism of legal aid, through which the State supports the fees of attorneys for (natural and legal) persons lacking financial resources. Within this legal aid system, the fees of the attorney, appointed by the State or chosen by the petitioner, are pre-set by a Government regulation (at a lower level than those paid by private clients, making it very unattractive for senior attorneys). There was supposed to be a specific regulation for cases of diffuse interests but it has not been enacted until now.

In some cases, however, attorneys work *pro bono*, especially to assist environmental NGOs.

NGOs still point, though, the high costs of hiring an attorney as a reason not to use judicial procedures [more often].

### 1.3.5 Court costs

Economical reasons cannot be an obstacle to access to justice, namely to popular action.

Therefore, **article 20 of PAL** determines that no prepayment has to be done with the filing of the petition. When the plaintiff wins the case or is partially declared to be in his/her right, he/she does not have to pay the costs. If the case is dismissed, the judge, taking into account the economical situation of the plaintiff and the reason of the dismissal of the case, will determine a reduced amount of the costs the plaintiff has to pay (between 1/10 and ½ of the normal costs), which can sometimes still be a considerable amount, depending on the values of the lawsuit and its complexity.

The legal aid system should also cover the court costs.

These rules do not apply to environmental NGOs, since they are exempted, by **article 11 of Environmental NGOs Law**, of the duty to pay costs of proceedings.

### 1.3.6 Publicity of the decision

Given the wide scope of the interests in issue, **article 19 of Popular Action Law** determines the final decision shall be published, at the expenses of the loosing party, in two newspapers, selected by the judge (preferably the ones with larger circulation among the persons concerned by the interest in issue).

### 1.3.7 Non judicial procedures

Law 65/93 of 26-11 (AADL) regulates the access to documents of the administrative organs of the State, the autonomous regions of Madeira and Azores, public institutions and associations, local authorities or other bodies with public responsibilities in environmental matters. It also transposes Council Directive 90/313/CEE of 7 June 1990, on the freedom of access to information on the environment.

Everybody has the right to information through access to non nominative administrative documents (**article 7 of AADL**). To consult the documents or obtain a copy of it, a written request should be addressed to the administrative authority holding it, which should give a response within 10 days. If the request is refused or there is no answer, the petitioner can present a complaint to the Commission on Access to Administrative Documents (CAAD), an independent administrative body, having for this a time limit of 20 days (**article 16**). This proceeding has no costs. The administrative organ holding the documents can send its representative to take part in the discussion of the request by the Commission and present its position. The Commission has 30 days to issue an opinion, which is not binding but that will have to be taken into consideration in a “second reading” decision of the administrative authority holding the documents. This final decision, or its absence, can be challenged before the administrative courts through the judicial procedure above described (I-3.2.1.b)).

# 2 Empirical Data

## 2.1 Methodology

The existing court statistics do not put in evidence the specific lawsuits concerned by the present study, meaning proceedings introduced by environmental NGOs and citizens before independent and impartial review bodies in cases related to environmental protection.

Case law databases, either in Internet or in law journals, are not exhaustive, including only the most representative decisions of appeal courts (sometimes not even the full text of the decision is published). Given the fact that not all cases reach an appeal court and that these courts do not give a final decision in many cases (ordering instead the proceeding to return to first instance to be ruled again), this source gives an incomplete (though paradigmatic) picture of the existing lawsuits.

None of the previous studies on this subject made a collection of court decisions after 1995.

Given all these factors, the result of the questionnaires addressed to all national courts, national and regional environmental NGOs and administrative authorities responsible for the licensing procedures on national and regional level appeared as very important to allow a more accurate perspective on the amount of lawsuits filed during this time period.

“Conselho Superior da Magistratura” (the organ that has administrative and disciplinary power over the courts of the judicial jurisdiction) cooperated in the distribution of the questionnaire among the judicial courts (over 200 courts in the first instance). This contribution was seen as a way to speed the process (by using the Conselho internal channels) and to have an additional guarantee of reply by the courts. Since there are fewer administrative courts, the questionnaire was sent directly to each one of them.

The result was however scarce. In a universe of 239 judicial courts (civil and penal jurisdiction), only 39 judges have replied. The majority belong to small courts having no lawsuit concerned by the present study. Through the questionnaire it was possible to collect data of 8 proceedings. Out of the 7 existing administrative courts 5 replied, however 2 of these (Lisbon and Coimbra, major urban and populated areas) were, due to logistical and human resources constraints, not able to give the information requested and in the case of Administrative Court of Porto the reply concerns only one of the seven judges of that court. 33 lawsuits were identified through these questionnaires.

The result of the enquiry to administrative authorities was not very successful either. The five regional bodies competent for the licensing procedures (Direcções Regionais do Ambiente e Ordenamento do Território) were contacted but none was able to give specific data concerning individual lawsuits since the organizational criteria of their respective database does not allow such a search.

All national and regional environmental NGOs (respectively 12 and 17), as well as some (16) NGOs with no specific scope, according to the legal definition of Environmental NGO were contacted. Only 7 replied[1] giving notice of 30 lawsuits.

In spite of this lack of precise numbers, the interviews with some key-players (lawyers, academics and people in NGOs that are most active regarding judicial procedures[2]) allowed a qualitative perspective of how access to justice has worked and been used in these last years.

## 2.2 Analysis of relevant lawsuits between 1995-2002

Regarding **access to information/administrative documents**, there seems to be an increasing awareness of the available proceedings to enforce this right and its use has obtained significant positive results.

Over the period from 1995 to 2002, the Commission on Access to Administrative Documents issued 84 opinions in proceedings related to environmental matters, 78 of them being favourable to the access requested. After this opinion, the Administration granted access to documents in 45 cases and refused it in 13 situations (there was no information on the remaining 20 cases). Even though the decisions by the Commission have no binding force, it has had a relevant persuasive effect.

However, the number of proceedings related to environmental issues represents only 5,6% of the total amount of proceedings brought before the Commission.

[1] Replies were received from FAPAS – Fundo para a Protecção dos Animais; LPN - Liga para a Protecção da Natureza; QUERCUS – Associação Nacional de Conservação da Natureza; Grupo Lobo – Associação para a Conservação do Lobo e do seu Ecossistema (national NGOs); ADAPA - Associação de Defesa do Ambiente e do Património de Alverca e Zona Sul do Concelho de Vila Franca de Xira (local NGO); A Rocha – Associação Cristã de Estudos e Defesa do Ambiente; ASPEA – Associação Portuguesa de Educação Ambiental

[2] Interviews were conducted with dr. José Cunhal Sendim, lawyer, law professor and member of GEOTA (environmental NGO), dr. José Sá Fernandes, lawyer, president of CIDAMB (environmental NGO), dr. Carlos Frutuoso Maia, lawyer of FAPAS (environmental NGO) and dra. Maria João Pereira, member of the board of directors of LPN (environmental NGO)

Table 1: Opinions issued by the CAAD in proceedings regarding environmental matters

| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | Total |
|---|---|---|---|---|---|---|---|---|---|
| Total of proceedings | 1 | 5 | 4 | 12 | 9 | 20 | 20 | 14 | 85 |
| Complaint presented by: | | | | | | | | | |
| - NGO | 1 | 1 | 3 | 6 | 4 | 8 | 8 | 4 | 35 |
| - Citizens | 0 | 4 | 1 | 6 | 5 | 12 | 12 | 10 | 50 |
| Administrative organ holding the documents: | | | | | | | | | |
| - Central Administration | 1 | 2 | 0 | 8 | 3 | 11 | 13 | 7 | 45 |
| - Local Administration | 0 | 3 | 4 | 4 | 6 | 9 | 7 | 7 | 40 |
| Documents refer to: | | | | | | | | | |
| - Nature conservation | 1 | 0 | 0 | 3 | 0 | 2 | 1 | 0 | 7 |
| - Water | 0 | 0 | 0 | 4 | 0 | 3 | 3 | 1 | 11 |
| - Waste | 0 | 0 | 0 | 0 | 2 | 2 | 1 | 1 | 6 |
| - Industrial Pollution | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 1 | 2 |
| - Urban Planning | 0 | 5 | 4 | 5 | 6 | 13 | 13 | 10 | 56 |
| - Cultural heritage | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 2 |
| - Procedural rules | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 |
| Commission's opinion: | | | | | | | | | |
| - Favourable to access | 0 | 4 | 2 | 11 | 9 | 19 | 20 | 12 | 77 |
| - Not favourable to access | 1 | 1 | 2 | 1 | 0 | 1 | 0 | 2 | 8 |
| Administration's response to favourable opinions: | | | | | | | | | |
| - Allowed access | 0 | 4 | 2 | 5 | 3 | 15 | 12 | 4 | 45 |
| - Refused access | 0 | 0 | 0 | 2 | 3 | 1 | 6 | 1 | 13 |
| - Did not inform the Commission | 1 | 1 | 2 | 5 | 3 | 4 | 2 | 9 | 27 |

Judicial proceedings to obtain access to documents represent a big part of administrative judicial proceedings (according to all the interviewed persons, the figures represented bellow are much inferior to the actual amount of judicial requests of access to documents). These are even more used than the complaint to the CAAD since they are more effective (the court's decision is binding while the Commission only gives an opinion). The success rate of these judicial proceedings is high since the petitioner only has to prove the right to access to documents, which is widely recognised.

According to most of the interviewed persons the use of these proceedings has also contributed to a change of the Administration's attitude. Sometimes the obstacle to access to information was simply the lack of knowledge of the civil servants dealing with the requests and these proceedings raised their awareness, preventing future cases.

**Violation of participation rights in administrative decision-making procedures is rarely a cause of legal action**. Environmental NGOs are regularly invited to participate in those proceedings and their opinions, even if not followed, are taken into account in the final decision and therefore do not need to judicially enforce this right. Citizen's participation is not as frequent and occurs mainly in local urban and spatial plans procedures, which affect them most and do not require technical knowledge or skills. The lack of judicial procedures to enforce this right by citizens can be due to the ignorance of the very right to participate or the right to judicially enforce it, to the

disbelief on the efficacy of the participation or the inexistence of significant violations to that right.

Since **threats to environment very often derive from actions of the State**, acting within its powers of authority (granting licences, defining or executing urban planning, waste or water policies, etc), **the amount of judicial proceedings before administrative courts is higher than in any of the other jurisdictions**.

However, due to the strictness of administrative procedural rules (the admissibility of proceedings is restricted to a number of previous requirements and the final ruling has limited scope) and also due to a certain attitude of administrative judges, still not very familiarized to the new values and principles of Environmental Law (opposite to the traditional vision of public interest coinciding with economic progress), the results of administrative judicial proceedings have been limited. With the exception of procedures to obtain access to documents, there are few decisions on the merits and even fewer cases won.

An issue as important as the alleged violation of protected areas by the construction of the new bridge over Tagus River (Ponte Vasco da Gama) was never ruled on the substance. Lawsuits were filed in an early stage (when studies to select locations were being carried) and were dismissed, some years later, after the conclusion of the bridge's construction, on formal grounds (considering there was no administrative act at that time to be challenged). In the meantime some compensation measures were agreed, through extra-judicial negotiations and the petitioners (environmental NGOs) decided not to file another lawsuit. On the other hand, one of the few cases won, regarding the construction of a Shopping Centre in Porto, violating the local urban plan, had no practical effects since the decision was also posterior to the ending of its construction and the local authority decided not to demolish it because of the high compensations it would have to pay to the owners.

The main positive outcome is a raising awareness to the protection of the environment leading to a change not only of the public opinion but also of decision-makers. Some issues of lawsuits have been solved, before the final decision of the judge, because the Public Administration yielded to pressure of NGO, citizens and public opinion. A change of scenario is expected with the reform of administrative judicial procedural rules and the forming of new judges, which will allow more flexibility and the possibility to obtain wider results through judicial procedures.

Table 2 Administrative judicial proceedings

| | Total of proceedings | Cases won | Cases lost | | Still pending |
|---|---|---|---|---|---|
| | | | On substantive grounds | On formal grounds | |
| Citizens | 20 | 7 | 3 | 7 | 3 |
| Env. NGOs | 41 | 19* | 5 | 12 | 5 |

* 17 of the cases won by NGOs concern access to administrative documents

Annulment of administrative acts is probably the second subject matter of administrative lawsuits (after the request to access to administrative documents). Due to the emergency of most threats to environment and the delay until final decision (it can

take 1-2 years, or up to 4-5 years if one or more instances of appeal are involved), the filing of this kind of lawsuit is almost always accompanied with the request of suspension of its effects (provisional remedies have to be decided within the time limits established in procedural law).

Table 3 Type of administrative judicial proceedings used

| Petitioner / Proceeding intending to obtain: | Environmental NGO | Citizen(s) |
|---|---|---|
| Suspension of the effects of an administrative act | 7 | 2 |
| Access to administrative documents | 21** | 1 |
| Certain conduct by private persons or concessionaires | 1 | 4 |
| Annulment of an administrative act | 9 | 10 |
| Declaration of invalidity of an administrative regulation | 0 | 0 |
| Recognition of a right or legitimate interest | 0 | 1 |
| TOTAL | 35* | 18* |

* the information regarding some proceedings relates only to the decisions of the appeal instances, not allowing to identify the type of proceeding used in the first instance (it is the case of 3 proceedings initiated by NGO and 2 by citizens)

** this number, corresponding to the proceedings collected, is very inferior to the actual figures – in fact, FAPAS (NGO) has informed (though not listed) to have filed around 50 proceedings during this period and this is probably the case of others NGOs

Regarding the field of environmental law at issue in the proceedings, a big part relate to urban and spatial planning. The violation of regulations in this field of law sometimes infringes simultaneously other provisions more closely linked to environmental protection, namely protected areas or waste management. The general right to a healthy environment is also used as cause of action whenever no specific regulation is being breached.

Table 4 Issues discussed in administrative judicial proceedings

| Petitioner / Fields of environmental law object of the proceedings | Environmental NGO | Citizen(s) |
|---|---|---|
| **Urban and Spatial Planning** | | |
| Decisions concerning infrastructure projects | 9 | 7 |
| Urban and Spatial Plans | - | 0 |
| Individual construction licences | 1 | 6 |
| **Nature** | | |
| Protected areas | 13 | 3 |
| Protected species | 1 | - |
| **Water** | 10 | 2 |
| **Waste management** | 4 | 4 |
| **Cultural heritage** | 1 | 2 |
| **Right to a healthy environment** | - | 1 |
| **Right to participate in administrative procedures** | 1 | - |

Central Administration was challenged regarding its decision-making competences on infrastructure projects (such as bridges, highways) and licensing of industrial activities (such as waste and water management facilities). Private concessionaires carrying out these activities were also subject to some proceedings. The cases involving local authorities aimed mostly at controlling its urban planning competences.

| Defendant / Petitioner | Central and Regional Administration | Local Administration | Private concessionaires |
|---|---|---|---|
| Environmental NGO* | 23 | 6 | 1 |
| Citizen(s) | 7 | 10 | 3 |

*There was not enough data to identify the defendant in 11 proceedings initiated by NGO

**Civil judicial procedures are not as frequent but seem more successful**. The fact that in these proceedings the defendant is not the State (or at least it is not acting with its *aucthoritas*) may contribute to some balance, at the eyes of the judge, between the Parties (even if the financial and technical resources of each party are disproportionate). In fact, civil courts seem to be more receptive, when balancing the interest in issue, to value more the protection of environment than other private economical interests.

The lack of preciseness of the law, regarding the definition of competences between civil and administrative jurisdiction, has been responsible for a few lost cases on formal grounds.

Table 5 Civil judicial proceedings

| | Total of proceedings | Cases won | Partial success | Cases lost | | Still pending |
|---|---|---|---|---|---|---|
| | | | | On substantive grounds | On formal grounds | |
| Citizens | 14* | 1 | 1 | 2 | 3 | 3 |
| Env. NGOs | 15* | 5 | 2 | 2 | 0 | 5 |

* There was not enough data to identify the result of 6 proceedings (1 initiated by NGO and 4 by citizens), nor the petitioners or result of one proceeding

The majority of civil judicial proceedings relate to economical activities carried by private companies and causing air and/or water pollution. However, since industrial and commercial activities have to be licensed by the State, in many cases it is the licensing itself that is contested (in administrative courts) rather than the private polluting activity through civil proceedings. A recurrent situation in these last years has been the filing of provisional remedies and main proceedings to prohibit bullfights where the animal is killed during the annual festivities of a small village in Alentejo (not all are listed because it does not appear in the case law databases, but the *media* have given knowledge of such proceedings each year since 1998). It has been a case with great impact in the public opinion, because those bullfights are a cultural ancient tradition in that village and the existing law prohibiting such activity has never been enforced. It has finally leaded to the modification of the law, in order to create an exceptional regime for that village.

Table 6 Issues discussed in civil judicial proceedings

| Petitioner / Fields of environmental law object of the proceedings | Environmental NGO | Citizen(s) |
|---|---|---|
| **Nature** | 12 | 2 |
| **Water** | 1 | - |
| **Air** | - | 4 |
| **Waste** | 1 | 3 |
| **Right to a healthy environment** | 1 | 6 |
| **Cultural Heritage** | - | 2 |

Protection of the environment through civil judicial proceedings is often an indirect consequence of the defence of private interests (personal private property or health concerns), namely between neighbours, situations which are not covered by the present study.

With regard to **penal judicial procedures** it was difficult, when consulting case law collections, to identify those cases initiated after a citizen or NGO complaint (and not on the Public Prosecutor's own initiative), reason for which the number of proceedings presented is considerably reduced – only 11 proceedings were identified. Most of these proceedings ended with the dismissal of the case by the Public Prosecutor after the enquiry (5). The provisions setting the crimes of pollution and pollution with danger require a conduct that causes pollution in "*inadmissible terms*", concept defined in article 279 (3) of Penal Code as implying a previous definition by a pubic authority of

limits for emissions and commination of penalties. The lack of this requirement is the cause of many dismissals of the cases at such an early stage of the proceeding.

Most proceedings accrue from environmental crimes set by the Penal Code but there are others relating to illegal hunting.

The **quasi inexistence of proceedings to claim compensation for environmental damages**, in any of the jurisdictions, is an evidence of the imperfection of the law. It is not clear how environmental damages should be repaired, especially if *in natura* reparation is not possible, and who show be entitled to the compensation. It was possible to identify one claim within a penal proceeding, which the court refused to rule ordering it to be filed in the civil court. Another claim, still pending in the civil court, proposed an original solution to the court: a number of swallow's nests had been destroyed from the exterior walls of a courthouse and the petitioner (NGO) asked for the placing of artificial nest that could attract the birds and also for a monetary compensation, reverting to the NGO, to be used in raising awareness campaigns towards the benefits and methods to protect swallows.

## 2.3 Overview analysis

Conditioned by the above mentioned difficulties on data collection, the results presented in this report cannot show a high degree of accuracy and exhaustiveness, however, based on interviews conducted with members of environmental NGO, lawyers working in this area and academic researchers (identified above in footnote 2), even if the actual amount of proceedings exceeds the numbers presented in the report, it is safe to say that it is still a not very significant part of the total amount of lawsuits in Portuguese courts.

In fact, a previous study of first instance court decisions on environmental matters, concerning a time period of about five years until 1995 ("Tribunais, Natureza e Sociedade: O Direito do Ambiente em Portugal"[3]), reached very similar conclusions. This study collected 24 civil proceedings (20 initiated by individuals), 20 penal proceedings (all arising from the Public Prosecutor initiative) and 16 of the administrative jurisdiction (5 lawsuits presented by individuals and 1 by an environmental NGO, the others arising from the Public Prosecutor initiative). It made no distinction between cases where only a general interest of the environment or also private interests were being protected. Though based on a case law collection and not on a direct questionnaire to the entire universe of the courts, this sample was considered as somehow representative since the collection of court decisions was carried by the initiative of an Environmental Law Centre that existed at the time in the "Centro de Estudos Judiciários" (the body responsible for training judges) and which has been in the meantime dismantled.

Summarizing, the main conclusions of the above mentioned study were: (1) scarce use of judicial proceedings; (2) indirect protection of the environment through the defence of individual interests (personality, property) or within neighbouring relationships; (3) rare intervention of environmental NGOs in judicial proceedings; (4) pre-industrial

[3] **"Tribunais, Natureza e Sociedade: O Direito do Ambiente em Portugal"**, Pureza, José Manuel; Frade, Catarina; Dias, Cristina Silva, Centro de Estudos Sociais, Lisboa, 1997 - www.diramb.gov.pt/data/basedoc/TXT_D_8826_1_0001.htm

feature of the proceedings (rural conflicts, concerning illegal hunting and fishing, emission of smoke, smells and noises, etc); (5) use of the judicial proceedings as a reactive rather than preventive tool.

The authors of that study identified the following obstacles to access to justice: structural problems of judiciary system (long delays in proceedings); lack of procedural regulation (regarding popular action and administrative "embargos"); resistance of judiciary system to a change of values and priorities (from economical and social rights, such as employment, to new rights such as to a healthy environment); complexity of Administrative Law and its organizational structures (making it inaccessible for those not having a deep knowledge of it); a preference to solve conflicts through non judiciary solutions; young and undeveloped environmentalist associative movement.

The evolution of past years implicates some modifications in the above-mentioned propositions. Popular Action Law has been enacted responding to the constitutional demand and detailing the conditions of access to justice to protect diffuse interests, such as environment. It has been a remarkable progress, especially considering its originality in comparison with most countries. However it is a consensual opinion that this Law has still some flaws and gaps, creating its own obstacles to an effective judicial protection, in particular in what regards the right to claim compensation for environmental damages. It is a general impression that, when environmental damages start to be economically measured, through claiming for compensation, Environment will be repositioned among other public and private interests and considered as valuable or even more valuable than many others.

Administrative procedural law and its judiciary organization are still a troubling element. The reform of administrative procedural law will hopefully bring some flexibility and simplification to the extensive but somehow sterile litigation that has occurred until now in administrative courts.

Environmental NGOs are more active, though maybe not as much as it would be desirable (the number of lawsuits filed by NGO has increased comparing to the period previous to 1995, but in absolute terms it is still very low). The main reason pointed out by its members is the lack of resources and disproportion of means when facing the State or big private companies (responsible for the biggest threats to environment). NGOs are still based upon voluntary work and often do not have people with the skills to deal with legal issues, financial resources to hire an attorney and sometimes (the smallest ones) are not even fully aware of the judicial means at their disposal. A new NGO ("CIDAMB – Associação para a Cidadania Ambiental") was recently created specifically to try to combat this problem. Its aim is to raise awareness among other NGOs and citizens regarding the rights to information, participation and access to justice, providing assistance and information in these issues. It will also try to make attorneys more sensible and available to these matters.

These reasons, adding to a general disbelief in judicial system (the proceedings take too long, sometimes when the harm is already done, and the courts are still not very receptive to new values of environmental protection, remaining still very attached to formal questions), may explain such a scarce use of judicial proceedings. A member of the board of directors of Liga para a Protecção da Natureza (LPN) said that this national

NGO has preferred in many situations to present a complaint to the European Commission rather than use national judicial proceedings, since such complaint may have a greater and more immediate effect in cases of projects financed by the UE that can be suspended.

When it comes to citizens, even though there has been a positive evolution regarding public awareness of the right to information, there is a great lack of knowledge of rights of participation and access to justice. All the previous factors pointed by NGO justify also the inexistence of more lawsuits filed by citizens.

Regarding the overall outcome of existing judicial procedures, it has allowed a limited protection of environment but is contributing to a change of mentalities of courts and public authorities. A better regulation and more public awareness and initiative towards judicial instruments will allow a better access to justice and, consequently, a faster evolution and a more effective protection of environment.

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# 4 List of legislation mentioned in the report

Access to Administrative Documents Law (AADL) – Law 65/93 of 26 August (modified by Law 8/95 of 29 March and Law 94/99 of 16 July)

Administrative Code of 1940

Administrative and Fiscal Courts Statute (AFCS) – Decree Law 129/84 of 27 April

Basic Principles of Environmental Law (BPEL) – Law 11/87

Civil Code of 1966

Code of Administrative Procedure of 1991 (as resulting from the revision of 1996)

Code of Civil Procedure (as resulting from the revisions of 1995, 1996 and 2000)

Code of Penal Procedure of 1987 (as resulting from the revisions of 1998 and 2000)

Constitution – Constitution of the Portuguese Republic of 25 April 1976

Environmental NGOs Law – Law 35/98 of 18 July (it has repealed Law 10/87 of 4 April)

Law of Administrative Courts Procedure (LACP) – Decree Law 267/85 of 16 July

Penal Code of 1982 (as resulting from the revisions of 1985 and 1998)

Popular Action Law (PAL) – Law 83/95 of 31 August

Urban and Spatial Planning Regulation – Decree Law 380/99 of 22 September

# 5 Annex

## 5.1 Table of judicial proceedings collected

The collection of proceedings listed bellow was based on the information obtained through the replies to the questionnaires and the research of case law databases. However, some replies were incomplete. In the case of court's databases, it was not always possible to find all the decisions concerning a given case, namely the first instance decisions.

### Administrative proceedings

| | Proceeding reference, court and Parties | Type of proceeding | Issue of the proceeding | Date of the decision | Decision | Costs of the proceeding |
|---|---|---|---|---|---|---|
| 1 | P 31535(1992) Supreme Administrative Court (Section)- LPN vs. Council of Ministries | Procedure to obtain the annulment of an administrative act (decision by the Council of Ministries approving the location for a new bridge over the Tejo) | Protected areas (Special Protected Areas/Birds habitat) Direct application of Directive 79/409 and (need for) Environmental Impact Assessment | 14-03-1995 | The request was denied (the court considered that article 4 of the Directive had no direct effect and that the obligation of an EIA only exists in a later moment, when the project to construct the bridge is approved ) | |
| | P 31535(1995) Supreme Administrative Court (Full Court) | Appeal against the Supreme Court Section decision and request for a preliminary ruling from the Court of Justice on article 4 of Directive 79/409 presented by LPN | | 14-10-1999 | The request for a preliminary ruling was denied since the court had no doubts that article 4 of D 79/409 had a direct effect. The appeal was however denied, confirming the initial decision, since the court considered that only the approval of a specific project and not of the location of the bridge could affect the protected areas and be subject to the obligation of a EIA | |
| 2 | P 564/95 Administrative Court of Lisbon - LPN vs. GATTEL (concessionaire) | Request of access to administrative documents (documents concerning the contract for the construction of the new bridge over the Tejo) | Protected areas | 03-10-1995 | The request was denied on formal grounds (the defendant should have been the President of the GATTEL, as its organ and not the entity GATTEL) | |
| | P 578/95 Supreme Administrative Court - Public Prosecutor vs. GATTEL | Appeal against the Administrative Court decision | | 09-01-1996 | The appeal was denied | |
| 3 | P 38436 A (1995) Supreme Administrative Court - QUERCUS vs. Energy and Environment Ministries | Provisional remedy asking the suspension of the effects of an administrative act (decision by the Energy and Environment Ministries approving the location of waste incineration facility) | Waste incineration | 07-12-1995 | The request was denied | |

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| | | Request against undue execution of the act in the pendency of a appeal against the decision denying the provisional remedy | | 27-06-1996 | The request was granted | |
| 4 | P 376/96 Administrative Court of Coimbra - QUERCUS ands citizens vs. Regional Director for Industry | Procedure to obtain the annulment of an administrative act | Waste incineration | | | |
| 5 | P 737/96-A Administrative Court of Lisbon - GEOTA vs. Tow Council of Alcochete | Provisional remedy asking the suspension of the effects of an administrative act (construction licence) | Protected areas (birds habitat) | | The request was granted | |
| | P 40935 (1996) Supreme Administrative Court | Appeal against the first instance decision presented by the defendant | | 17-09-1996 | The appeal was denied | |
| 6 | P... Administrative Court of Porto - Citizen vs. Private Company/concessionaire | Provisional remedy asking the ordering of certain conduct by the defendant | Protection of natural resources (water quality in a dam) | 30-08-1996 | The request was denied on formal grounds (lack of legal standing of the plaintiff) | |
| | P 41249 Supreme Administrative Court | Appeal against the Administrative Court decision presented by the petitioner | | 28-11-1996 | The appeal was denied (the court recognised *locus standi* to the plaintiff but considered there was no danger to prevent since the administrative authorities had meanwhile prohibited such activities) | |
| 7 | P 5075 Administrative Court of Porto - Citizen vs. Town Councillor of Porto | Request of access to administrative documents (documents concerning the licensing proceeding for the construction of a Shopping Centre) | Urban planning | | The access was granted | |
| | P 678/95 Administrative Court of Porto - Citizen vs. Town councillor of Porto and private construction companies | Procedure to obtain the annulment of an administrative act (construction licence for a Shopping Centre) | Urban planning | 14-12-2000 | Annulment of the act | |

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| | P 47701(2001) Supreme Administrative Court | Appeal against the decision of the Administrative Court of Porto presented by the defendants | Procedural rules (plaintiff *locus standi*) and substantive issues concerning urban planning Law | 07-02-2002 | The appeal was denied, confirming the initial decision | Costs by the appellant |
| 8 | P 40629 Supreme Administrative Court (Section)- GEOTA vs. President of Town Council of Cascais | Request of access to administrative documents | | | The request was denied (presented one day after the time limit) | |
| | P 40629 Supreme Administrative Court (Full court) | Request of rectification of a material error the Supreme Court Section decision presented by GEOTA (the last day to present the request was a Sunday and should be transferred to the next Monday) | | 07-08-1996 | The request was denied on formal grounds (the court considered it was a judgment error and not a material error and in consequence the decision could not be rectified) | |
| 9 | P ... Administrative Court of Lisbon - GEOTA (Env NGO) vs. Secretary of State of Local Administration and Spatial Planning | Request of access to administrative documents (documents concerning the contract for the construction of the new bridge over the Tejo) | Urban planning | | The request was denied | |
| | P 40604 Supreme Administrative Court - GEOTA (Env NGO) vs. Secretary of State of Local Administration and Spatial Planning | Appeal of a decision from the Lisbon Administrative Court on a request of access to administrative documents | | 09-07-1996 | The access to documents was granted | Exempted |
| 10 | P ... Administrative Court of Coimbra - citizens vs.Town Council of Oliveira do Hospital and Petrol Company (Petrogal) | Procedure to obtain the annulment of an administrative act | | ... | The request was denied on formal grounds (*locus standi* of the plaintiffs) | |

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| | P 43704(1998) Supreme Administrative court | Appeal against the decision of the Administrative Court | Procedural rules (plaintiff locus standi) | 15-12-1999 | The appeal was granted, revoking the Administrative Court decision and annulling the administrative act | |
| 11 | P 85/98 Administrative Court of Lisbon - Citizens vs. Private companies (concessionaires) | Provisional remedy asking the abstention of the defendants to continue their activities (construction of the subway tunnel) | Urban planning / protected areas | 1999 | The request was denied (decision on the merits) | |
| | P ... Central Administrative Court | Appeal against the Administrative Court decision presented by the petitioners | | 07-10-1999 | The appeal was granted | |
| 12 | P 138/98 Administrative Court of Lisbon - Citizen vs. Portuguese State | Procedure to obtain the recognition of a right | Urban planning / protected areas | - | still pending | |
| 13 | P ... Supreme Administrative Court (Section)- Citizens vs. Environment Minister | Procedure to obtain the annulment of an administrative act (decision to expropriate lands to locate a Waste Management facility) | Waste Management / Spatial Planning | | The request was denied | |
| | P ... Supreme Administrative Court (full court) | Appeal against the Section decision | | 16-03-2001 | The appeal was partially granted and the court ordered its return to be decided by the Section if Spatial Planning rules had been violated | |
| | P 42268 Supreme Administrative Court (Section) | | | 14-02-2002 | The court considered there was no violation of Spatial Planning rules and denied the request of annulment of the act | |
| 14 | P ... Administrative Court of Porto - Citizen vs. Town Council of Vila Nova de Famalicão | Procedure to obtain the annulment of an administrative act (construction licence?) | Urban planning, right to an healthy urban environment | | | |

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| | P ... Administrative Court of Porto - Citizen vs. Town Council of Vila Nova de Famalicão | Provisional remedy asking the suspension of the effects of the administrative act | Urban planning, right to an healthy urban environment | 02-07-1998 | The request was denied on formal grounds (lack of all the legal requirements needed for the granting of the suspension) | |
| | P 1842/98 Central Administrative Court | Appeal against the Administrative Court decision that rejected the request for the provisional remedy | | 26-11-1998 | The appeal was denied and the Administrative court decision confirmed (considering that, within popular action, the adequate proceeding to obtain the suspension is the one set by article 18 of Law 83/95, and not the general proceeding used by the plaintiff) | |
| | P 1132/98 Constitutional Court | Appeal against the Central Administrative Court decision considering its interpretation of article 18 of Law 83/95 as unconstitutional (because it sets a more restrictive mechanism to obtain the suspension of the effects of an administrative act) | Right of access to justice | 12-01-2000 | The appeal was denied and the Central Administrative Court decision confirmed (as non unconstitutional) | |
| 15 | P ... Administrative Court of Lisbon - citizens vs. Junta Autónoma des Estradas (Public institute) | Provisional remedy asking the suspension of the construction works for a high-way | Urban planning | 08-10-1998 | The request was denied on formal grounds (lack of competence of the administrative jurisdiction) | |
| | P 1220/98 Administrative Court of Lisbon - citizens vs. JAE | Procedure to prohibit the construction of a high-way | | 18-12-2000 | The request was denied on formal grounds (lack of competence of the administrative jurisdiction) | |
| 16 | P 591/98 Administrative Court of Porto - GEOTA vs. Northern Regional Directorate of Environment | Request of access to administrative documents | Waste management (construction of a landfill) | 12-10-1998 | The access was granted | Exempted |

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| 17 | P 537/98 Administrative Court of Lisbon - LPN (Env NGO) vs. President of the Nature Conservation Institute | Request of access to administrative documents | Protected areas (Natura 2000) | 23-10-1998 | The request was denied on formal grounds | Exempted |
| 18 | P 1465/98 Administrative Court of Lisbon - LPN (Env NGO) vs. President of the Nature Conservation Institute | Procedure to obtain the annulment of an administrative act (preliminary report on the definition of Natura 2000) | Protected areas (Natura 2000) | 25-03-1999 | The request was denied (decision on the merits) | Exempted |
| 19 | P 537/98 Administrative Court of Lisbon - LPN (Env NGO) vs. President of the Nature Conservation Institute | Request of access to administrative documents | Protected areas | 08-10-1998 | The petitioner requested the dismissal of the case for supervenient inutility (the defendant allowed the access) | Exempted |
| 20 | P 978/98 Administrative Court of Lisbon - ADAPA (Env NGO) vs. Town Council | Provisional remedy asking the suspension of the effects of a construction licensing decision | Cultural heritage | 21-10-1998 | The request was denied on formal grounds | Exempted |
| 21 | P 40344 Supreme Administrative Court - Citizen vs. Local authority (Junta de Freguesia) | Appeal against a decision of the Administrative Court in a proceeding initiated by a local authority | Cultural heritage | 18-02-1999 | The appeal was granted | |
| 22 | P 1375/98 Administrative Court of Lisbon - LPN (Env NGO) vs. Environment Minister | Request of access to administrative documents | Water management | 12-01-1999 | The case was dismissed for supervenient inutility (the defendant allowed the access) | Exempted |
| 23 | P 1375/98 Administrative Court of Lisbon - LPN (Env NGO) vs. Director-General of Environment | Request of access to administrative documents | Water management / Environmental Impact Assessment | 16-11-1998 | The petitioner requested the dismissal of the case for supervenient inutility (the defendant allowed the access) | Exempted |

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| 24 | P 275/99 Administrative Court of Lisbon - LPN (Env NGO) vs. President of the Nature Conservation Institute | Request of access to administrative documents | Protected areas | 10-05-1999 | The request was denied and the petitioner was condemned to pay a penalty (100 euros) for litigating in bad faith | Exempted |
| | P 275/99 Supreme Administrative Court | Appeal against the Administrative Court decision presented by LPN | | 16-06-1999 | The appeal was dismissed because the appellant did not present allegations | Exempted |
| 25 | P ... (1999) Administrative Court of Ponta Delgada - Citizens vs. Town Council of Ponta Delgada and private constructor | Procedure to obtain the annulment of an administrative act (construction licence for a building) - invoking substantive and formal grounds | Urban planning | ... | The request was denied (decision on the merits) | 100€ of costs by the private respondent (decision of the SAC) |
| | P 48238 Supreme Administrative Court | Appeal against the decision of the Administrative Court of Ponta Delgada | | 09-07-2002 | The appeal was granted, revoking the Administrative Court decision and annulling the administrative act | 200€ of costs by the private respondent |
| 26 | P 36995 Supreme Administrative Court - GEOTA (Env NGO) vs. Ministry of Equipment, Spatial Planning and other | Appeal against a lower judicial decision | | 10-11-1999 | The appeal was denied | |
| 27 | P 42354 Supreme Administrative Court - Citizen vs. Environment and Spatial Planning Ministry | Procedure to obtain the annulment of an administrative act (joint decision of the Ministry and the Town Council of ...) | Water and waste management | 08-06-1999 | The appeal was denied (decision on the merits) | 300 € |

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| 28 | P 343 - Supreme Administrative Court - QUERCUS vs. First instance court of Viana do Castelo and Administrative court of Porto | Appeal to decide a jurisdiction conflict | Urban planning | 11-01-2000 | The appeal was denied | |
| 29 | P 347 (1999) Supreme Administrative Court - QUERCUS (Env NGO) vs. First instance court of Viana do Castelo and Administrative court of Porto | Appeal to decide a jurisdiction conflict | Procedural rules (competence) | 06-04-2000 | The administrative court was ruled to be competent in this matter | Exempted |
| 30 | P 127/00 Administrative Court of Porto - QUERCUS vs. Northern Regional Directorate of Environment and Spatial Planning | Request of access to administrative documents | | 2000 | The access was granted | |
| 31 | P 30/2000 Administrative Court of Funchal - GEOTA (Env NGO) vs. ... | Request of access to administrative documents | Public maritime domain | 30-03-2000 | Supervenient inutility of the lawsuit (the defendant allowed the access) | Exempted |
| 32 | P 41/2000 Administrative Court of Funchal - GEOTA (Env NGO) vs. .... | Request of access to administrative documents | Public maritime domain | 03-03-2000 | Supervenient inutility of the lawsuit (the defendant allowed the access) | Exempted |
| 33 | P 42/2000 Administrative Court of Funchal - GEOTA (Env NGO) vs. .... | Request of access to administrative documents | Public maritime domain | 15-03-2000 | The access was granted | Exempted |

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| 34 | P 43/2000 Administrative Court of Funchal - GEOTA (Env NGO) vs. .... | Request of access to administrative documents | Public maritime domain | 18-01-2000 | Supervenient inutility of the lawsuit (the plaintiff voluntarily dismissed the case) | Exempted |
| 35 | P 67/2000 Administrative Court of Funchal - GEOTA (Env NGO) vs. .... | Request of access to administrative documents | Public maritime domain | 13-03-2000 | The access was granted | Exempted |
| 36 | P 137/2000 Administrative Court of Funchal - GEOTA (Env NGO) vs. ..... | Procedure to obtain the annulment of an administrative act | Decision concerning infrastructure projects | - | still pending | Exempted |
| 37 | P 205/2000 Administrative Court of Funchal - GEOTA (Env NGO) vs. ..... | Request of access to administrative documents | Public maritime domain | 31-08-2000 | The access was granted | Exempted |
| 38 | P 206/2000 Administrative Court of Funchal - GEOTA (Env NGO) vs. ..... | Request of access to administrative documents | Public maritime domain | 25-08-2000 | The access was granted | Exempted |
| 39 | P 207/2000 Administrative Court of Funchal - GEOTA (Env NGO) vs. ..... | Request of access to administrative documents | Public maritime domain | 21-09-2000 | The access was granted | Exempted |
| 40 | P 165/2000 of Administrative Court of Lisbon - Public Prosecutor and FAPAS (Env NGO) vs. Secretary of the Court of Nisa | Procedure to obtain the annulment of the decision choosing the construction company responsible to execute cleaning and repairing works in the courthouse of Nisa | Protection of wild birds | 18-06-2002 | The request was dismissed on formal grounds (there is a civil proceeding with the same purpose) | |
| | P 2050/02-11P Supreme Administrative Court | Appeal against the Administrative Court decision | | - | still pending | |

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| 41 | P 9510/2000 Administrative Court of Lisbon - Citizen vs. Town Council of Almada | Procedure to obtain the annulment of an administrative act (construction licence for a high way crossing an ecological reserve, a protected landscape and a botanical reserve) | Protected areas | 19-07-2000 | The request was granted | |
| | P 1884/02 Supreme Administrative Court | Appeal against the Administrative Court decision presented by the defendant | | 18-12-2002 | The appeal was denied | Exempted |
| 42 | P 339/2000 Administrative Court of Porto - Citizens vs. Private company (concessionaire) | Provisional remedy asking the abstention of the defendants to continue their activities (construction of the surface subway) | Urban planning / classified heritage | | The request was denied | |
| | P ... Central Administrative Court | Appeal against the Administrative Court of Porto decision | | 07-11-2002 | The appeal was denied on formal grounds | |
| 43 | P ... Administrative Court of Coimbra - Citizens vs. Town Council of Leiria | Procedure to obtain the annulment of an administrative act (construction licence) and the recognition of a right | Urban planning | 18-10-2000 | The case was dismissed based on formal grounds (inadmissible cumulation of petitions) | |
| | P 47338(2001) Supreme Court of Justice - Citizens vs. Town Council of Leiria | Appeal against the decision of the Administrative Court of Coimbra | Procedural rules | 31-01-2002 | The appeal was partially granted - the inadmissibility of cumulation was confirmed but the administrative court decision was revoked in the part where it did not admit the continuance of the proceeding to obtain only the annulment of the administrative act (the proceeding returned to the Administrative Court of Coimbra be judged as such) | Exempted |

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| 44 | P 46058 A Supreme Administrative Court - LPN (Env NGO) and others vs. Environment Secretary of State | Provisional remedy asking the suspension of the effects of an administrative act (favourable opinion by the Secretary of State concerning the construction of a high-way Aljustrel-Castro Verde) | Protected areas | 04-05-2000 | The request was denied | |
| | P 46058 Supreme Administrative Court (Section) - LPN (Env NGO) and others vs. Secretary of State for Environment | Procedure to obtain the annulment of an administrative act (favourable opinion by the Secretary of State concerning the construction of a high-way Aljustrel-Castro Verde) | | 01-03-2001 | The request was denied on formal grounds (the act in issue was not considered as a judicially challengeable administrative act since it can not affect the rights of citizens) | Exempted |
| | P 46058 Supreme Administrative Court (Full court) - LPN (Env NGO) and others vs. Secretary of State for Environment | Appeal against the Supreme Court Section decision | | 18-04-2002 | The appeal was denied, confirming the initial decision | Exempted |
| 45 | P 46 262 A Supreme Administrative Court - LPN, GEOTA and QUERCUS (Env NGO) vs. Secretary of State for Public Works | Provisional remedy asking the suspension of the effects of an administrative act (favourable opinion by the Secretary of State concerning the construction of a high-way Aljustrel-Castro Verde) | Protected areas | 05-07-2000 | The request was denied on formal grounds (insufficient identification of the administrative act in issue) | Exempted |
| | P 46 262 Supreme Administrative Court - LPN, GEOTA and QUERCUS (Env NGO) vs. Secretary of State for Public Works | Procedure to obtain the annulment of an administrative act (favourable opinion by the Secretary of State concerning the construction of a high-way Aljustrel-Castro Verde) | | - | The procedure is still pending | |

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| 46 | P 46578(2000) Supreme Administrative Court - Citizen vs. Ministers Presidency | Procedure to obtain the annulment of an administrative act (decision by the Ministers Council ) | Waste co-incineration | 25-01-2001 | The request was denied on formal grounds (the act in issue was not considered as a judicially challengeable administrative act) | |
| 47 | P 47807A(2001) Supreme Court of Justice - ACOP (Consumers association) vs. Environment and Spatial Planning Ministry | Provisional remedy asking the suspension of the effects of an administrative act | Waste co-incineration | 01-08-2001 | The request was denied (decision on the merits) | 50 € |
| 48 | P 716/01 Administrative Court of Porto - Núcleo de Defesa do Meio Ambiente do Lordelo do Ouro NDMALO-GE (Env NGO) vs. Porto Town Councillor for Urban and Spatial Planning | Request of access to administrative documents | Right of participation in an administrative proceeding | 22-10-2001 | The access was granted | Exempted |
| 49 | P 472/01 Administrative Court of Lisbon - QUERCUS (Env NGO) VS. Lisbon Regional Directorate of Environment and Spatial Planning | Procedure asking the ordering of certain conduct by the defendant | Protected areas | 2001 | The request was denied | |

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| 50 | P 564/2001 Administrative Court of Lisbon - Citizen vs. Town Council | Procedure to obtain the annulment of an administrative act (construction licence) | Urban planning | - | still pending | |
| 51 | P 46499A Supreme Administrative Court - Citizens vs. Environment Secretary of State | Procedure to obtain the annulment of an administrative act (favourable opinion by the Environment Secretary of State to the EIA concerning a high way São Bartolomeu de Messines/Via Longitudinal do Algarve) | | 25-06-2002 | The appeal was denied on formal grounds | 150 € |
| 52 | P 88/02 Administrative Court of Funchal - COSMOS (Env NGO) vs. Town Council of Santa Cruz | Procedure to obtain the annulment of an administrative act (decision to build an infra-structure) | | - | still pending | Exempted |
| 53 | P 112/02 Administrative Court of Funchal - COSMOS (Env NGO) vs. Town Council of Machico | Request to grant a certificate of an administrative document | Decision concerning infrastructure projects | 03-09-2002 | The request was granted | Exempted |
| 54 | P 270/2000 Administrative Court of Funchal - COSMOS (Env NGO) vs. Madeira Regional Government | Request of access to administrative documents | Public maritime domain | 14-02-2002 | Supervenient inutility of the lawsuit (the defendant allowed the access) | Exempted |

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| 55 | P 44729 Supreme Administrative Court (Section) - LPN (Env NGO) vs. Council of Ministries | Provisional remedy asking the suspension of the effects of an administrative act | Protected areas | 16-04-1999 | The request was denied on formal grounds (the act in issue was a normative and not administrative decision) | Exempted |
| | P 44729 Supreme Administrative Court (Section) - LPN (Env NGO) vs. Council of Ministries | Procedure to obtain the annulment of an administrative act (decision by the Council of Ministries excluding a wet land from the Ecological Reserve) | | 30-01-2003 | The request was denied on formal grounds (the court considered that the Council of Ministries decision had the form of a regulation and not an administrative act, consequently the present procedure was not adequate to challenge it) | Exempted |

## Civil proceedings

| | **Proceeding reference, court and Parties** | **Type of proceeding** | **Issue of the proceeding** | **Date of the decision** | **Decision** | **Court costs** |
|---|---|---|---|---|---|---|
| 1 | P454-D/95 First instance court of Porto - Group of citizens and parents association vs. Petrol company | Provisional remedy asking the prohibition of any commercial activity (gas station) near an elementary school | Right to health and physic integrity and to an healthy environment / Air pollution, noise | 06-04-1995 | The provision was granted | |

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|---|---|---|---|---|---|---|
| | P 1051/95 Second instance court of Porto | Appeal against the first instance decision filed by the defendant | Violation of procedural rules (inadequacy of the proceeding used) | 11-12-1995 | The appeal was denied and the provision confirmed | Costs by the appellant |
| | P 483/96 Supreme Court of Justice | Appeal against the second instance decision | Violation of procedural rules | 02-07-1996 | The appeal was denied and the provision confirmed | Costs by the appellant |
| | P 454/95-3 First instance court of Porto - Group of citizens and parents association vs. Petrol company | Declarative action asking the prohibition of any commercial activity by the defendant near the school | Right to health and physic integrity and to an healthy environment / Air pollution, noise | ... | Interlocutory decision on the merits dismissed the case (the court considered there was no offence to the rights invoked) | |
| | P 986/96 Second instance court of Porto | The petitioners filed an appeal against the first instance decision challenging it on the merits / The defendant filed a dependant appeal invoking lack of legal standing by the parents associations | | 08-05-1997 | Deciding on the appeal filed by the petitioners, the court confirmed the first instance decision | Costs by the parents association (it had legal aid) |
| | P 902/98 Supreme Court of Justice | Appeal against the second instance decision | | 27-01-1998 | The appeal was granting and the second instance revoked, ordering the second instance court to decide on the dependant appeal presented by the defendant since it posed procedural issues that should be decided previously to the merits of the case | Costs by the parents association (it had legal aid) |

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| | P 986/96 Second instance court of Porto | | | 19-03-1998 | The appeal presented by the defendant was granted (the court considered the parents association had no legal standing). The court decided the ruling on the other questions was prejudiced | Costs by the parents association (it had legal aid) |
| | P 910/98 Supreme Court of Justice | Appeal against the second instance decision | | 13-10-1998 | The appeal was denied and the second instance decision confirmed | Costs by the parents association (it had legal aid) |
| 2 | P 116/96 First instance court of Ourém - OUFABÁ and group of citizens vs. Private company | Declarative action asking the prohibition of an activity | Underground water pollution, smoke | - | The trial took place in December 2002 and January 2003. Now waiting for the final decision. | |
| 3 | P 843/97 First instance court of Lisbon - Citizen vs. Town Council of Lisbon and private company | Provisional remedy asking the suspension of construction works | Cultural heritage | | The request was denied | |
| | P 1328/98 First instance court of Lisbon - Citizen vs. Town Council of Lisbon and private company | Declarative action asking the prohibition of construction works | Cultural heritage | | The case was dismissed | |

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| 4 | P ... First instance court of Póvoa do Lanhoso - ADA-TL (Env NGO) vs. Waste Management Company | Provisional remedy asking the prohibition of any activity of waste deposit, management and destruction by the defendant in a given location | Waste management | 19-06-1997 | The provision was denied based on a decision on the merits (inexistence of justified concern of damage to environment) | |
| | P 9730868 Second instance court of Porto | Appeal against the first instance decision filed by the petitioners | | 23-10-1997 | The appeal was denied and the first instance decision confirmed | |
| | P 200/98 Supreme Court of Justice | Appeal against the second instance decision filed by the petitioners | | 23-09-1998 | The appeal was granted, revoking the second instance decision and granting the provisional remedy (the basic requirements for the granting of the remedy were proved: a justified concern of damages to environment and probable existence of the right) | Costs by the defendant |
| | P ... First instance court of Póvoa do Lanhoso | Petition filed by the defendant to substitute the provisional remedy granted (suspension of the defendant activity) for the payment of a judicial bond | Procedural rules (possibility of substitution of provisional remedies by a judicial bond) | 26-05-2000 | The request was denied | |
| | P 422/2000 Second instance court of Porto | Appeal against the first instance decision filed by the defendant | | 12-06-2001 | The appeal was denied and the provisional remedy confirmed (decision based on the preventive and precautionary principles) | |

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| 5 | P 825/97 First instance court of Lisbon - Group of citizens vs. Private Transports Company (Carris)<br><br>P 2789/98 Second instance court of Lisbon<br><br>P 1090/98 Supreme Court of Justice | Provisional remedy asking the prohibition of transference of the bus terminal to a new location (near the residence of the plaintiffs)<br><br>Appeal against the first instance decision filed by the petitioners<br><br>Appeal against the second instance decision filed by the petitioners | Urban environment and quality of life | 02-12-1997<br><br>02-07-1998<br><br>14-04-1999 | The provision was denied (the position of the plaintiffs is no more valuable than the one of those residing near the current location of the bus terminal)<br><br>The appeal was denied and the first instance decision confirmed<br><br>The appeal was denied and the second instance decision confirmed | |
| 6 | P 89/99 First instance court of Felgueiras - ...<br><br>P 110/99 of Second Instance court of Porto - ... | Provisional remedy asking the prohibition of an activity<br><br>Appeal | Quality of life, water and waste management<br><br>Procedural rules (competence of judicial jurisdiction) | 05-05-1999<br><br>25-11-1999 | The appeal was denied and the first instance decision confirmed (considering the judicial court as competent) | |
| 7 | P 1010-B/99-2S First instance court of Porto - "Animal - Associação Nortenha de Intervenção no Mundo Animal" (Env NGO) vs. Uncertain | Provisional remedy asking the prohibition of bullfights with the killing of bulls in the annual festivities (1999) of a certain village and the condemnation of the defendants an+C30d the State in a pecuniary sanction | Protection of animals and public health | 17-08-1999 | The provisional remedy was granted | |

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| | P 00301555 Second instance court of Porto | Appeal presented Public Prosecutor (representing the defendants) against the first instance decision (given the existence of a law prohibiting such kind of bullfights, there is no interest in the present proceeding) | | 01-03-2001 | The appeal was denied (the proceeding is intended to enforce the Law) | The defendant/appellant is exempted from payment of costs |
| 8 | P 232/99 First instance court of Ourique - LPN (Env NGO) vs. Citizen | Provisional remedy asking the condemnation of the defendant to hand over and not trespass properties of the petitioner where a LIFE Nature project is being executed and the payment of a pecuniary sanction for each infraction | LIFE Nature contract n.º B4-3200/95/510 - Project for the conservation of bird species | 16-12-1999 | The provision was granted but the pecuniary sanction was reduced to 500.000$ for each infraction | |
| | P 2092/2000 Second instance court of Évora presented by the defendant | Appeal against the first instance decision granting the provision | | 18-01-2001 | The appeal was denied | |
| | P 2093/2000 - Second instance court of Évora | Appeal against the first instance decision denying a request for the court to declare the provision had expired | | 22-03-2001 | The appeal was granted, revoking the first instance decision and extinguishing the provisional remedy | |

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| | | LPN presented a request to reform of the previous decision of 22-03-2001 | | 10-07-2001 | The request was granted, denying the appeal presented by the defendant and confirming the first instance decision | |
| | P ... Supreme Court of Justice | Appeal against the reform of the second instance court decision presented by the defendant | | 04-04-2002 | The appeal was denied | |
| | Proc 78/2000 First instance court of Ourique - LPN (Env NGO) vs. Citizen | Declarative action | | - | the proceeding is still pending | |
| 9 | P 170/99 First instance court of São João da Madeira - Citizen vs. Citizen | Declarative action asking the prohibition of an activity (construction of a building with more than 3 floors) | Urban law (Local urban plan) and quality of life | 09-10-2001 | The petition was dismissed (the court considered not proved the violation of urban rules, nor the menace to the quality of life of the plaintiff) | |
| | P 317/2001 Second instance court of Porto - Citizen vs. Citizen | Appeal against the first instance decision | | 23-04-2002 | The appeal was denied and the first instance decision confirmed | |
| 10 | P 78-B/2000 of First instance court of Vila Nova de Gaia - Group of citizens vs. Local industry | Declarative action asking the prohibition of the industrial activity of the defendant | Pollution caused by smoke and noise | | ... | |

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| | P 0130480 Second instance court of Porto | Appeal against an interlocutory decision of first instance(11-12-2000) considering the judicial jurisdiction competent to rule the matter | Procedural rules (competence of judicial jurisdiction) | 26-04-2001 | The appeal was denied and the first instance decision confirmed | |
| 11 | P ... First instance court of ... - Sociedade Protectora dos Animais (NGO) vs. Hunting Club and Shooting Federation | Provisional remedy asking the prohibition of a pigeon shooting contest, the handover of the pigeons and the condemnation of the defendants in a pecuniary sanction | | ... | The provision was granted | |
| | P 7021/99 Second instance court of Lisbon - Hunting Club and Shooting Federation vs. Sociedade Protectora dos Animais (NGO) | Appeal against the first instance decision | | 04-04-2000 | The appeal was granted and the provisional remedy revoked | |
| | P 3282/2000 Supreme Court of Justice - Sociedade Protectora dos Animais (NGO) vs. Hunting Club and Shooting Federation | Appeal against the second instance decision | | 13-12-2000 | The appeal was denied and the second instance decision confirmed (the killing of pigeons is justified because shooting is a sport such as fishing and hunting) | The appellant is exempted from payment of costs |

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| 12 | P ... First instance court of Lisbon - Group of citizens vs. Public Construction Company (EPUL)<br><br>P 9110/2000 Second instance court of Lisbon - Group of citizens and Town Council of Lisbon | Provisional remedy asking the suspension of the construction works of a Special Rehousing Plan<br><br>Appeal against the first instance decision | Violation of participation rights in the decision making to procedure / right to an healthy environment | 10-07-2000<br><br>26-11-2000 | The court ruled incompetence to decide such matter (belongs to administrative jurisdiction)<br><br>The court considered the judicial jurisdiction as competent to rule this matter since the constructor is not an administrative authority nor a concessionaire | |
| 13 | P 24/99 First instance court of Nisa - FAPAS (NGO) vs. Portuguese State<br><br>P 775/99 Second instance court of Évora<br><br>P 413/2000 Supreme Court of Justice | Provisional remedy asking the removal of any device capable of preventing the nesting of swallows in the courthouse's exterior walls and the payment of a daily pecuniary sanction until full compliance reverting to other NGOs<br><br>Appeal against the first instance decision presented by the plaintiff<br><br>Appeal against the second instance decision | Protection of wild birds (nesting) | 28-04-1999<br><br>27-06-2000 | Denied<br><br>Denied<br><br>The appeal was granted and the provisional remedy partially granted (the pecuniary sanction had not been object of the appeal and the court did not rule on this | |

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| | | | | | matter) | |
| | P 90/2000 First instance court of Nisa - FAPAS (Env NGO) vs. The State | Declarative action asking the condemnation of the State to remove from the courthouse's walls all devices intended to prevent the nesting of swallows, to not destroy other swallow's nests and to minimize the negative effects of the past destruction of similar nests | Protection of wild birds (nesting) | - | The trial already took place. Now waiting the final decision | |
| 14 | P 185/00 First instance court of Cascais - Salvar Sintra (Env NGO) vs. Private companies | Administrative embargos (article 42 of Law 11/87) [special provisional remedy to suspend an activity damaging the environment (construction of touristic resorts inside a protected area)] | Protected areas (Natural Park of Sintra-Cascais) | 17-05-2000 | The request was denied on formal grounds (incompetence of the court) | Exempted |
| | Appeal to the second instance court of Évora presented by Salvar Sintra | Appeal | | 23-07-2001 | The appeal was granted and the proceeding returned to the first instance for decision on the merits | |

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| | P 185/00 returned to be decided by the First instance court of Cascais | | | 01-03-2002 | The request was partially granted | |
| | Appeal to the second instance court of Évora presented by the private companies | Appeal | | 05-12-2002 | The first instance decision was confirmed | |
| | P 440/2002 First instance court of Cascais - Salvar Sintra (Env NGO) vs. Private companies | Declarative action asking the prohibition of activities damaging to environment | | - | The proceeding is still pending | |
| 15 | P ... First instance court of Porto - ANIMAL (NGO) vs. Commission organizing the annual festivities in Barrancos | Provisional remedy asking the prohibition of bullfights with the killing of bulls in the annual festivities (2000) of a certain village and the condemnation of the defendants and the State in a pecuniary sanction | | 18-08-2000 | The provision was granted | |
| | P ... First instance court of Porto - ANIMAL (NGO) vs. Commission organizing the annual festivities in Barrancos | Declarative action asking the prohibition of bullfights with the killing of the animals, its cutting and consumption in the streets and claiming a compensation for damages | | 13-07-2001 | Interlocutory decision dismissing the case because the bullfights had already taken place and considering the NGO had no subjective right relating to the damage invoked | |

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| | P 0132111<br>Second instance court of Porto | Appeal against the first instance decision | | 31-01-2002 | The appeal was partially granted, confirming the first instance decision in what regards the inutility of prohibiting the activities but revoking the rest and ordering the first instance to rule on the request of declaration of illegality of the activity and the claiming for compensation for damages | The appellant is exempted from payment of costs |
| 16 | P 273/2001 First instance court of Setúbal - citizen vs. Portuguese Government and Environment Ministry<br><br>P ... Second Instance Court of Évora | Declarative action asking the prohibition of an activity<br><br>Appeal against the first instance decision | Industrial waste | 22-01-2001<br><br>... | Dismissal of the case, because of the lack of legal personality of the defendants<br><br>... | 0 |
| 17 | P ... First instance court of Benavente - QUERCUS (Env NGO) vs. Private company (touristic resort) | Provisional remedy asking the prohibition of the cutting of trees | Nature protection | 2001 | The request was denied | |

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| 18 | P ... First instance court of Cadaval - citizens vs. Waste management company | Provisional remedy asking the prohibition of construction of a waste treatment facility | Waste management, participation rights in the decision making procedure | | The provisional remedy was denied (the court considered itself incompetent to rule the issue, since an administrative decision - location of the facility - was being challenged) | |
| | P ... Second instance court of Lisbon - citizens vs. Waste Management company | Appeal against the first instance decision | Procedural rules (competence of judicial jurisdiction) | | The appeal was granted and the first instance decision revoked, ordering the first instance court to decide on the provisional remedy request | |
| | P 3241/2001 Supreme Court of Justice - Waste Management company vs. Citizens | Appeal against the second instance decision | | 24-01-2002 | The appeal was granted, revoking the second instance decision and confirming the first instance decision | |
| 19 | P 317/2001 First instance court of Setúbal - citizen vs. The Portuguese State | Declarative action asking the prohibition the decision to install the industrial waste co-incineration process in a cement facility | Industrial waste/ Precautionary principle | ... | Preliminary decision dismissing the case, due to lack of competence of the civil courts to judge this matter | 0 |
| | P 1654/01 Second Instance Court of Évora | Appeal against the first instance decision | Procedural rules | ... | The appeal was granted, ordering the continuance of the proceeding until final decision by the first instance | |

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| | P 1176 Supreme Court of Justice | Appeal against the second instance decision presented by the Public Prosecutor (representing the State) | | 09-05-2002 | The appeal was granted and the first instance decision confirmed (the administrative courts are competent to judge this matter) | |
| 20 | P ... First instance court of Santa Maria da Feira - Citizens vs. Private Company | Provisional remedy asking the suspension of a polluting industrial activity for a period of 60 days (during which procedures to limit emissions would be set up) | Industrial pollution, right to a healthy environment | 22-07-2002 | The provision was granted | |
| | P 0252552 Second instance court of Porto - Private company vs. Citizens | Appeal against the first instance decision | | 03-01-2003 | The appeal was partially granted revoking the first instance decision in what concerns the suspension of the activity (the industry could re-initiate its activity, having however a time limit of 120 days to adopt certain procedures to stop the emissions) | 1/10 of Costs by the petitioners |
| 21 | P 563/02 First instance court of Castelo Branco - QUERCUS and FAPAS (Env NGO) vs. Private companies | Provisional remedy asking the removal of a net from a scarp | Nature protection | | The judged homologated a settlement between the parties | |

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| | P 850/2002 First instance court of Castelo Branco - QUERCUS and FAPAS (Env NGO) vs. Private companies and the Portuguese State | Declarative action asking the removal of the net and a compensation for environmental damages | | - | still pending | |
| 22 | P 144/2002 First instance court of Oliveira do Hospital - group of citizens vs. Private company | Declarative action asking the prohibition of the construction of an infra-structure project | Protected areas | - | still pending | |
| 23 | P 423/2002 First instance court of Oliveira do Hospital - group of citizens vs. Citizens | Procedure to prohibit the use of a natural excavation C9 | | - | still pending | |

# Penal proceedings

| | Proceeding, court and Parties | NGO/Citizens intervention | Legal type of crime | Date of the decision | Final decision | Costs of the proceeding |
|---|---|---|---|---|---|---|
| 1 | P ... First instance court of Macedo de Cavaleiros - Public Prosecutor vs citizens | QUERCUS (Env NGO) presented a complaint of capture of birds | | 21-06-1995 | The Public Prosecutor dismissed the case because the facts were not considered as crime. Considering an administrative infringement procedure could be initiated the Public Prosecutor gave notice of it to the competent authority (National Parks, Reserves and Nature Conservation Service) | |
| 2 | P 58/96 First instance court of Gouveia - Public Prosecutor vs. Private company (extraction of ore) | Citizen presented a complaint | Air and noise pollution (article 279 (b) (c) Penal Code) and Pollution with danger (article 280 Penal Code) | 15-07-1996 | The Public Prosecutor dismissed the case because the facts could not be considered as crime (not all the requirements of the penal provision were fulfilled) | |

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| 3 | P 93/97 First instance Court of Gondomar - Public Prosecutor vs. Citizen | FAPAS (Env NGO) presented a complaint | Illegal hunting | | The defendant was convicted for the crime | |
| 4 | P 159-A/97 First instance court of Vila Verde -FAPAS and Public Prosecutor vs. National Park Peneda-Gerês and Portuguese State<br><br>P 195/98 Second Instance Court of Porto - FAPAS vs. National Park Peneda-Gerês and Portuguese State | FAPAS (Env NGO) presented a complaint, became a private prosecutor and civil Party claiming compensation for damages | Illegal hunting<br><br>Appeal against the interlocutory decision rejecting the claim of compensation for damages | 17-10-1997<br><br>25-03-1998 | The interlocutory decision accepting the prosecution rejected the request for compensation for damages (based on procedural rules)<br><br>The appeal was denied on formal grounds (penal popular action procedure does not admit the request for compensation for damages, it was to be filed separately) | 80 € of costs by the appellant (article 20 (3) Law 83/95) |
| 5 | P 2/98 First instance court of Castelo de Vide - Public Prosecutor vs. Citizen<br><br>P 339/99 Second instance court of Évora | FAPAS (Env NGO) presented a complaint, became a private prosecutor and civil Party claiming compensation for damages<br><br>Appeal | Illegal hunting | 03-03-1999 | The defendant was convicted for the crime but the claim of compensation was denied<br><br>The crime was declared object of amnesty | |

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| 6 | P 11534/98 First instance court of Lisbon - Public Prosecutor vs. Hospital | QUERCUS (Env NGO) presented a complaint | Pollution (hospital waste) | 1999 | The Public Prosecutor dismissed the case after the enquiry | |
| 7 | P ... First instance court of Santa Cruz - Public Prosecutor vs. Solid Waste Management Concessionaire | Citizens presented a complaint | Water pollution (article 279 (1) (a) of Penal Code) | 28-09-1998 | The appeal was denied on formal grounds (penal popular action procedure does not admit the request for compensation for damages, it was to be filed separately) | |
| 8 | P ... First instance Court of Vila Nova de Gaia - Public Prosecutor vs. Private Company (electrical material) | Citizen presented a complaint | Pollution with danger (article 280 Penal Code) | 26-11-1998 | The judge accepted the Public Prosecutor's proposal of not applying a punishment (according to articles 280, 286 and 74 of Penal Code) since there was a diminished guilt and illegality and the source of pollution was being eliminated | |
| 9 | P ... First instance court of Leiria - Public Prosecutor vs. Private industry | Citizen presented a complaint | Air pollution (article 279 Penal Code) and Pollution with danger (article 280 Penal Code) | 22-01-1999 | The Public Prosecutor dismissed the case because the facts could not be considered as crime (not all the requirements of the penal provision were fulfilled) | |

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| 10 | Proc 102/01 First instance court of Ourique - Public Prosecutor vs. Citizen | LPN (Env NGO) presented a complaint | Damages against nature | 21-06-2001 | The Public Prosecutor dismissed the case after the enquiry | |
| 11 | 37/02.5CAPRL First instance court of Portel - Public Prosecutor vs. citizen | Citizen presented a complaint | Still not specified since the enquiry is still pending (there are suspicious of a crime against environment and public health) | - | still pending | |

## 5.2 Legislation in the original language

1. Popular action Law – Law 83/95 of 31 August (Lei 83/95 de 31 de Agosto)

2. Environmental Non Governmental Organizations Law – Law 35/98 of 18 July (Lei 35/98 de 18 de Julho)

3. Access to Administrative Documents Law (AADL) – Law 65/93 of 26 August, as republished and modified by Law 8/95 of 29 March and Law 94/99 of 16 July (Lei 94/99 de 16 de Julho, segunda alteração e republicação em anexo da Lei 65/93 de 26 de Agosto, já alterada pela Lei 8/95 de 29 de Março)

# ASSEMBLEIA DA REPÚBLICA

# Lei n.º 83/95 de 31 de Agosto

## Direito de participação procedimental e de acção popular

A Assembleia da República decreta, nos termos dos artigos 52.°, n.° 3, 164.°, alínea d), e 169.°, n.° 3, da Constituição, o seguinte:

## CAPÍTULO I

## Disposições gerais

### Artigo 1.°

*Âmbito da presente lei*

1 - A presente lei define os casos e termos em que são conferidos e podem ser exercidos o direito de participação popular em procedimentos administrativos e o direito de acção popular para a prevenção, a cessação ou a perseguição judicial das infracções previstas no n.° 3 do artigo 52.° da Constituição.

2 - Sem prejuízo do disposto no número anterior, são designadamente interesses protegidos pela presente lei a saúde pública, o ambiente, a qualidade de vida, a protecção do consumo de bens e serviços, o património cultural e o domínio público.

### Artigo 2.°

*Titularidade dos direitos de participação procedimental e do direito de acção popular*

1 - São titulares do direito procedimental de participação popular e do direito de acção popular quaisquer cidadãos no gozo dos seus direitos civis e políticos e as associações e fundações defensoras dos interesses previstos no artigo anterior, independentemente de terem ou não interesse directo na demanda.

2 - São igualmente titulares dos direitos referidos no número anterior as autarquias locais em relação aos interesses de que sejam titulares residentes na área da respectiva circunscrição.

### Artigo 3.°

*Legitimidade activa das associações e fundações*

Constituem requisitos da legitimidade activa das associações e fundações:

*a)* A personalidade jurídica;

*b)* O incluírem expressamente nas suas atribuições ou nos seus objectivos estatutários a defesa dos interesses em causa no tipo de acção de que se trate;

*c)* Não exercerem qualquer tipo de actividade profissional concorrente com

empresas ou profissionais liberais.

## CAPÍTULO II

## Direito de participação popular

### Artigo 4.°

*Dever de prévia audiência na preparação de planos ou na localização e realização de obras e investimentos públicos*

1 - A adopção de planos de desenvolvimento das actividades da Administração Pública, de planos de urbanismo, de planos directores e de ordenamento do território e a decisão sobre a localização e a realização de obras públicas ou de outros investimentos públicos com impacte relevante no ambiente ou nas condições económicas e sociais e da vida em geral das populações ou agregados populacionais de certa área do território nacional devem ser precedidos, na fase de instrução dos respectivos procedimentos, da audição dos cidadãos interessados e das entidades defensoras dos interesses que possam vir a ser afectados por aqueles planos ou decisões.

2 - Para efeitos desta lei, considera-se equivalente aos planos a preparação de actividades coordenadas da Administração a desenvolver com vista à obtenção de resultados com impacte relevante.

3 - São consideradas como obras públicas ou investimentos públicos com impacte relevante para efeitos deste artigo os que se traduzam em custos superiores a um milhão de contos ou que, sendo de valor inferior, influenciem significativamente as condições de vida das populações de determinada área, quer sejam executados directamente por pessoas colectivas públicas quer por concessionários.

### Artigo 5.°

*Anúncio público do início do procedimento para elaboração dos planos ou decisões de realizar as obras ou investimentos*

1 - Para a realização da audição dos interessados serão afixados editais nos lugares de estilo, quando os houver, e publicados anúncios em dois jornais diários de grande circulação, bem como num jornal regional, quando existir.

2 - Os editais e anúncios identificarão as principais características do plano, obra ou investimento e seus prováveis efeitos e indicarão a data a partir da qual será realizada a audição dos interessados.

3 - Entre a data do anúncio e a realização da audição deverão mediar, pelo menos, 20 dias, salvo casos de urgência devidamente justificados.

## Artigo 6.°

*Consulta dos documentos e demais actos do procedimento*

1 - Durante o período referido no n.° 3 do artigo anterior, os estudos e outros elementos preparatórios dos projectos dos planos ou das obras deverão ser facultados à consulta dos interessados.

2 - Dos elementos preparatórios referidos no número anterior constarão obrigatoriamente indicações sobre eventuais consequências que a adopção dos planos ou decisões possa ter sobre os bens, ambiente e condições de vida das pessoas abrangidas.

3 - Poderão também durante o período de consulta ser pedidos, oralmente ou por escrito, esclarecimentos sobre os elementos facultados.

## Artigo 7.°

*Pedido de audiência ou de apresentação de observações escritas*

1 - No prazo de cinco dias a contar do termo do período da consulta, os interessados deverão comunicar à autoridade instrutora a sua pretensão de serem ouvidos oralmente ou de apresentarem observações escritas.

2 - No caso de pretenderem ser ouvidos, os interessados devem indicar os assuntos sobre que pretendem intervir e qual o sentido geral da sua intervenção.

## Artigo 8.°

*Audição dos interessados*

1 - Os interessados serão ouvidos em audiência pública.

2 - A autoridade encarregada da instrução prestará os esclarecimentos que entender úteis durante a audiência, sem prejuízo do disposto nos artigos seguintes.

3 - Das audiências serão lavradas actas assinadas pela autoridade encarregada da instrução.

Artigo 9.°

*Dever de ponderação e de resposta*

1 - A autoridade instrutora ou, por seu intermédio, a autoridade promotora do projecto, quando aquela não for competente para a decisão, responderá às observações formuladas e justificará as opções tomadas.

2 - A resposta será comunicada por escrito aos interessados, sem prejuízo do disposto no artigo seguinte.

Artigo 10.°

*Procedimento colectivo*

1 - Sempre que a autoridade instrutora deva proceder a mais de 20 audições, poderá determinar que os interessados se organizem de modo a escolherem representantes nas audiências a efectuar, os quais serão indicados no prazo de cinco dias a contar do fim do período referido no n.° 1 do artigo 7.°

2 - No caso de os interessados não se fazerem representar, poderá a entidade instrutora escolher, de entre os interessados, representantes de posições afins, de modo a não exceder o número de 20 audições.

3 - As observações escritas ou os pedidos de intervenção idênticos serão agrupados a fim de que a audição se restrinja apenas ao primeiro interessado que solicitou a audiência ou ao primeiro subscritor das observações feitas.

4 - No caso de se adoptar a forma de audição através de representantes, ou no caso de a apresentação de observações escritas ser em número superior a 20, poderá a autoridade instrutora optar pela publicação das respostas aos interessados em dois jornais diários e num jornal regional, quando exista.

Artigo 11.°

*Aplicação do Código do Procedimento Administrativo*

São aplicáveis aos procedimentos e actos previstos no artigo anterior as pertinentes disposições do Código do Procedimento Administrativo.

## CAPÍTULO III

## Do exercício da acção popular

Artigo 12.°

*Acção procedimental administrativa e acção popular civil*

1 - A acção procedimental administrativa compreende a acção para defesa dos interesses referidos no artigo 1.° e o recurso contencioso com fundamento em ilegalidade contra quaisquer actos administrativos lesivos dos mesmos interesses.

2 - A acção popular civil pode revestir qualquer das formas previstas no Código de Processo Civil.

Artigo 13.°

*Regime especial de indeferimento da petição inicial*

A petição deve ser indeferida quando o julgador entenda que é manifestamente improvável a procedência do pedido, ouvido o Ministério Público e feitas preliminarmente as averiguações que o julgador tenha por justificadas ou que o autor ou o Ministério Público requeiram.

Artigo 14.°

*Regime especial de representação processual*

Nos processos de acção popular, o autor representa por iniciativa própria, com dispensa de mandato ou autorização expressa, todos os demais titulares dos direitos ou interesses em causa que não tenham exercido o direito de auto-exclusão previsto no artigo seguinte, com as consequências constantes da presente lei.

Artigo 15.°

*Direito de exclusão por parte de titulares dos interesses em causa*

1 - Recebida petição de acção popular, serão citados os titulares dos interesses em causa na acção de que se trate, e não intervenientes nela, para o efeito de, no prazo fixado pelo juiz, passarem a intervir no processo a título principal, querendo, aceitando-o na fase em que se encontrar, e para declararem nos autos se aceitam ou não ser representados pelo autor ou se, pelo contrário, se excluem dessa representação, nomeadamente para o efeito de lhes não serem aplicáveis as decisões proferidas, sob pena de a sua passividade valer como aceitação, sem prejuízo do disposto no n.° 4.

2 - A citação será feita por anúncio ou anúncios tornados públicos através de qualquer meio de comunicação social ou editalmente, consoante estejam em causa interesses gerais ou geograficamente localizados, sem obrigatoriedade de

identificação pessoal dos destinatários, que poderão ser referenciados enquanto titulares dos mencionados interesses, e por referência à acção de que se trate, à identificação de pelo menos o primeiro autor, quando seja um entre vários, do réu ou réus e por menção bastante do pedido e da causa de pedir.

3 - Quando não for possível individualizar os respectivos titulares, a citação prevista no número anterior far-se-á por referência ao respectivo universo, determinado a partir de circunstância ou qualidade que lhes seja comum, da área geográfica em que residam ou do grupo ou comunidade que constituam, em qualquer caso sem vinculação à identificação constante da petição inicial, seguindo-se no mais o disposto no número anterior.

4 - A representação referida no n.° 1 é ainda susceptível de recusa pelo representado até ao termo da produção de prova ou fase equivalente, por declaração expressa nos autos.

## Artigo 16.°

*Ministério Público*

1 - O Ministério Público fiscaliza a legalidade e representa o Estado quando este for parte na causa, os ausentes, os menores e demais incapazes, neste último caso quer sejam autores ou réus.

2 - O Ministério Público poderá ainda representar outras pessoas colectivas públicas quando tal for autorizado por lei.

3 - No âmbito da fiscalização da legalidade, o Ministério Público poderá, querendo, substituir-se ao autor em caso de desistência da lide, bem como de transacção ou de comportamentos lesivos dos interesses em causa.

## Artigo 17.°

*Recolha de provas pelo julgador*

Na acção popular e no âmbito das questões fundamentais definidas pelas partes, cabe ao juiz iniciativa própria em matéria de recolha de provas, sem vinculação à iniciativa das partes.

## Artigo 18.°

*Regime especial de eficácia dos recursos*

Mesmo que determinado recurso não tenha efeito suspensivo, nos termos gerais, pode o julgador, em acção popular, conferir-lhe esse efeito, para evitar dano irreparável ou de difícil reparação.

## Artigo 19.°

*Efeitos do caso julgado*

1 - As sentenças transitadas em julgado proferidas em acções ou recursos administrativos ou em acções cíveis, salvo quando julgadas improcedentes por insuficiência de provas, ou quando o julgador deva decidir por forma diversa fundado em motivações próprias do caso concreto, têm eficácia geral, não abrangendo, contudo, os titulares dos direitos ou interesses que tiverem exercido o direito de se auto-excluírem da representação.

2 - As decisões transitadas em julgado são publicadas a expensas da parte vencida e sob pena de desobediência, com menção do trânsito em julgado, em dois dos jornais presumivelmente lidos pelo universo dos interessados no seu conhecimento, à escolha do juiz da causa, que poderá determinar que a publicação se faça por extracto dos seus aspectos essenciais, quando a sua extensão desaconselhar a publicação por inteiro.

## Artigo 20.°

*Regime especial de preparos e custas*

1 - Pelo exercício do direito de acção popular não são exigíveis preparos.

2 - O autor fica isento do pagamento de custas em caso de procedência parcial do pedido.

3 - Em caso de decaimento total, o autor interveniente será condenado em montante a fixar pelo julgador entre um décimo e metade das custas que normalmente seriam devidas, tendo em conta a sua situação económica e a razão formal ou substantiva da improcedência.

4 - A litigância de má-fé rege-se pela lei geral.

5 - A responsabilidade por custas dos autores intervenientes é solidária, nos termos gerais.

Artigo 21.°

*Procuradoria*

O juiz da causa arbitrará o montante da procuradoria, de acordo com a complexidade e o valor da causa.

## CAPÍTULO IV

## Responsabilidade civil e penal

Artigo 22.°

*Responsabilidade civil subjectiva*

1 - A responsabilidade por violação dolosa ou culposa dos interesses previstos no artigo 1.° constitui o agente causador no dever de indemnizar o lesado ou lesados pelos danos causados.

2 - A indemnização pela violação de interesses de titulares não individualmente identificados é fixada globalmente

3 - Os titulares de interesses identificados têm direito à correspondente indemnização nos termos gerais da responsabilidade civil.

4 - O direito à indemnização prescreve no prazo de três anos a contar do trânsito em julgado da sentença que o tiver reconhecido.

5 - Os montantes correspondentes a direitos prescritos serão entregues ao Ministério da Justiça, que os escriturará em conta especial e os afectará ao pagamento da procuradoria, nos termos do artigo 21.°, e ao apoio no acesso ao direito e aos tribunais de titulares de direito de acção popular que justificadamente o requeiram.

Artigo 23.°

*Responsabilidade civil objectiva*

Existe ainda a obrigação de indemnização por danos independentemente de culpa sempre que de acções ou omissões do agente tenha resultado ofensa de direitos ou interesses protegidos nos termos da presente lei e no âmbito ou na sequência de actividade objectivamente perigosa.

Artigo 24.°

*Seguro de responsabilidade civil*

Sempre que o exercício de uma actividade envolva risco anormal para os interesses protegidos pela presente lei, deverá ser exigido ao respectivo agente seguro da correspondente responsabilidade civil como condição do início ou da continuação daquele exercício, em termos a regulamentar.

Artigo 25.°

*Regime especial de intervenção no exercício da acção penal dos cidadãos e associações*

Aos titulares do direito de acção popular é reconhecido o direito de denúncia, queixa ou participação ao Ministério Público por violação dos interesses previstos no artigo 1.° que revistam natureza penal, bem como o de se constituírem assistentes no respectivo processo, nos termos previstos nos artigos 68.°, 69.° e 70.° do Código de Processo Penal.

## CAPÍTULO V

## Disposições finais e transitórias

Artigo 26.°

*Dever de cooperação das entidades públicas*

1 - É dever dos agentes da administração central, regional e local, bem como dos institutos, empresas e demais entidades públicas, cooperar com o tribunal e as partes intervenientes em processo de acção popular.

2 - As partes intervenientes em processo de acção popular poderão, nomeadamente, requerer às entidades competentes as certidões e informações que julgarem necessárias ao êxito ou à improcedência do pedido, a fornecer em tempo útil.

3 - A recusa, o retardamento ou a omissão de dados e informações indispensáveis, salvo quando justificados por razões de segredo de Estado ou de justiça, fazem incorrer o agente responsável em responsabilidade civil e disciplinar.

Artigo 27.°

*Ressalva de casos especiais*

Os casos de acção popular não abrangidos pelo disposto na presente lei regem-se pelas normas que lhes são aplicáveis.

Artigo 28.°

*Entrada em vigor*

A presente lei entra em vigor no 60.° dia seguinte ao da sua publicação.

*Aprovada em 21 de Junho de 1995.*
*O Presidente da Assembleia da República, António Moreira Barbosa de Melo.*
*Promulgada em 8 de Agosto de 1995.*
*Publique-se.*
*O Presidente da República, MÁRIO SOARES.*
*Referendada em 11 de Agosto de 1995.*

*Pelo Primeiro-Ministro, Manuel Dias Loureiro, Ministro da Administração Interna.*

## Assembleia da República

# Lei n. 35/98 de 18 de Julho

Define o estatuto das organizações não governamentais de ambiente (revoga a Lei n. 10/87, de 4 de Abril)

A Assembleia da República decreta, nos termos dos artigos 161., alínea c), e 166., n. 3, e do artigo 112., n. 5, da Constituição, para valer como lei geral da República, o seguinte:

## CAPÍTULO I

## Disposições gerais

### Artigo 1.

*Objecto*

A presente lei define o estatuto das organizações não governamentais de ambiente, adiante designadas por ONGA.

### Artigo 2.

*Definição*

1 - Entende-se por ONGA, para efeitos da presente lei, as associações dotadas de personalidade jurídica e constituídas nos termos da lei geral que não prossigam fins lucrativos, para si ou para os seus associados, e visem, exclusivamente, a defesa e valorização do ambiente ou do património natural e construído, bem como a conservação da Natureza.

2 - Podem ser equiparados a ONGA, para efeitos dos artigos 5., 6., 13., 14. e 15. da presente lei, outras associações, nomeadamente sócio-profissionais, culturais e científicas, que não prossigam fins partidários, sindicais ou lucrativos, para si ou para os seus associados, e tenham como área de intervenção principal o ambiente, o património natural e construído ou a conservação da Natureza.

3 - Cabe ao Instituto de Promoção Ambiental, adiante designado por IPAMB, proceder, no acto do registo, ao reconhecimento da equiparação prevista no número anterior.

4 - São ainda consideradas ONGA, para efeitos da presente lei, as associações dotadas de personalidade jurídica e constituídas nos termos da lei geral que não tenham fins lucrativos e resultem do agrupamento de várias ONGA, tal como definidas no n. 1, ou destas com associações equiparadas.

## CAPÍTULO II

## Estatuto das ONGA

### Artigo 3.

*Atribuição do estatuto*

O estatuto concedido às ONGA pela presente lei depende do respectivo registo, nos termos dos artigos 17. e seguintes.

### Artigo 4.

*Utilidade pública*

1 - As ONGA com efectiva e relevante actividade e registo ininterrupto junto do IPAMB há pelo menos cinco anos têm direito ao reconhecimento como pessoas colectivas de utilidade pública, para todos os efeitos legais, desde que preencham os requisitos previstos no artigo 2. do Decreto-Lei n. 460/77, de 7 de Novembro.

2 - Compete ao Primeiro-Ministro, mediante parecer do IPAMB, reconhecer o preenchimento das condições referidas no número anterior e emitir a respectiva declaração de utilidade pública.

3 - A declaração de utilidade pública referida no número anterior é publicada no Diário da República.

4 - Será entregue às ONGA objecto de declaração de utilidade pública o correspondente diploma, nos termos da lei geral.

5 - As ONGA a que se referem os números anteriores estão dispensadas do registo e demais obrigações previstas no Decreto-Lei n. 460/77, de 7 de Novembro, sem prejuízo do disposto nas alíneas b) e c) do artigo 12. do mesmo diploma legal.

6 - A declaração de utilidade pública concedida ao abrigo do disposto no presente artigo e as inerentes regalias cessam:

a) Com a extinção da pessoa colectiva;

b) Por decisão do Primeiro-Ministro, se tiver deixado de se verificar algum dos pressupostos da declaração;

c) Com a suspensão ou anulação do registo junto do IPAMB.

### Artigo 5.

*Acesso à informação*

1 - As ONGA gozam, nos termos da lei, do direito de consulta e informação junto dos órgãos da Administração Pública sobre documentos ou decisões administrativas com incidência no ambiente, nomeadamente em matéria de:

a) Planos e projectos de política de ambiente, incluindo projectos de ordenamento ou fomento florestal, agrícola ou cinegético;

b) Planos sectoriais com repercussões no ambiente;

c) Planos regionais, municipais e especiais de ordenamento do território e instrumentos de planeamento urbanístico;

d) Planos e decisões abrangidos pelo disposto no artigo 4. da Lei n. 83/95, de 31 de Agosto;

e) Criação de áreas protegidas e classificação de património natural e cultural;

f) Processos de avaliação de impacte ambiental;

g) Medidas de conservação de espécies e habitats;

h) Processos de auditoria ambiental, certificação empresarial e atribuição de rotulagem ecológica.

2 - A consulta referida no número anterior é gratuita, regendo-se o acesso aos documentos administrativos, nomeadamente a sua reprodução e passagem de certidões, pelo disposto na lei geral.

3 - As ONGA têm legitimidade para pedir, nos termos da lei, a intimação judicial das autoridades públicas no sentido de facultarem a consulta de documentos ou processos e de passarem as devidas certidões.

## Artigo 6.

### *Direito de participação*

As ONGA têm o direito de participar na definição da política e das grandes linhas de orientação legislativa em matéria de ambiente.

## Artigo 7.

### *Direito de representação*

1 - As ONGA de âmbito nacional gozam do estatuto de parceiro social para todos os feitos legais, designadamente o de representação no Conselho Económico e Social, no conselho directivo do IPAMB e nos órgãos consultivos da Administração Pública, de acordo com a especificidade e a incidência territorial da sua actuação, com vista à prossecução dos fins previstos no n. 1 do artigo 2.

2 - As ONGA de âmbito regional ou local têm direito de representação nos órgãos consultivos da administração pública regional ou local, bem como nos órgãos consultivos da administração pública central com competência sectorial relevante, de acordo com a especificidade e a incidência territorial da sua actuação, com vista à prossecução dos fins previstos no n. 1 do artigo 2.

3 - Para efeitos do direito de representação previsto no presente artigo, entende-se por:

a) ONGA de âmbito nacional - as ONGA que desenvolvam, com carácter regular e permanente, actividades de interesse nacional ou em todo o território nacional e que tenham pelo menos 2000 associados;

b) ONGA de âmbito regional - as ONGA que desenvolvam, com carácter regular e permanente, actividades de interesse ou alcance geográfico supramunicipal e que tenham pelo menos 400 associados;

c) ONGA de âmbito local - as ONGA que desenvolvam, com carácter regular e permanente, actividades de interesse ou alcance geográfico municipal ou inframunicipal e que tenham pelo menos 100 associados.

4 - O disposto no número anterior aplica-se também às ONGA que resultem do agrupamento de associações, relevando apenas, para apuramento do número de associados, as associações que preencham os requisitos fixados no n. 1 do artigo 2.

5 - O exercício do direito de representação pelas ONGA que resultem do agrupamento de associações exclui o exercício do mesmo direito pelas associações agrupadas.

6 - Cabe ao IPAMB, no acto do registo, a atribuição do âmbito às ONGA.

## Artigo 8.

### *Estatuto dos dirigentes das ONGA*

1 - Os dirigentes e outros membros das ONGA que forem designados para exercer funções de representação, nos termos do artigo 7., gozam dos direitos consagrados nos números seguintes.

2 - Para o exercício das funções referidas no número anterior, os dirigentes das ONGA que sejam trabalhadores por conta de outrem têm direito a usufruir de um horário de trabalho flexível, em termos a acordar com a entidade patronal, sempre que a natureza da respectiva actividade laboral o permita.

3 - Os períodos de faltas dados por motivo de comparência em reuniões dos órgãos em que os dirigentes exerçam representação ou com membros de órgãos de soberania são considerados justificados, para todos os efeitos legais, até ao máximo acumulado de 10 dias de trabalho por ano e não implicam a perda das remunerações e regalias devidas.

4 - Os dirigentes das ONGA referidos no n. 1 e que sejam estudantes gozam de prerrogativas idênticas às previstas no Decreto-Lei n. 152/91, de 23 de Abril, com as necessárias adaptações.

## Artigo 9.

*Meios e procedimentos administrativos*

1 - As ONGA têm legitimidade para promover junto das entidades competentes os meios administrativos de defesa do ambiente, bem como para iniciar o procedimento administrativo e intervir nele, nos termos e para os efeitos do disposto na Lei n. 11/87, de 7 de Abril, no Decreto-Lei n. 442/91, de 15 de Novembro, e na Lei n. 83/95, de 31 de Agosto.

2 - As ONGA podem solicitar aos laboratórios públicos competentes, por requerimento devidamente fundamentado, a realização de análises sobre a composição ou o estado de quaisquer componentes do ambiente e divulgar os correspondentes resultados, sendo estes pedidos submetidos a parecer da autoridade administrativa competente em razão da matéria e atendidos antes de quaisquer outros, salvo os urgentes ou das entidades públicas.

## Artigo 10.

*Legitimidade processual*

As ONGA, independentemente de terem ou não interesse directo na demanda, têm legitimidade para:

a) Propor as acções judiciais necessárias à prevenção, correcção, suspensão e cessação de actos ou omissões de entidades públicas ou privadas que constituam ou possam constituir factor de degradação do ambiente;

b) Intentar, nos termos da lei, acções judiciais para efectivação da responsabilidade civil relativa aos actos e omissões referidos na alínea anterior;

c) Recorrer contenciosamente dos actos e regulamentos administrativos que violem as disposições legais que protegem o ambiente;

d) Apresentar queixa ou denúncia, bem como constituir-se assistentes em processo penal por crimes contra o ambiente e acompanhar o processo de contra-ordenação, quando o requeiram, apresentando memoriais, pareceres técnicos, sugestões de exames ou outras diligências de prova até que o processo esteja pronto para decisão final.

## Artigo 11.

*Isenção de emolumentos e custas*

1 - As ONGA estão isentas do pagamento dos emolumentos notariais devidos pelas respectivas escrituras de constituição ou de alteração dos estatutos.

2 - As ONGA estão isentas de preparos, custas e imposto do selo devidos pela sua intervenção nos processos referidos nos artigos 9. e 10.

3 - A litigância de má fé rege-se pela lei geral.

Artigo 12.

*Isenções fiscais*

1 - As ONGA têm direito às isenções fiscais atribuídas pela lei às pessoas colectivas de utilidade pública.

2 - Nas transmissões de bens e na prestação de serviços que afectuem as ONGA beneficiam das isenções de IVA previstas para os organismos sem fins lucrativos.

3 - As ONGA beneficiam das regalias previstas no artigo 10. do Decreto-Lei n. 460/77, de 7 de Novembro.

Artigo 13.

*Mecenato ambiental*

Aos donativos em dinheiro ou em série concedidos às ONGA e que se destinem a financiar projectos de interesse público previamente reconhecido pelo IPAMB será aplicável, sem acumulação, o regime do mecenato cultural previsto nos Códigos do IRS e do IRC.

Artigo 14.

*Apoios*

1 - As ONGA têm direito ao apoio do Estado, através da administração central, regional e local, para a prossecução dos seus fins.

2 - Incumbe ao IPAMB prestar, nos termos da Lei n. 11/87, de 7 de Abril, e dos regulamentos aplicáveis, apoio técnico e financeiro às ONGA e equiparadas.

3 - A irregularidade na aplicação do apoio financeiro implica:

a) Suspensão do mesmo e reposição das quantias já recebidas;

b) Inibição de concorrer a apoio financeiro do IPAMB por um período de três anos;

c) Responsabilidade civil e criminal nos termos gerais.

4 - O IPAMB procede, semestralmente, à publicação no Diário da República da lista dos apoios financeiros concedidos, nos termos da Lei n. 26/94, de 29 de Agosto.

Artigo 15.

*Direito de antena*

1 - As ONGA têm direito de antena na rádio e na televisão, nos mesmos termos das associações profissionais.

2 - O exercício do direito de antena pelas ONGA que resultem do agrupamento de associações, nos termos do n. 4 do artigo 2., exclui o exercício do mesmo direito pelas associações agrupadas.

Artigo 16.

*Dever de colaboração*

As ONGA e os órgãos da Administração Pública competentes devem colaborar na realização de projectos ou acções que promovam a protecção e valorização do ambiente.

## CAPÍTULO III

## Registo e fiscalização

Artigo 17.

*Registo*

1 - O IPAMB organiza, em termos a regulamentar, o registo nacional das ONGA e equiparadas.

2 - Só são admitidas ao registo as associações que tenham pelo menos 100 associados.

3 - As associações candidatas ao registo remetem ao IPAMB um requerimento instruído com cópia dos actos de constituição e dos respectivos estatutos.

4 - O IPAMB procede anualmente à publicação no Diário da República da lista das associações registadas.

Artigo 18.

*Actualização do registo*

1 - As associações inscritas no registo estão obrigadas a enviar anualmente ao IPAMB:

a) Relatório de actividades e relatório de contas aprovados pelos órgãos estatutários competentes;

b) Número de associados em 31 de Dezembro do ano respectivo.

2 - As associações inscritas no registo estão obrigadas a enviar ao IPAMB todas as alterações aos elementos fornecidos aquando da instrução do processo de inscrição, no prazo de 30 dias a contar da data em que ocorreram tais alterações, nomeadamente:

a) Cópia da acta da assembleia geral relativa à eleição dos órgãos sociais e respectivo termo de posse;

b) Cópia da acta da assembleia geral relativa à alteração dos estatutos;

c) Extrato da alteração dos estatutos publicada no Diário da República;

d) Alteração do valor da quotização dos seus membros;

e) Alteração da sede.

Artigo 19.

*Modificação do registo*

O IPAMB promove a modificação do registo, oficiosamente ou a requerimento da interessada, sempre que as características de uma associação registada se alterem por forma a justificar classificação ou atribuição de âmbito diferente da constante do registo.

Artigo 20.

*Fiscalização*

1 - Compete ao IPAMB fiscalizar o cumprimento da presente lei, nomeadamente através de auditorias periódicas às associações inscritas no registo.

2 - O IPAMB pode efectuar auditorias extraordinárias às associações inscritas no registo sempre que julgue necessário, nomeadamente:

a) Para verificação dos dados fornecidos ao IPAMB no acto de registo;

b) No âmbito da prestação do apoio técnico e financeiro.

3 - Das auditorias pode resultar, por decisão fundamentada do presidente do IPAMB, a suspensão ou a anulação da inscrição das associações no registo quando se verifique o incumprimento da lei ou o não preenchimento dos requisitos exigidos para efeitos de registo.

## CAPÍTULO IV

## Disposições transitórias e finais

Artigo 21.

*Transição de registos*

1 - As associações de defesa do ambiente inscritas no anterior registo junto do IPAMB transitam oficiosamente para o novo registo nacional das ONGA e equiparadas quando preencham os requisitos previstos na presente lei.

2 - O IPAMB, no prazo de 30 dias a contar da entrada em vigor da presente lei, notifica as associações interessadas da transição referida no número anterior.

3 - Se da aplicação da presente lei resultar a alteração da classificação ou do âmbito a atribuir, ou o não preenchimento dos requisitos exigidos para efeitos de registo, o IPAMB notifica desse facto as associações interessadas, concedendo-lhes um prazo de 180 dias para comunicarem as alterações efectuadas.

4 - Na falta da comunicação das alterações a que se refere o número anterior, considera-se, consoante os casos, automaticamente modificado o registo nos termos da notificação feita pelo IPAMB ou excluída a associação do registo nacional das ONGA ou equiparadas.

## Artigo 22.

### *Regulamentação*

A presente lei será objecto de regulamentação no prazo de 90 dias após a data da sua publicação.

## Artigo 23.

### *Revogação*

É revogada a Lei n. 10/87, de 4 de Abril.

## Artigo 24.

### *Entrada em vigor*

1 - Na parte que não necessita de regulamentação esta lei entra imediatamente em vigor.

2 - As disposições da presente lei não abrangidas pelo número anterior entram em vigor com a publicação da respectiva regulamentação.

*Aprovada em 4 de Junho de 1998.*

*O Presidente da Assembleia da República, António de Almeida Santos.*

*Promulgada em 3 de Julho de 1998.*

*Publique-se.*

*O Presidente da República, JORGE SAMPAIO.*

*Referendada em 9 de Julho de 1998.*

*O Primeiro-Ministro, António Manuel de Oliveira Guterres.*

# Lei nº 65/93, de 26 de Agosto, com as alterações introduzidas pela Lei nº 8/95 de 29 de Março e pela Lei nº 94/99, 16 de Julho

# REGULA O ACESSO AOS DOCUMENTOS DA ADMINISTRAÇÃO

## CAPITULO I

Disposições gerais

### Artigo 1.°

***Administração aberta***

O acesso dos cidadãos aos documentos administrativos é assegurado pela Administração Pública de acordo com os princípios da publicidade, da transparência, da igualdade, da justiça e da imparcialidade.

### Artigo 2.°

***Objecto***

1 - A presente lei regula o acesso a documentos relativos a actividades desenvolvidas pelas entidades referidas no artigo 3.º e transpõe para a ordem jurídica interna a Directiva do Conselho n.º 90/313/CEE, de 7 de Junho de l990, relativa à liberdade de acesso à informação em matéria de ambiente.

2 - O regime de exercício do direito dos cidadãos a serem informados pela Administração sobre o andamento dos processos em que sejam directamente interessados e a conhecer as resoluções definitivas que sobre eles forem tomadas consta de legislação própria.

### Artigo 3.°

***Âmbito***

1 - Os documentos a que se reporta o artigo anterior são os que têm origem ou são detidos por órgãos do Estado e das Regiões Autónomas que exerçam funções administrativas, órgãos dos institutos públicos e das associações públicas e órgãos das autarquias locais, suas associações e federações e outras entidades no exercício de poderes de autoridade, nos termos da lei.

2 - A presente lei é ainda aplicável aos documentos em poder de organismos que exerçam responsabilidades públicas em matéria ambiental sob o controlo da Administração Pública.

## Artigo 4.°

### *Documentos administrativos*

1 - Para efeito do disposto no presente diploma, são considerados:

a) Documentos administrativos: quaisquer suportes de informação gráficos, sonoros, visuais, informáticos ou registos de outra natureza, elaborados ou detidos pela Administração Pública, designadamente processos, relatórios, estudos, pareceres, actas, autos, circulares, ofícios-circulares, ordens de serviço, despachos normativos internos, instruções e orientações de interpretação legal ou de enquadramento da actividade ou outros elementos de informação;

b) Documentos nominativos: quaisquer suportes de informação que contenham dados pessoais;

c) Dados pessoais: informações sobre pessoa singular, identificada ou identificável, que contenham apreciações, juízos de valor ou que sejam abrangidas pela reserva da intimidade da vida privada.

2 - Não se consideram documentos administrativos, para efeitos do presente diploma:

a) As notas pessoais, esboços, apontamentos e outros registos de natureza semelhante;

b) Os documentos cuja elaboração não releve da actividade administrativa, designadamente referentes à reunião do Conselho de Ministros e de Secretários de Estado, bem como à sua preparação.

## Artigo 5.°

### *Segurança interna e externa*

1 - Os documentos que contenham informações cujo conhecimento seja avaliado como podendo pôr em risco ou causar dano à segurança interna e externa do Estado ficam sujeitos a interdição de acesso ou a acesso sob autorização, durante o tempo estritamente necessário, através da classificação nos termos de legislação específica.

2 - Os documentos a que se refere o número anterior podem ser livremente consultados, nos termos da presente lei, após a sua desclassificação ou o decurso do prazo de validade do acto de classificação.

## Artigo 6.°

### *Segredo de justiça*

O acesso a documentos referentes a matérias em segredo de justiça é regulado por legislação própria.

## Artigo 7.°

### *Direito de acesso*

1 - Todos têm direito à informação mediante o acesso a documentos administrativos de carácter não nominativo.

2 - O direito de acesso aos documentos administrativos compreende não só o direito de obter a sua reprodução, bem como o direito de ser informado sobre a sua existência e conteúdo.

3 - O depósito dos documentos administrativos em arquivos não prejudica o exercício, a todo o tempo, do direito de acesso aos referidos documentos.

4 - O acesso a documentos constantes de processos não concluídos ou a documentos preparatórios de uma decisão é diferido até à tomada da decisão, ao arquivamento do processo ou ao decurso de um ano após a sua elaboração.

5 - O acesso aos inquéritos e sindicâncias tem lugar após o decurso do prazo para eventual procedimento disciplinar.

6 - Os documentos a que se refere a presente lei são objecto de comunicação parcial sempre que seja possível expurgar a informação relativa à matéria reservada.

7 - O acesso aos documentos notariais e registrais, aos documentos de identificação civil e criminal, aos documentos referentes a dados pessoais com tratamento automatizado e aos documentos depositados em arquivos históricos rege-se por legislação própria.

## Artigo 8.°

### *Acesso aos documentos nominativos*

1 - Os documentos nominativos são comunicados, mediante prévio requerimento, à pessoa a quem os dados digam respeito, bem como a terceiros que daquela obtenham autorização escrita.

2 - Fora dos casos previstos no número anterior os documentos nominativos são ainda comunicados a terceiros que demonstrem interesse directo, pessoal e legítimo.

3 - A comunicação de dados de saúde, incluindo dados genéticos, ao respectivo titular faz-se por intermédio de médico por ele designado.

## Artigo 9.°

### *Correcção de dados pessoais*

1 - O direito de rectificar, completar ou suprimir dados pessoais inexactos, insuficientes ou excessivos é exercido nos termos do disposto na legislação referente aos dados pessoais com tratamento automatizado, com as necessárias adaptações.

2 - Só a versão corrigida dos dados pessoais é passível de uso ou comunicação.

## Artigo 10.°

### *Uso ilegítimo de informações*

1 - A Administração pode recusar o acesso a documentos cuja comunicação ponha em causa segredos comerciais, industriais ou sobre a vida interna das empresas.

2 - É vedada a utilização de informações com desrespeito dos direitos de autor e dos direitos de propriedade industrial, assim como a reprodução, difusão e utilização destes documentos e respectivas informações que possam configurar práticas de concorrência desleal.

3 - Os dados pessoais comunicados a terceiros não podem ser utilizados para fins diversos dos que determinaram o acesso, sob pena de responsabilidade por perdas e danos, nos termos legais.

## Artigo 11.°

### *Publicações de documentos*

1 - A Administração Pública publicará, por forma adequada:

a) Todos os documentos, designadamente despachos normativos internos, circulares e orientações, que comportem enquadramento da actividade administrativa;

b) A enunciação de todos os documentos que comportem interpretação de direito positivo ou descrição de procedimento administrativo, mencionando, designadamente, o seu título, matéria, data, origem e local onde podem ser consultados.

2 - A publicação e o anúncio de documentos deve efectuar-se com a periodicidade máxima de seis meses e em moldes que incentivem o regular acesso dos interessados.

## CAPITULO II

Exercício do direito de acesso

### Artigo 12.°

***Forma do acesso***

1 - O acesso aos documentos exerce-se através de:

a) Consulta gratuita, efectuada nos serviços que os detêm;

b) Reprodução por fotocópia ou por qualquer meio técnico, designadamente visual ou sonora;

c) Passagem de certidão pelos serviços da Administração.

2 - A reprodução nos termos da alínea b) do número anterior far-se-á num exemplar, sujeito a pagamento, pela pessoa que a solicitar, do encargo financeiro estritamente correspondente ao custo dos materiais usados e do serviço prestado, a fixar por decreto-lei ou decreto legislativo regional, consoante o caso.

3 - Os documentos informatizados são transmitidos em forma inteligível para qualquer pessoa e em termos rigorosamente correspondentes ao do conteúdo do registo, sem prejuízo da opção prevista na alínea b) do n.° 1.

4 - Quando a reprodução prevista no n.° 1 puder causar dano ao documento visado, o interessado, a expensas suas e sob a direcção do serviço detentor, pode promover a cópia manual ou a reprodução por qualquer outro meio que não prejudique a sua conservação.

### Artigo 13.°

***Forma do pedido***

O acesso aos documentos deve ser solicitado por escrito através de requerimento do qual constem os elementos essenciais à sua identificação, bem como o nome, morada e assinatura do interessado.

### Artigo 14.°

***Responsável pelo acesso***

Em cada departamento ministerial, secretaria regional, autarquia, instituto e associação pública existe uma entidade responsável pelo cumprimento das disposições da presente lei.

## Artigo 15.°

### *Resposta da Administração*

1 - A entidade a quem foi dirigido o requerimento de acesso a um documento deve, no prazo de 10 dias:

a) Comunicar a data, local e modo para se efectivar a consulta, efectuar a reprodução ou obter a certidão;

b) Indicar, nos termos do artigo 268.°, n.° 2, da Constituição e da presente lei, as razões da recusa, total ou parcial, do acesso ao documento pretendido;

c) Informar que não possui o documento e, se for do seu conhecimento, qual a entidade que o detém ou remeter o requerimento a esta, comunicando o facto ao interessado;

d) Enviar ao requerente cópia do pedido, dirigido à Comissão de Acesso aos Documentos Administrativos, para apreciação da possibilidade de acesso à informação registada no documento visado.

2 - A entidade a quem foi dirigido requerimento de acesso a documento nominativo de terceiro, desacompanhado de autorização escrita deste, solicita o parecer da Comissão de Acesso aos Documentos Administrativos sobre a possibilidade de revelação do documento, enviando ao requerente cópia do pedido.

3 - O mesmo parecer pode ainda ser solicitado sempre que a entidade a quem foi dirigido requerimento de acesso tenha dúvidas sobre a qualificação do documento, sobre a natureza dos dados a revelar ou sobre a possibilidade da sua revelação.

4 - O pedido de parecer formulado nos termos dos n.ºs 2 e 3 deve ser acompanhado de cópia do requerimento e de todas as informações e documentos que contribuam para convenientemente o instruir.

## Artigo 16.°

### *Direito de queixa*

1 - O interessado pode dirigir à Comissão de Acesso aos Documentos Administrativos, no prazo de 20 dias, queixa contra o indeferimento expresso, a falta de decisão ou decisão limitadora do exercício do direito de acesso.

2 - A Comissão de Acesso aos Documentos Administrativos tem o prazo de 30 dias para elaborar o correspondente relatório de apreciação da situação, enviando-o, com as devidas conclusões, a todos os interessados.

3 - Recebido o relatório referido no número anterior, a Administração deve comunicar ao interessado a sua decisão final, fundamentada, no prazo de l5 dias, sem o que se considera haver falta de decisão.

## Artigo 17.°

### *Recurso*

A decisão ou falta de decisão podem ser impugnadas pelo interessado junto dos tribunais administrativos, aplicando-se, com as devidas adaptações, as regras do processo de intimação para consulta de documentos ou passagem de certidões.

# CAPITULO III

## Da Comissão de Acesso aos Documentos Administrativos

## Artigo 18.°

### *Comissão*

1 - É criada a Comissão de Acesso aos Documentos Administrativos (CADA), a quem cabe zelar pelo cumprimento das disposições da presente lei.

2 - A CADA é uma entidade pública independente, que funciona junto da Assembleia da República e dispõe de serviços próprios de apoio técnico e administrativo.

## Artigo 19.°

### *Composição da CADA*

1 - A CADA é composta pelos seguintes membros:

a) Um juiz conselheiro do Supremo Tribunal Administrativo, designado pelo Conselho Superior dos Tribunais Administrativos e Fiscais, que preside;

b) Dois deputados eleitos pela Assembleia da República, sendo um sob proposta do grupo parlamentar do maior partido que apoia o Governo e o outro sob proposta do maior partido da oposição;

c) Um professor de Direito designado pelo Presidente da Assembleia da República;

d) Duas personalidades designadas pelo Governo;

a) Um representante de cada uma das Regiões Autónomas, designados pelos respectivos Governos das Regiões;

b) Uma personalidade designada pela Associação Nacional dos Municípios Portugueses;

c) Um advogado designado pela Ordem dos Advogados;

d) Um membro designado, de entre os seus vogais, pela Comissão Nacional de Protecção de Dados.

2 - Todos os titulares podem fazer-se substituir por um membro suplente, designado pelas mesmas entidades.

3 - Os mandatos são de dois anos, renováveis, sem prejuízo da sua cessação quando terminem as funções em virtude das quais foram designados.

4 - O presidente aufere a remuneração e outras regalias a que tem direito como juiz conselheiro do Supremo Tribunal Administrativo.

5 - À excepção do presidente, todos os membros podem exercer o seu mandato em acumulação com outras funções.

6 - Os direitos e regalias dos membros da CADA são fixados no diploma regulamentar da presente lei, sendo aplicáveis à CADA as disposições do n.º 1 do artigo 11.º, dos n.ºs 2, 4 e 5 do artigo 13.º, do artigo 15.º, das alíneas a) e c) do n.º 1 e do n.º 2 do artigo 16.º e do n.º 1 do artigo 18.º da Lei n.º 43/98, de 6 de Agosto.

7 - Nas sessões da Comissão em que sejam debatidas questões que interessam a uma dada entidade pode participar, sem direito de voto, um seu representante.

8 - Os membros da CADA tomam posse perante o Presidente da Assembleia da República nos 10 dias seguintes à publicação da respectiva lista na l.ª série do Diário da República.

## Artigo 20.°

### *Competência*

1 - Compete à CADA:

a) Elaborar a sua regulamentaçã1

c) Dar parecer sobre o acesso aos documentos nominativos, nos termos do n.º 2 do artigo 15.º, a solicitação do interessado ou do serviço requerido;

d) Dar parecer sobre a comunicação de documentos nominativos entre serviços e organismos da Administração em caso de dúvida sobre a admissibilidade dessa revelação, salvo nos casos em que o acesso deva ser autorizado nos termos da Lei n.º 67/98, de 26 de Outubro;

e) Pronunciar-se sobre o sistema de classificação de documentos;

f) Dar parecer sobre a aplicação do presente diploma e bem como sobre a elaboração e aplicação de diplomas complementares, a solicitação da Assembleia da República, do Governo e dos órgãos da Administração;

g) Elaborar um relatório anual sobre a aplicação da presente lei e a sua actividade, a enviar à Assembleia da República para publicação e apreciação e ao Primeiro-Ministro;

h) Contribuir para o esclarecimento e divulgação das diferentes vias de acesso aos documentos administrativos no âmbito do princípio da administração aberta.

2 - O regulamento interno da CADA é publicado na 2.ª série do Diário da República.

3 - Os pareceres são elaborados pelos membros da CADA, que podem solicitar para tal efeito o adequado apoio dos serviços.

4 - Os pareceres são publicados nos termos do regulamento interno.

## Artigo 21.°

### *Cooperação da Administração*

Os agentes da Administração Pública estão sujeitos ao dever de cooperação com a CADA, sob pena de responsabilidade disciplinar.

# Portugal Case Study - The Swallows of Nisa

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# 1 The setting in which the case takes place

## 1.1 The facts

Portugal is the final destination of big populations of swallows (*Delichon Urbica*), migrating from Africa, during spring and summer (from February to August). A large amount of swallows nested each year in the exterior walls of the courthouse of Nisa, a village in Alentejo (south of Portugal), as it happens in many buildings, whenever its shapes are propitious for the building of the nests. In 1999 over 400 nests existed already in the walls of the courthouse of Nisa, where approximately 4800 swallows were born each year.

In the early days of 1999 nests were removed from the exterior walls of the courthouse and cleaning, conservation and repairing works were initiated in the outside of the building, which included the placement of devices to prevent swallows from nesting there again.

After realizing what was being done, "FAPAS - Fundo para a Protecção dos Animais Selvagens", an environmental NGO, decided to take several initiatives in order to ensure the protection of that colony of swallows and the nesting in the following years. This included filing a provisional remedy and a main proceeding in the civil court against the Portuguese State and making a complaint to the Public Prosecutor asking him to file a petition in the administrative court. Subsequently FAPAS asked the administrative court to intervene in this proceeding, assisting the Public Prosecutor.

A complete description of the chain of events is more perceptible by its chronological enumeration as follows:

06-11-97 The Secretary of the Court of Nisa requested permission to the Secretary General of the Justice Ministry to clean the exterior walls of the courthouse and remove the existing nests of swallows.

07-01-99 After being contacted by the Justice Ministry, the Instituto para a Conservação da Natureza (ICN), public entity with responsibilities regarding nature conservation, informed that, given the time of year, there was no time to follow the normal proceeding to issue a permit and, therefore, the removal of the nests should be completed until the 31st of January, according to the terms to be settled by the Parque Natural da Serra de S. Mamede (the authority competent for the protection of natural resources in the region in issue). ICN also suggested the placement of devices to prevent the nesting in the following years.

15-01-99 All the nests were removed from the exterior walls of the courthouse (approximately 400) even before the formalization of the contract to carry out the works, in order to respect the indication of ICN. A net was placed on the top of the building, in the meantime, to prevent the return of the swallows. The works included the installation of devices to permanently prevent the nesting of swallows.

04-03-99 A formal administrative act of the Secretary General of the Justice Ministry contracted a private company to carry the cleaning, conservation and repairing works in the outside of the building.

March 1999 FAPAS, in an attempt to reconcile Swallow and Man, contacted informally the Justice Ministry requesting the placement of artificial nests with platforms beneath to attract swallows and protect the building from the dirtiness caused by the birds. These contacts were unsuccessful.

22-03-99 **FAPAS presented a request for a provisional remedy** in the first instance court of Nisa against the Portuguese State asking for the removal of any device capable of preventing the nesting of swallows in the courthouse's exterior walls, its abstention from any activity that might prevent the nesting in the courthouse and the payment of a daily compulsory pecuniary sanction until full compliance, reverting to other NGOs (Liga para a Potecção da Natureza e Quercus). It became *proceeding 24/99***.**

22-03-99 The **first instance court of Nisa decided to deny the requested provisional remedy**. FAPAS presented immediately an **appeal** against this decision to the second instance court, which became *proceeding 775/99*.

14-07-99 FAPAS presented a complaint to several public entities, namely the Public Prosecutor working in the administrative court of Lisbon (Tribunal Administrativo de Círculo de Lisboa).

27-01-00 The **second instance court (Tribunal da Relação de Évora) rejected the appeal** against the first instance decision, confirming its decision of denying the provisional remedy. FAPAS **appealed again**, now to the third instance court (Supremo Tribunal de Justiça), originating *proceeding*

*413/2000*.

28-02-00 The **Public Prosecutor filed a proceeding in the administrative court** of Lisbon asking the annulment of the administrative act issued by the Secretary General of the Justice Ministry that selected the contractor to place the devices in the courthouse of Nisa to permanently prevent the nesting of swallows (*proceeding 165/00*).

30-05-00 **FAPAS requested** to the administrative court of Lisbon **to intervene in the administrative proceeding, assisting the Public Prosecutor**. The request was granted almost one year later.

27-06-00 The **third instance court granted the appeal** against the second instance decision, **ordering the removal of any device that might prevent the nesting of swallows in the courthouse of Nisa and ordering the Portuguese State to abstain from any activity capable of preventing their nesting.**

29-06-00 **FAPAS filed the main proceeding in the civil court** (first instance court of Nisa) asking the court to constrain the Portuguese State to (1) remove all devices preventing the swallow's nesting from the exterior walls of the courthouse of Nisa; (2) abstain from any action that may prevent the nesting of the birds; (3) abstain from destroying the existing nests in the exterior walls of the building; (4) carry out the necessary works to minimize the effects of the destruction of the nests; (5) pay a special compensation for environmental damages, which would be used by the petitioner in awareness raising campaigns to explain to the population why and how swallows should be protected. This proceeding is still pending *(proceeding 90/2000).*

18-06-00 The **administrative court decided to dismiss the administrative proceeding** because of the existence of the civil proceeding (that had meanwhile been initiated by FAPAS). Both **FAPAS and the Public Prosecutor appealed** against this decision to the second instance court of the administrative jurisdiction (Supremo Tribunal Administrativo). The appeal is still pending (*proceeding 2050/02*).

## 1.2 The parties

"FAPAS - Fundo para a Protecção dos Animais Selvagens" is a national environmental NGO created in 1990, having as a scope the protection of wild fauna and flora. With approximately 700 associates, FAPAS promotes several actions and initiatives with two main purposes: follow up of situations that may constitute a threat to the preservation of wild life and development of specific actions intended to protect and restore natural *habitats*, vegetal and animal species.

Based essentially on voluntary work, FAPAS is financed by the contributions of its associates, the sponsoring of specific campaigns by different entities and by Community funds, used to develop projects. It also relies on scientific and legal support and advice, given by biologists and lawyers, most of them working *pro bono*[1].

Unlike most of the Portuguese national NGOs, FAPAS' head-office is not in the capital city Lisbon, but in Porto (in the north of Portugal). It has had though some delegations mostly in the south of Portugal. Currently the delegation of Vila Viçosa (in Alentejo) is the most active[2].

One of the board members of FAPAS had personal knowledge of what had been done in the courthouse of Nisa. Even though this is a very common species of birds in Portugal and the consequences of the removal of the nests and the setting of devices to prevent the nesting might not have been dramatic to the conservation of these birds, the NGO decided to act considering the violation of environmental rules was being carried by the State and in a public building. The State should be a role model to everyone and more than anyone has a special obligation towards the protection of the environment. The fact that these works were being carried in a courthouse, the "house of justice", gave even more symbolism to the situation.

FAPAS started by trying to ensure the protection of the swallows through informal contacts with the Justice Ministry (see chronology of the facts – 1.1). The decision of going to court was taken only after the failure of this attempt.

This was not the only occasion FAPAS made use of judicial proceedings. A great number of the petitions filed by the NGO, before that time and since then, have been requests of access to administrative documents (around 50 proceedings in the last 8 years), but FAPAS has also initiated some criminal and civil lawsuits.

The defendant in the civil proceeding is the Portuguese State, since the Secretary General of the Ministry of Justice (who has ordered the works) has no legal personality.

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[1] A further and more detailed presentation of FAPAS and its activities is available in its website – www.fapas.pt

[2] The delegation of Vila Viçosa also has its own website - http://www.alentejodigital.pt/fapas-vilavicosa/

In the lawsuit presented in the administrative court of Lisbon, the petitioner is the Public Prosecutor.

FAPAS had already filed the provisional remedy in the civil court and had received the decision of the first instance denying the request. Since there was an administrative act that could be challenged before the administrative courts (the act of the Secretary General of the Justice Ministry contracting the company to set the devices in the courthouse that prevent the nesting of the swallows), FAPAS decided to act also in the administrative jurisdiction. However, by the time FAPAS could identify the administrative act, the time limit of 2 months to file the lawsuit requesting its annulment had already been exceeded. Given the fact that the Public Prosecutor has a more prolonged time limit to file the same proceeding (one year – article 28 of Law of Administrative Courts Procedure), FAPAS informed him of the facts, and the Public Prosecutor initiated the lawsuit on February 28, 2000. Later, FAPAS requested and was admitted to also participate in this proceeding as a Party, assisting the Public Prosecutor.

The defendant in the administrative proceeding is the Secretary General of the Justice Ministry, the administrative body that contracted the private company to execute the works. In the administrative jurisdiction it is always the body that issued the act that is prosecuted, and not the legal person to which it belongs.

Instituto da Conservação da Natureza (ICN), the public entity responsible for executing the National Strategy for Nature and Biodiversity Conservation, the policies of nature conservation, of biodiversity and natural heritage protection, as well as for the management of the coastal areas, intervened in the civil proceeding by presenting a technical opinion. FAPAS has also presented its own expert on the matter (Paulo Santos, biologist and university professor).

## 1.3 The importance of the case

This case is exemplar in different ways. Since the nesting of swallows in both public and private buildings is a very common phenomenon in Portugal, the decision of the court will create a standard applicable in many situations. Even though there is no rule such as the precedent in Anglo-Saxons juridical systems, it is probably the first time a court rules on this matter (at least with such publicity) and for many citizens and institutions, owning buildings where swallows nest, it will probably be accepted as a rule of conduct.

# 2 Environmental effectiveness

## 2.1 The environmental factual issues

This species of swallows – *Delichon Urbica* – nest always, and only, in human constructions (buildings or other structures) and chooses areas where the quality of the environment has not been severely damaged. Its presence can therefore be interpreted as an indicator of the quality of the environment.

One of the main facts raised by the technical opinions presented in court and that has been accepted as a proven fact, concerning the environmental implications of this case, is the importance of these birds to control the insects' population. In fact, and according to a guide on swallows in Portugal[3], a family of swallows eats more than 200 thousand insects in just 20 days. Transposing this calculation to the case of Nisa, the 400 families of swallows, whose nests were destroyed, would eat 840 millions of insects during the six months of staying in Portugal (from February to August).

Paulo Santos, biologist university professor and member of FAPAS, in his written opinion and oral testimony presented in court, also mentioned that swallows repair their own nests, when necessary, but abandon them if they are too damaged, making another nest on the side. This biologist stated that the disturbance to the nesting places causes the interruption of the breeding activities, not being certain that the swallows, having had their nests destroyed, would be able to nest elsewhere.

On the other hand, ICN also presented a technical opinion, but on a different sense, stating that swallows, returning each year to the same breeding place, if prevented to nest in the courthouse (due to the existence of nets or the continuance of the works), would nest in other buildings or structures.

Although it was accepted as a fact that swallows return every year to the same breeding place, there was a considerable discussion around the question whether the swallows would or not be able to nest elsewhere, when finding a net (or other device) preventing them to do so in the courthouse.

The first instance court considered the opinion of Paulo Santos did not give an absolute certainty regarding the incapacity of the swallows to nest in other buildings. According to this court this hypothesis was contradicted by the fact, which was considered notorious, that swallows were nesting in the surrounding buildings since the beginning of the works in the courthouse, which corroborated the ICN opinion. It was therefore considered proved that swallows can nest elsewhere and not proved that its breeding activity had been harmed.

FAPAS contested this (among other things) in the appeal to the second instance. The NGO did not accept the inclusion in the matter of fact (the factual basis for the

[3] MATOS, Rosa, "O Pequeno Guia das Andorinhas e Andorinhões de Portugal", FAPAS (with the support of IPAMB), 2000 (2nd edition)

juridical decision) of the sentence stating that swallows had been nesting elsewhere, which had been considered as a notorious fact. According to the procedural law (article 514 (1) Code of Procedural Law) notorious facts can be taken into consideration by the judge, without need of allegation or proof by the parties. The law defines notorious fact as a fact of the common knowledge.

After recalling, in its petition of appeal, several definitions given by the doctrine and jurisprudence, FAPAS admitted that a fact, like the one in issue, could be considered as notorious, since it is something that occurs publicly, that can be known by any person, living in that village or who passes by and realizes it. However, FAPAS upheld that the fact, as settled by the first instance court – "Currently and since the beginning of the works in the courthouse, the swallows have been nesting in the buildings around the courthouse and other places of this village" – was not relevant for the decision, since it does not allow to know if the swallows that have been nesting elsewhere since 1999 are the same birds that used to nest in the courthouse in previous years.

The second instance court accepted FAPAS' arguments and excluded this sentence from the matter of fact.

## 2.2 The legal substantive principles and rules of law

The substantive principles of Portuguese Environmental Law are laid down in Law 11/87 of 7 April, detailing and regulating the constitutional demands. The basic and general principle is enunciated in article 2: "all citizens have the right to a human and ecologically balanced environment and the duty to defend it, belonging to the State, through its bodies or appealing to popular and community initiatives, the task of promoting the improvement of the individual and collective quality of life. The goals of the environmental policy are to optimise and assure the continuity of the use of natural resources, in qualitative and quantitative terms, as a basic presupposition of a sustainable development". Specific principles, necessary to render concrete the first one, are, according to article 3, the principles of: prevention, integration of environmental concerns in other policies, public participation, unity of management and action, international cooperation, search for the most adequate level of action, recuperation of damaged areas and liability of polluters.

Fauna is classified, under this statute, as one of the natural environmental components (along with the air, light, water, living soil and subsoil and flora). Article 16 of Law 11/87 determines that all fauna shall be protected through special legislation, in order to ensure and promote the conservation and exploitation of species with scientific, economical or social interest and to guarantee its genetic potential and the *habitats* essential to their survival.

Several juridical instruments grant protection to wild birds. The Convention on the conservation of European wildlife and natural *habitats* of September 19, 1979 (Bern Convention), signed and ratified by Portugal through the Decree 95/81 of 23 July, establishes a general obligation to the Parties of the Convention to conserve wild flora and fauna and their natural *habitats*. This Convention is regulated, in Portugal, by Decree-Law 316/89 of 22 September (modified by Decree Law 196/90 of 18 June), which sets, in its article 4 the prohibition of the intentional deterioration and destruction of *habitats* of the species listed in annex II of the Convention (which includes the *delichon urbica*), or the intentional disturbance of these species, in particular, during the breeding season.

Directive 79/409/EEC of 2 April, regarding the conservation of wild bird species living in the European territory of Member States, covers the protection, management and control of these species and lays down rules for their exploitation. Directive 92/43/EEC of 21 May imposes the conservation of natural *habitats* and of wild fauna and flora in the European territory of the Member States to which the Treaty applies, as a way of contributing towards ensuring biodiversity.

Both Directives were transposed to Portuguese law through Decree Law 75/91 of 14 February (modified by Decree Law 224/93 of 18 June), setting measures for the conservation of wild birds living in national territory, namely regarding the protection of the swallows at stake, its nests, eggs and *habitats*.

Article 5 of this statute determines the prohibition of the deliberate destruction of, damage to, or removal of the nests and eggs of wild birds. The deliberate disturbance of these birds particularly during the period of breeding and rearing (growing) is also forbidden. However, these activities may be allowed in some cases enumerated in article 4, which correspond to situations where higher interests justify such actions, as, for example, the interest of public health and security. It is, however, always required a permission issued by the Environment Ministry (having heard the "Serviço Nacional de Parques, Reservas e Conservação da Natureza", the national authority with responsibilities regarding the national network of protected areas).

Decree Law 75/91, which was in force at the time of the facts in issue (and therefore is the Law ruling the case), has been meanwhile replaced by Decree-Law 140/99 of 24 April (entered into force on April, 29 1999). In what concerns the issue under analysis the new legal regime is basically similar. However, the authority with the competence to authorize activities that are in principle forbidden is now the Instituto para a Conservação da Natureza (ICN). The new Decree-Law is somewhat more demanding on what concerns the requirements to grant this authorization: the activity should pursue the protection of one of the enumerated interests (as in the previous statute) and (as a demand not expressly mentioned in the previous regime) it can only be authorized in the cases where no satisfactory alternative exists and the maintenance of the populations of the species in the area of their natural distribution is not threatened by that activity.

The technical opinion of the ICN, presented in court by the defendant (the Portuguese State), made reference to the fact that swallows are not a threatened species at national or European level, being listed as "not threatened species" in the red books of Portugal and Spain. These books, elaborated by ICN, contain an exhaustive list of animal species, catalogued according to scientific criteria, and are very often used as a reference, even by the legislator, but have no juridical value by themselves. ICN additionally stated that the removal of the nests out of the breeding season does not affect the conservation status of the species.

The legal regime protecting swallows as wild birds was never questioned neither by the defendant nor by any of the courts ruling the case in the different instances, as it will be described bellow (3.1.).

Both second and third instance courts made, though, critic remarks to the anthropocentric perspective of the Portuguese legislator. Quoting the doctrine[4], the second instance court underlines that, at the time the Constitution and Law 11/87 were created, it was a common and generalised concept that the right to environment (included in the "third generation of fundamental rights") was the right of a person to grow and live in an environment that would allow him/her the full development and expression of his/her capacities, in an healthy physical and mental state (which does not exclude the existence of the duty to protect such environment). According to the Law, only persons are subject of rights. In the case in issue, it was the right of every member of the community to the protection of the nests and eggs of wild birds that was being discussed.

However, both courts questioned if this perspective is still adequate in the present days, agreeing with the doctrine[5] that considers it is no longer possible to conceive nature protection as a goal determined by Man in its own and exclusive benefit and that it is necessary to protect nature as a value itself, not only as something useful to Man. Recognising that this change of perspective has to be done by the legislator, the judges leave an open invitation to the deepening of the discussion around the issue of the rights of animals, trees, forests, water, rivers and seas.

## 2.3 The procedural issues

### 2.3.1 Legal standing of the NGO in the civil proceeding

Popular Action Law (Law 83/95 of 31 August) grants legal standing to protect the right to a healthy environment to associations having legal personality (being a legal person), expressly mentioning in their internal regulations the defence of the interests at issue as their goal or competence and having no other professional activity that

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4 TORRES, Mário "Princípios fundamentais do Direito do Ambiente", *in* "Textos – Ambiente e Consumo", Centro de Estudos Judiciários, II vol., pp. 239 ss.

5 FREITAS, Amaral *in* "Direito do Ambiente" (introductory remarks), Instituto Nacional de Administração, 1993 and TORRES, Mário (*supra)* are quoted and given as examples of Professors with this opinion

comes into competition with companies or independent workers (article 2 and 3 of Popular Action Law). FAPAS fulfils all these requirements and therefore was recognised as a legitimate petitioner. Being a NGO with national scope it could go to court to discuss an issue even if localized in a small village.

### 2.3.2 Competence of the civil court

Even though the defendant is the State, the request for a provisional remedy and subsequent main proceeding were presented in a civil court, since the removal of the nests was not done within the exercise of a power of authority (it was not an administrative decision). The jurisdiction of administrative courts is based upon the type of activity object of the issue, rather than the subjects in issue. Only the exercise of an administrative activity pursuing public interests or goals, either by the State or private persons (*v.g.* concessionaires) is to be ruled by administrative Law and courts. In this case the removal of the nests was decided and executed as part of the private administration of a property of the State and therefore should be challenged before a civil court, applying the rules of Civil Law.

### 2.3.3 The provisional remedy

On what concerns the form of action, Article 12 (2) of Law 83/95 determines that civil popular action can take any form established in the Code of Civil Procedure, which includes all types of main proceedings and provisional remedies. Given the emergency of the situation – swallows return each year to nest and breed – FAPAS started by presenting a request for a provisional remedy, asking a temporary ruling in order to ensure the annual breeding activities until the final decision to be taken in the main proceeding (it became proc. 24/99 of the first instance court of Nisa).

The Code of Civil Procedures lays down different provisional remedies, adequate to different situations but sets also a general clause admitting the use of the so-called “non specified provisional remedies”, which allows the request of a particular provisional solution that is effective in a given case, whenever none of the above suits the particular situation in issue (article 381 of Code of Civil Procedure).

FAPAS used this possibility - non-specified provisional remedy, asking the court to constrain the Portuguese State to remove any device capable of preventing the nesting of swallows in the courthouse's exterior walls and abstain from any activity that might prevent the nesting in the courthouse. The purpose of any remedy is to ensure the posterior decision of the main proceeding can still have practical effects, which, in this case, meant ensuring the breeding of the birds until the final decision of the main proceeding is taken and prevent any harm that might be already irreversible at that later moment (the court decision, even if favourable to the nesting of the birds, would be of no use if the birds had already been definitely driven away by the devices placed in the building). In order to guarantee compliance with the

court decision, FAPAS also requested the settlement of a daily compulsory pecuniary sanction (as allowed by article 384 Code of Civil Procedure), reverting to other NGOs (Liga para a Potecção da Natureza and Quercus).

Provisional remedies are decided on a basis of a *summario cognitio*. Therefore its granting only depends of the following requirements to be proved through a circumstantial evidence, as determined in article 387 Code of Civil Procedure: (1) serious probability of the existence of the alleged right (*fumus bonus iuris*), (2) justified concern of an offence (*periculum in mora*). It can be, however, refused whenever it causes a loss to the defendant considerably higher than the one it is supposed to prevent.

These are urgent procedures. Since in the case in issue, the defendant was given the opportunity to oppose to the request (having 10 days for that purpose), the time limit for the issuing of the decision was 2 months (the court of Nisa did not take much more than one month, from 22 March until 28 April 1999, although in most cases courts tend to not respect the legal time limit). The final ruling of this provisional remedy was only delayed because there were two appeals (the Code of Civil Procedure imposes no time limit for its decision): the appeal against this first decision (proc. 775/99 of Tribunal da Relação de Évora) was decided on 27 January 2000 (within approximately 7 months) and the second appeal (proc. 413/2000 of Supremo Tribunal de Justiça) on 27 June 2000 (one year later).

It should be noted that the Supremo Tribunal de Justiça (third instance court), as a previous remark and following the teaching of a Law Professor[6], stated that, being the prevention principle so essential to Environmental Law, the legislator should create specific provisional remedies, swift and just, for the defence of the right to environment and the protection of natural ecosystems. Referring to the achievement of public interests through public authoritarian intervention, the court followed another Professor[7], upholding that it might be more efficient for the legislator to try to motivate the agents through incentives, using coactive instruments only as a last resource.

### 2.3.4 The main proceeding (civil)

The main civil proceeding was filed in the first instance court of Nisa on September 29, 2000 (proc. 90/2000), immediately after the final decision of the Supremo Tribunal de Justiça (issued in 27-06-2000). Article 389 of Code of Civil Procedure sets a time limit of 30 days (always suspended during judicial vacations) to file the petition, or the provisional remedy will expire. This time limit was respected.

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6 CANOTILHO, Gomes, "Protecção do Ambiente e Direito de Propriedade", p. 102

7 FRANCO, António Sousa, "Ambiente e Desenvolvimento", *in* "Textos", Centro de Estudos Judiciários, p. 270

In the main proceeding the court will give a definite resolution for the case: after a deeper analysis of the facts, the court will have to decide whether the Portuguese State has violated or not the legal regime protecting swallows and determine, accordingly, all its obligations.

Therefore, FAPAS asked not only that the State should be constraint to remove all devices preventing the swallows to nest from the exterior walls of the courthouse of Nisa and abstain from any action that may prevent the nesting of the birds (as it had asked in the provisional remedy); but also requested the court to order the State to abstain from destroying the existing nests in the exterior walls of the building, carry out the necessary works to minimize the effects of the destruction of the nests (namely the construction of artificial nests to attract swallows) and pay a special compensation for environmental damages suffered (to be used by the petitioner in awareness raising campaigns to explain to the population why and how swallows should be protected).

The trial already took place, the matter of fact considered as proved is already determined and now the court only has to issue the final decision.

### 2.3.5 The administrative judicial proceeding

Administrative jurisdiction has competence to rule on this case in what refers to the validity of the administrative act of the Secretary General of the Justice Ministry, contracting the private company to install devices to prevent the nesting in courthouse of Nisa. Since this act was not preceded by an authorization of the Environment Ministry, required by Decree Law 75/91, it is annullable for violation of law.

The Public Prosecutor, following a complaint of FAPAS (as described above – 1.2), filed the administrative proceeding exercising his duty to defend legality, set in article 27 of Law of Administrative Courts Procedure. Even if not expressly mentioned in the petition, also article 45 of Law 11/87 of 7 April (Basic Principles of Environmental Law) grants to the Public Prosecutor the right/duty to protect the environment through the legal mechanisms at his disposal, which includes the filing of judicial proceedings.

Even though the NGO had requested to the Public Prosecutor to file not only the proceeding to request the annulment of the act but also a provisional remedy to suspend its effects, the Public Prosecutor made a previous analysis of the legality of such requests and decided that not all the requirements for the suspension of the effects of the administrative act existed and therefore presented just the petition to annul the act.

Subsequently FAPAS asked its intervention in the judicial administrative proceeding, assisting the Public Prosecutor. In its request to the administrative court FAPAS invoked article 10 (c) of Environmental NGOs Law (Law 35/98 of 18 July), which

grants legal standing to Environmental NGOs regarding administrative judicial proceedings with the purpose of challenging acts or regulations that violate Environmental Law. There was no opposition to this request, but it took almost one year to the administrative court to issue the decision accepting the intervention of FAPAS.

The Administrative Court, having knowledge of the civil judicial proceeding (that had been meanwhile initiated by FAPAS) decided to dismiss the case considering it had become useless since the situation would be ruled by the civil court (decision of 18-06-2002).

Both Public Prosecutor and FAPAS appealed against this decision, considering that the civil and administrative jurisdiction had different scopes and therefore the same situation could and should be judged by each of them. The administrative court should judge the conformity with administrative law (the need of a previous authorization by the competent body, in the case, the Environment Ministry) while the civil court should analyse the respect for other substantive rules, such as environmental law. The appellants upheld that a given administrative act can be formally valid according to administrative procedural law, and judged as such by administrative court, but considered unlawful by a civil court for violating, for instance, environmental rules, or vice-versa. The appeal is now waiting for the decision of Supremo Tribunal Administrativo (second and only instance of appeal).

## 2.4 The result of the case from the environmental point of view

This case is very interesting regarding environmental effectiveness because, even though it required two instances of appeal, the preliminary ruling was successful to the protection of the environment.

The nesting in 1999 was not ensured (and could never have been, since the request was presented in March), however, it was ordered the removal of any devices capable of preventing the nesting in the coming years. The Portuguese State took some time to comply with the decision of the Supremo Tribunal de Justiça since it had to observe administrative procedural requirements to contract a private company to remove the devices installed in the courthouse. But it never refused to do it. However, since the request for the daily compulsory pecuniary sanction (the payment of a daily fine until full compliance) had not been included in the appeal, it was not applicable.

Two proceedings – in the civil and administrative jurisdiction – are still pending.

The compensation FAPAS claimed in the main civil proceeding (for awareness raising campaigns towards the protection of swallows), if granted, will contribute to an enhanced environmental protection. However, considering the facts proved in trial (the court did not accept as proved al the losses nor the costs indicated by FAPAS for

the campaigns), the lawyer of FAPAS has low expectations concerning the granting of the requested compensation (if granted it will surely be a lower amount).

# 3 Legal and "democratic" aspects in the case

## 3.1 The judicial decisions

The applicability of the legal regime protecting wild birds to the facts in issue was never questioned, neither by the Parties nor by the courts ruling the case.

The defendant opposed to the request stating that the removal of the nests had been done in accordance with legal authorizations and was justified with the need to preserve a public building and defend the public health (in accordance to article 4 of Decree Law 75/91). The courthouse of Nisa had not been cleaned or repaired for 8 years and, according to the defendant, it was very deteriorated and dirty, partly because of the swallows' nests. The defendant claimed that the dust from the swallows nests and its faeces, deposited in the walls, created louses not allowing the opening of the windows to ventilate the building and causing or worsening allergic diseases of the workers and visitors of the building.

In fact, the Secretary of the Court of Nisa requested, by a written notice, to the Secretary General of the Ministry of Justice the permission to clean the swallows' nests from the courthouse. The Ministry contacted the ICN, which suggested the removal of the nests should be done until the 31st of January, suggesting also the installation of devices to prevent the nesting in the coming years (see chronology of events – 1.1).

Even though the first instance court referred to this information of the ICN as an "authorization" on which the removal of the nests had been based, it was, however, made clear by the second instance court that it was not enough to comply with the legal requirements, since Decree-Law 75/91 (in force at the time) expressly demanded an authorization by the Environment Ministry, which was never presented or proved to exist in court.

The divergences between the decisions of the three instances sprang mainly from different interpretations of the requirements for the granting of the provisional remedy (described above - 2.3.) and different opinions regarding the alleged conflict between the values of nature protection and public health defence.

Acknowledging the legal regime protecting wild birds, the first instance court considered there was a serious possibility of the existence of the alleged right – *fumus bonus iuris*. However the judge decided that there was not a justified concern of an offence to that right, since he accepted the opinion presented by ICN, according to which the swallows were able to nest elsewhere. Additionally, the court considered the request was disproportionate since there was a higher interest of public health in the cleaning of the building. The first instance decision of April 28 1999 refused therefore the request.

FAPAS appealed to the second instance court of Évora, arguing that (1) there had been no competent authorization or technical opinion previous to the removal of the nests and therefore it was illegal, violating articles 4 and 5 of Decree Law 75/91, (2) it could not be considered as a notorious fact that the swallows that used to nest in the courthouse's walls were nesting elsewhere, (3) the suspension of the cleaning and repairing works during the reproduction season would protect the swallows and not cause a significant damage to other interests, such as public health.

The second instance court accepted arguments 1 and 2. However, taking into account that the provisional remedy was requested in March, when the return of swallows was imminent, the court considered that the proceeding could never have the intended effect of preventing a threat. When first instance decision was issued (April 28 1999) the swallows had probably already returned and there was no time to remove obstacles to the nesting. The appeal was, in consequence overruled, on the basis of lack of *periculum in mora* in the very moment of the filing of the petition.

FAPAS appealed again and the Supremo Tribunal de Justiça, by a decision of July 27 2000, granted the requested provision. Analysing the requirements to grant the provision, this court considered the request does not have its scope limited at ensuring the nesting of swallows in 1999, aiming instead at ensuring the right of nesting of wild birds during normal season in the places where they usually do it, and therefore considered there is a justified concern of threat to the birds nesting.

According to the court, public health had not been endangered by the swallows, but due to the fact that the building had not been cleaned for more then 8 years. To the judges of Supremo Tribunal de Justiça there is no real conflict between the interests of nature protection and public health, remembering for this purpose, the importance of swallows to control the insects' population. But even if there was, state the judges, there are always means of harmonising the life of wild birds and Man's well fare. The State has a special obligation of doing so, in order to ensure nature protection and conservation. Quoting again a Law Professor[8], the Supremo Tribunal de Justiça concludes saying "environment is expensive, but never too expensive".

The pecuniary sanction petitioned in the first instance was not included in the appeal and therefore the court did not rule on this matter.

## 3.2 Impact of the case

This case was publicised in the *media*, mainly newspapers to which FAPAS gave notice of the judicial proceedings and the final decision (one of the main national weekly newspapers –"Expresso"- followed the case, publishing articles before and after the final decision of the third instance court[9]). It deserved a special attention because it concerned a public building, more particularly a courthouse (the "house of

[8] CANOTILHO, Gomes "Protecção do Ambiente e Direito de Propriedade", p. 105

[9] "Expresso" newspaper editions of 20-09-99 and 08-07-00

justice"), what turns it in a "role model". The judges of Supremo Tribunal de Justiça were very aware of that and underlined in their decision that "if everyone followed the defendant's example, no wall would be left for swallows, which him – the State, is obliged to protect".

The case was announced in the *media* as the first time the State lost in the court over environmental matters.

The decisions of both second and third instance court have the special merit of demonstrating that the Portuguese courts and judges might be changing their attitudes towards the environment and towards the basic principles and concepts of environmental law.

The superior courts judges, more than just deciding the matter, analysed and criticised general issues of the legal regime, appealing several times to a change of mentalities, not only by other courts that might take these decisions into account in future cases, but also by the legislator. The main issues put in evidence and criticised were the anthropocentric perspective of the legislator and the lack of specific provisional remedies to effectively prevent environmental aggressions.

In what concerns the final ruling of the case, the Supremo Tribunal de Justiça, contrary to the first and second instance courts made an interpretation of the procedural requirements of the provisional remedy much more adequate to the purposes and needs of nature protection. And even though swallows are not an endangered species (but they are object of legal protection), the Supremo Tribunal de Justiça considered that the principle of nature conservation and the protection of the environment for its own value and for the use of Man is absolute and sufficient to prohibit any action, as insignificant as it may seem, that may collide with it. Still according to this court the State has a special obligation of enforcing the above-mentioned principle and its actions should be a role model to everybody. It is also an obligation of the State, states this superior court, to harmonize nature and Man and for this reason the court did not accept the argument of the protection of public health as an excuse to disrespect the obligations towards nature.

Given the scarce number of decisions in this area, these opinions, defended with big emphasis by the superior courts, assume considerable relevance.

It is even more significant to note that in its petitions FAPAS never tried to raise such theoretical questions, just asking for the enforcement of the ruling law to the facts in issue. It was the superior courts that felt the need to discuss the basic concepts beneath the rules and assume a critical position towards the legislation in force.

The receptivity of the population of Nisa to FAPAS demands was not total and immediate. This is a small and rural village of the interior and the NGO was seen as an outsider (people from a big city of the north) that came to disturb their quietness, creating a big discussion, challenging the State and the symbol of justice (the court)

because of a bird that seems so common and not threatened. The members of FAPAS made same awareness campaigns to try to reverse this resistance and explain the population about the need to protect the swallows, which had some success.

In August 2001, the local population of another small village in Alentejo warned QUERCUS (an environmental NGO) about a similar case: a net had been placed on the exterior walls of the building of the local municipality, causing the death of dozens of swallows. Both the local citizens and the NGO immediately recalled the case initiated by FAPAS to protest against what was being done. A local newspaper ("Linhas de Elvas", with on-line edition[10]) gave notice of this incident and also described the lawsuit proposed by FAPAS.

During the year of 2003 FAPAS had knowledge of the destruction of swallows nests in other public building, belonging to the municipality of Alvito (also in Alentejo). When the NGO requested further information about the case to ICN it was informed that ICN had already initiated an infringement procedure against the local authority, which shows that the previous judicial proceeding had a positive effect on this administrative authority, inducing a change of behaviour (in the case of Nisa it was ICN who suggested the placement of devices to permanently prevent the nesting).

[10] www.linhas.elvas.net/arquivo/2001/2Sem/2619/act05.asp

# 4 Socio-economic aspects

Since the petitioner is an environmental NGO it is legally exempted from the payment of court costs. FAPAS never had to pay attorney fees, since it has had a lawyer working *pro bono*. This specific case was particularly inexpensive for FAPAS, since the technical expert that presented a written opinion and testified in court did not charge any fees either and the NGO only had to deal with the travel expenses (to go to court) of the lawyer and a small number of witnesses it presented.

The lawyer of FAPAS believes it is not very difficult for most NGOs to find a lawyer and technical experts willing to work *pro bono*, or for a symbolic fee in a given judicial proceeding. Many university professors are members of Environmental NGOs and, for that reason, frequently give their technical opinions for free. There is also the possibility to request to the court for a technical opinion or examination and, in that case, the fees of the experts appointed by the court will be included in the court costs.

The macro-economic effects of this case, even if the NGO wins the case and the compensation for damages is granted, are not that significant.

# United Kingdom Country Report

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# 1 Introduction

## 1.1 Legal regimes in the United Kingdom

Although this report is stated to cover the "United Kingdom", in fact, as agreed with the coordinators of this Study, it addresses the situation in England and Wales. The United Kingdom is comprised of various different jurisdictions: Scotland, which has had a mostly separate legal system (increasingly the case since devolution); Northern Ireland (which has various separate elements including as to regulation and control of environmental matters, also due to an increased degree of control over local matters); and England and Wales. The position of Wales has become complicated due to a degree of limited autonomy recently granted to Wales as to regulation of local matters, including environmental issues. However, for the purposes of this review study, the jurisdiction(s) covered are England and Wales.

## 1.2 Scope of the review study

This study looks at the situation concerning the issue of "Access to Justice in Environmental Matters" and addresses "citizen group" and "individual" lawsuits before courts and tribunals insofar as the issues involved are not solely related to the personal interests of the persons involved, whether as to property interests or personal health or otherwise. Hence, only cases invoking a community interests are to be examined, but in any event where an environmental NGO is involved, for example, by being the applicant in judicial review proceedings or intervening as third party. Actions for rights of access to environmental information are recorded in terms of statistics, but are not further analysed.

In addition, cases involving "judicial and administrative bodies" are referred to where the body in question is to be considered as "independent and impartial". As seen further below, there are several instances of environmental "appeals" where the appeal body, viewed alone, does not pass the ECHR requirements for it to be accepted as independent and impartial, but where the system as a whole, including that providing for judicial review of the decisions in question, has been held by the UK courts to be accepted as within the rubric of the provision of an "independent and impartial" legal review system. Such bodies includes those set up to address appeals to the Secretary of State concerning environmental licensing decisions, primarily staffed by Inspectors appointed by the Secretary of State but administered by an entity called the Planning Inspectorate.[1]

This study comes at an opportune time for the United Kingdom as the Department for the Environment, Food and Rural Affairs has, in the context of Aarhus Convention obligations, been sponsoring similar studies on civil and criminal justice in environmental matters, as well as whether there should be a dedicated Environmental Tribunal.

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[1] See, in particular, *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and Regions* [2001] 2 All England Reports 929, House of Lords; *R (on the application of Vetterlein and others) v Hampshire County Council* [2002] Journal of Planning Law 289; *R (on the application of Aggregate Industries Ltd) v English Nature and Another* [2003] Environmental Law Reports 3.

## 1.3 Structure of the legal system and environmental cases

There is no "single-document" written Constitution in the United Kingdom. The law applicable to any given case is likely to be a mixture of statute law and case law. Courts are generally considered as competent to interpret the law, but not to make law insofar as the same would replace the role or position of Parliament.

However, due to manner in which the law has developed in England and Wales over the centuries, there is a body of judge-made law called "the common law" which it is acknowledged the courts may develop and administer, save where otherwise affected by statute law.

The classic case of an environmental action is in "nuisance" (an unlawful interference of a physical nature in the right to enjoy one's property and/or property interests). This is a cause of action developed by the courts, and is not statute-based. The public interest element of such cases is manifested in cases of "public nuisance", which is a wrong, but prosecuted in the manner of a civil action.

In England and Wales, the divide between criminal, civil and administrative jurisdictions is not as clear cut as may exist in civil law legal systems, likewise as to the competence of the courts as regards the operation of such jurisdictions. For example, the Magistrates' Court is the lowest tier of criminal justice, but it also handles, by way of the same judges as sit on criminal matters, certain non-criminal environmental matters (such as appeals over the charges levied by local authorities for the remediation of contaminated land sites).

Further, it is only relatively recently that a specific Administrative Law Court was established (2 October 2000). However, while there is an expansion in the understanding of public law concepts, it is premature to say that in England and Wales there is a clearly identifiable separate administrative law jurisdiction.

## 1.4 Structure of the Courts and Environmental Review Panels

### 1.4.1 Criminal Courts:

The lowest tier is the Magistrates' Court. This handles about 90% of all criminal cases, and deals with what are generally considered as the less serious criminal cases. It has an extensive criminal jurisdiction over breaches of much environmental legislation and of environmental licences. The penalties it may set are limited as to powers of imprisonment and for fines.

Above the Magistrates Court is the Crown Court, which exercises a limited appeal on the merits jurisdiction from Magistrates' Courts, but is primarily the "first instance" court for the more serious criminal cases. Its powers as to sentencing are limited in certain cases by statute, but are otherwise unlimited. Likewise with its powers on fining.

The Divisional Court exercises a supervisory jurisdiction over Magistrates' Courts, ensuring that the law has been correctly identified and construed and applied by Magistrates. A very limited appeal by way of certified question of law lies to the House of Lords.

The Court of Appeal (Criminal Division) is the appeal court from the Crown Court, and from there on points of law of general public importance, to the House of Lords.

Comments on the criminal system and environmental public interest questions

The majority of criminal prosecutions are taken by authorised public authorities (there is a Crown Prosecution Service), but in principle, it is open to any citizen to bring a criminal prosecution. The state, in the position of the Attorney General, applies a supervisory eye over such prosecutions and can intervene, effectively to stop such prosecutions where considered not in the public interest.

Criminal prosecutions can always be said to be "in the public interest", but for the purposes of this study it is only those rare cases where there was clearly the wider environmental interest involved that are considered in any detail.

### 1.4.2 Civil Courts:

A notable feature of the civil justice system in England and Wales is the vast difference in numbers of cases initiated before the courts and cases that are actually determined by the courts. Latest figures available [(see the Environmental Law Foundation Report on Civil Law Aspects of Environmental Justice) suggest that in 2001, some 1,800,000 non-family proceedings were initiated before the County Court and the High Court, of which some 63,500 proceeded to disposal by the court – less than 3% of cases commenced.]

In fact, this figure itself is likely to be an over-estimate of all cases that were otherwise to go to the courts because under the new Civil Procedural Rules (CPR) adopted in April 1999, it is now necessary in many cases to comply with a Pre-Action Protocol which requires prior notice of an intended action to be given. That initial communication may, and does, lead to cases being settled in some form or another without ever touching the court system in any substantive fashion.

The "lowest" tier for civil (private party to private party) justice is the County Court. The County Court is a creature of statute and its competences are regulated by the County Courts Act 1984. That Act does not provide for jurisdiction over "public interest" litigation, but limits jurisdiction to "private party" litigation. Although it is certainly possible that private litigation may reap benefits for the community at large, for example, where there is a noise nuisance or smell nuisance case, from experience, these cases are likely only to involve limited private party interests. It was therefore not considered that the County Courts were of relevance to this study. This conclusion has been borne out by the further work completed by the Environmental Law Foundation (ELF) Report, the author of which concluded that there was no public interest litigation in the County Courts.[2]

Above the County Courts, and also to a limited extent as an Appeal Court, but also acting as a first instance court for more serious civil cases, is the High Court in its

[2] The ELF report is of great interest as it concludes that only some 261 environmental cases were concluded by final court orders in 2001. On the same correlation of cases started to cases concluded, this would, however, imply some 8,613 environmental cases were initiated through the courts in 2001. These do not appear to include "public interest" environmental cases.

various relevant "Divisions" or Chambers. In such composition, the High Court is also predominantly a "private parties" litigation court

Above the High Court is the Court of Appeal (Civil Division), and above that the House of Lords.

### 1.4.3 The Administrative Court

During the years 1995-2000 (until 2 October 2000), there was no separate Administrative Court, and the business now addressed there, and in a more formal manner, was dealt with in the "Crown Office". This was a "chamber" of the Division of the High Court called the Queen's Bench Division (itself usually reserved for contentious factual and legal disputes).

The jurisdiction of the Administrative Court, as mostly was the case under the Crown Office regime, covers applications to prevent a pubic authority acting unlawfully, applications to require a public authority to act lawfully, applications to quash an invalid act, and applications for declarations as to what is the proper legal regime and rules applying to a particular case, as well as, in appropriate cases, injunctions, and claims for damages associated with another substantive claim otherwise within the jurisdiction of the Administrative Court. The jurisdiction of the Administrative Court is set out under the CPR, Part 54.

The Crown Office was the chamber that addressed challenges to the exercise of public authority powers, where an alternative route for a remedy was not available. This exclusionary rule is that generally adhered to by the Administrative Court, although the courts are loathe to allow form act as cover for substance. The House of Lords has recently affirmed this position, and the generally stated rule, but not always followed in practice, is that access to the courts should be available wherever there is an arguable case of abuse of power (*R (on the application of Burkett and another) v Hammersmith and Fulham London Borough Council* [2002] 1 Weekly Law Reports 1593, House of Lords)[3].

This is the court therefore where the majority of cases with which this study is concerned will start, and which is the focus of the review of cases. However, there is now a Pre-Action Protocol applicable for the Administrative Court, and so the number of cases (including potential cases) is difficult to estimate exactly.

Appeals from the Administrative Court generally proceed to the Court of Appeal (Civil Division) and thence to the House of Lords on questions of law of general public importance. There is a possibility to go straight to the House of Lords where the case merits this, for example, where there is a Court of Appeal ruling that is considered contrary to the proper construction and application of the law, and the

[3] The House of Lords said, inter alia, legal policy favoured simplicity and certainty, rather than complexity and uncertainty; that in public law the emphasis should be on substance not form, that uncertainty in public law could lead to a citizen being deprived of the right to challenge an undoubted abuse of power, where the challenge might involve not only individual rights but also community interests.

House of Lords will have to hear the case anyway, where there is such a question of general public importance involved.[4]

At Appendix 1 is the relevant Order from the Rules of the Supreme Court applicable for judicial review cases until 2 October 2000; at Appendix 2 are the new rules under the Civil Procedure Rules, Part 54; at Appendix 3 is the Practice Direction in relation to such applications; and at Appendix 4 the Pre-Action Protocol.

It should be noted that the threshold test for an applicant to pass to be able to bring an application for judicial review is that he has "sufficient interest" in "the matter to which the application relates" (Supreme Court Act 1981, section 31).

Applications for judicial review may be said to "generally" (but see below) involve a two-stage process in English law: the first stage involves the application for permission to apply, when the court acts as a filter against obviously unmeritorious or vexatious applications (for example, that the applicant is really no more than a "meddlesome busybody" – *R v Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 Weekly Law Reports 763, per Lord Donaldson). Usually the review of the merits are addressed superficially or after a "quick perusal", but applications should only be rejected at this stage where it is clear that there are no relevant merits in the application.

Also at the first stage, challenges to the bringing of the application may be raised, such as asserting that the Applicant lacks "sufficient interest" in making the application or for obtaining the remedy sought, that the application be rejected for delay, or to raise objections to permission being granted notwithstanding any such delay. At the second stage, the legal and factual merits of the case are examined in detail, and the case ruled on substantively. However, "sufficient interest" should be taken together with the legal and factual context of the claim and whether there has been a breach of requisite statutory or other public duties (*R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] Appeal Cases 617, House of Lords).

The courts are more prepared now, in fact as they have been for some years, to consider judicial review applications in a combined hearing. That is, the courts will not simply conduct a "quick perusal" of the merits in complicated cases, but will make the detailed examination of fact and law at the same time and as part of the same process of considering the first stage "permission" element. It can be seen from the cases that this has led to an increased chance (i) for obtaining permission and (ii) for applications to succeed. See, as a recent example of the former *R (on the application of Vetterlein and others) v Hampshire County Council* [2002] Journal of Planning Law 289; and see, for a good example expressly of the latter *R v. Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [2000] Environmental Law Reports 221 (and the Case Study).

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[4] The *Alconbury* matter, cited above is a case in point, where the important issue of compatibility of the administrative planning regime, coupled with judicial review, with Article 6(1) ECHR rights went from the High Court straight to the House of Lords.

### 1.4.4 Environmental Regulatory Appeals

There are a large number of appeal processes provided for in England and Wales where considerations of impacts on the environment may be involved. Such appeals include the grant or refusal of environmental licences in a variety of cases such as rights of way over land, IPPC permits, waste management licences, oil and gas exploration licences, and also as to land use issues,

A recently concluded study (*Modernising Environmental Justice (Regulation and the Role of an Environmental Tribunal* (Authors, Professor Richard Macrory CBE and Michael Woods [June 2003])[5]) has identified this range of appeals in a useful and systematic fashion. Rather than setting out at length the list of such instances, reference should be made to Appendix 5 to this Report, which contains Appendix A from that report. That Appendix A identifies the non-land use instances for such appeals of one sort or another (including appeal by way of judicial review). It also sets out when the merits of the decisions in question can be addressed on appeal.

That Appendix A indicates that there are over fifty such types of appeal. They include appeals within the system of administration itself. For example, against a refusal by the Environment Agency (of England and Wales) to grant a waste management licence under the Environmental Protection Act 1990, the appeal is to the Secretary of State who either delegates the decision to an Inspector or delegates the hearing of the appeal to an Inspector but decides the case finally him/herself. Such appeal can either be in writing, or orally if so sought by the Environment Agency or the Applicant.

The list also includes cases of "statutory appeal", where appeal against the decision of the administration is to the High Court directly. This set of cases includes appeals against decisions taken after a public inquiry (or hearing[6]) has been held (for example, as to establishment of rights of way and re-designation of the status of paths [eg as rights of way for all classes of users]).

The list also identifies cases where no appeal route is specified, so that any challenge to the decision taken must be made by way of judicial review proceedings.

The disparate nature and venue for such appeals, as well as the bases upon which appeals may be initiated, and as to the content of the appeals itself give rise to access to justice considerations.

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[5] This is an extremely important and wide-ranging report, with supporting evidence, to argue for the establishment of a "limited competence" Environmental Tribunal having the appropriate specialisation to address the complex and varied nature of environmental appeals of many sorts. It could also address comprehensively the issues of access by third parties and the provision of third party appeal rights in environmental cases.

[6] There is a difference in the manner of conduct between a public hearing and a public inquiry, the latter being more formal and used where it is likely that the parties will want to cross-examine witnesses. However, no difference in terms of the protection of the rights of individuals is entailed by the choice of public hearing to public inquiry.

# 2 Standing

## 2.1 The question of "standing" to bring Judicial Review proceedings

The question of standing to bring a judicial review application has for many years been one of "sufficient interest" (see Rules of the Supreme Court, Order 53; and now CPR, Part 54)[7].

As these rules were/are rules of court, it is for the courts to construe them. They have done so as a matter of fact in a manner compatible with the degree of control considered appropriate to their own procedure. As can be seen further below, the courts have adopted an increasingly wide construction.

Note, that standing is an assessment generally accepted to be one of fact and law and not an act of "discretion" (*R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, House of Lords; *R v North West Leicestershire District Council, ex parte Moses* Unreported, 19 September 1999, High Court).

The position generally on standing has been very helpfully summarised in *Judicial Review Handbook* (3rd Ed) Michael Fordham, Harts Publishing, 2001, p607:

> *"From the case-law on standing in judicial review, it is possible to extract a number of principal themes:* ***First****, that the general approach of the Court to standing is a liberal one.* ***Secondly****, that financial interest may be sufficient but will seldom if ever be necessary.* ***Thirdly****, that public interest considerations favour the testing of the legality of executive action.* ***Fourthly****, that it would be against the public interest if there were a "vacuum" (or "lacuna") of unchecked illegality for want of a challenger with standing.* ***Fifthly****, that the Courts seek to strike a balance, distinguishing broadly between busybodies and those with a legitimate grievance or interest.* ***Sixthly****, that one factor which may in some situations count against a claimant is where there is an obviously better placed challenger who is not complaining."*

In R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, 642 the House of Lords said (per Lord Diplock):

> *"the draftsman of that order avoided using the expression "a person aggrieved," although it lay ready to his hand. He chose instead to get away from any formula that might be thought to have acquired, through judicial exposition, a particular meaning as a term of legal art. The expression that he used in rule 3 (5) had cropped up sporadically in judgments relating to*

[7] Many years ago the test for standing was a "person aggrieved". There is case law suggesting that this was a test with a narrower remit than "sufficient interest". However, as far as judicial review proceedings are concerned, this is of academic interest only.

*prerogative writs and orders and consisted of ordinary English words which, on the face of them, leave the court an unfettered discretion to decide what in its own good judgment it considers to be "a sufficient interest" on the part of an applicant in the particular circumstances of the case before it. For my part I would not strain to give them any narrower meaning"*

Further, the courts are rarely in fact concerned with the actual status per se of the applicant. In *R v Traffic Commissioners for North Western Traffic Area ex p BRAKE* - Queen's Bench Division (Crown Office List) - Turner J - 03.11.95, the court was dealing with a judicial review application by an unincorporated association of individuals and corporations who formed themselves into a pressure group whose aims are to promote greater safety in the use of motor lorries on public roads. The court refused to find at the then earlier separate permission stage for judicial review proceedings that, because of its composition and legal status, the applicant could not bring judicial review proceedings.

See also, as to the readiness of the courts to allow associations to bring judicial review proceedings, *R v Gloucestershire County Council and another, ex parte Barry; R v Lancashire County Council and another, ex parte Royal Association for Disability and Rehabilitation and another* [1996] 4 All ER 421, Court of Appeal.

Hence, from these cases cited above it can be seen that judicial review is open to individuals, corporate entities, and associations (incorporated and unincorporated).

Moreover, standing is generally dealt with as an integral part of the consideration of the merits, and the concern to ensure that questions of illegality are dealt with by the courts seems to loom large in the courts' approach. In *R v.* S*ecretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* 1995] 1 Weekly Law Reports 386, the High Court said (per Rose LJ):

*"The authorities referred to seem to me to indicate an increasingly liberal approach to standing on the part of the courts during the last 12 years. It is also clear from* Ex parte National Federation of Self-Employed and Small Businesses Ltd. *that standing should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case: see* per *Lord Wilberforce, at p. 630D, Lord Fraser, at p. 645D and Lord Scarman, at p. 653F.*

*Furthermore, the merits of the challenge are an important, if not dominant, factor when considering standing. In Professor Wade's words in* Administrative Law, *7th ed. (1994), p. 712: "the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved."*

*Leaving merits aside for a moment, there seem to me to be a number of factors of significance in the present case: the importance of vindicating the rule of*

*law, as Lord Diplock emphasised [1982] A.C. 617; the importance of the issue raised, as in* Ex parte Child Poverty Action Group *[1990] 2 Q.B. 540; the likely absence of any other responsible challenger, as in* Ex parte Child Poverty Action Group and Ex parte Greenpeace Ltd. (No. 2) *[1994] 4 All E.R. 329; the nature of the breach of duty against which relief is sought (see* per *Lord Wilberforce, at p. 630D, in* Ex parte National Federation of Self-Employed and Small Businesses Ltd.); *and the prominent role of these applicants in giving advice, guidance and assistance with regard to aid: see* Ex parte Child Poverty Action Group *[1990] 2 Q.B. 540, 546H. All, in my judgment, point, in the present case, to the conclusion that the applicants here do have a sufficient interest in the matter to which the application relates within section 31(3) of the Supreme Court Act 1981 and Ord. 53, r. 3(7)." (all emphases added)*

Moreover, more recently the stance of the courts indicates that standing is often taken for granted in relation to bodies that have been active in a particular area of law and policy.

For example, in *R (Howard League for Penal Reform) v Secretary of State for the Home Department*, [2003] 1 Family Law Reports 484, the High Court, per Munby J, said

*"[1] These proceedings raise important questions as to the duties owed by the State to the children -- young people under the age of 18 -- whom it detains.*

*[2] The proceedings have been brought by the Howard League for Penal Reform (the Howard League) whose history and credentials need no introduction. It undoubtedly is, as it claims to be, the leading non-governmental organisation in this country concerned with penal issues and policy. Here I need only to note that in the last decade or so it has had a particular focus on children and young people in the criminal justice system.*

*[3] It is not disputed by the defendant that the Howard League has a 'sufficient interest' in the matter so as to give it locus to make the current application:* R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement *[1995] 1 WLR 386 and* R v Somerset County Council ex parte Dixon *[1998] Env LR 111." (emphases added)*

It has also been said that the test, not in fact as concerning a question of jurisdiction, is the applicant should be the "proper person to make the application…This…means

that he has a legitimate interest in the remedy sought" - *Deloitte & Touche AG v Johnson* [1999] 1 Weekly Law Reports 1605, Privy Council, per Lord Millett[8].

The position in relation to environmental issues is not treated in a different or particular manner, although the courts are awake to the serious issues that are necessarily at issue when there are challenges in such cases with an environmental content. See, particularly, and by way of illustration, *R (Greenpeace Ltd) v Secretary of State for the Environment, Food and Rural Affairs and another* [2002] 1 Weekly Law Reports 3304, Court of Appeal's statement, on a judicial review as to then legality of import licences for timber said to be illegally logged in Brazil:

> *"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."* *(emphases added)*

### 2.1.1 Standing in relation to environmental matters of an individual

In *R* v Somerset County Council ex p Dixon [1998] Env LR 111, a case concerned with the question of the legality of a permission to extract minerals from quarries – the High Court, per Sedley J (as he then was), said, in relation to a challenge by an individual, in a judgment worth quoting at some length:

> *"Standing*
>
> *On principle, the question of locus ought to be considered in the context of the issues raised. As now presented, these are issues which go to the root of the legality of the extended quarrying activity which ARC wishes to undertake. That the quarrying is bound to have a significant environmental impact is not disputed; nor is it diminished by the fact that to quash the present permission*

[8] Although the Privy Council is not a court "of England and Wales", its rulings are highly persuasive for other courts to follow. It is suggested that the courts of England and Wales would not be likely to depart from previous authority that standing goes to the question of "jurisdiction". This case actually addressed the jurisdiction of the court to remove a liquidator, but Lord Millett's statements was in the general context of the court being asked to exercise a statutory power or its inherent jurisdiction..

*will be to release nine other areas from the restrictions entered into as a quid pro quo. If there is an arguable case, what it concerns is the legality of possibly irreversible interference with part of the landscape. Mr Dixon is a local resident, a parish councillor in the Whatley area, a member of the executive committee of the Somerset Association of Local Councils, a member of more than one body concerned with the environment and a candidate for election to the district council covering Whatley Quarry. Mr Ouseley contends that Mr Dixon, having no interest as a landowner or as the possessor of a personal right or interest threatened by the proposed quarrying, has no 'sufficient interest' within the Supreme Court Act 1981, section 31(3), and RSC Order 53 Rule 3(7).*

*"….it has become clear that the following elements need to be highlighted:*

*"(a) The threshold at the point of the application for leave is set only at the height necessary to prevent abuse.*

*"(b) To have 'no interest whatsoever' is not the same as having no pecuniary or special personal interest. It is to interfere in something with which one has no legitimate concern at all; to be, in other words, a busybody.*

*"(c) Beyond this point, the question of standing has no materiality at the leave stage.*

*"(d) At the substantive hearing 'the strength of the applicant's interest is one of the factors to be weighed in the balance': that is to say that there may well be other factors which properly affect the evaluation of whether the application in the end has a 'sufficient interest' to maintain the challenge and - what may be a distinct question - to secure relief in one form rather than another."*

*Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs - that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power. If an arguable case of such misuse can be made out on an application for leave, the court's only concern is to ensure that it is not being done for an ill motive. It is if, on a substantive hearing, the abuse of power is made out that everything relevant to the applicant's standing will be weighed up, whether with regard to the grant or simply to the form of relief.*

*Mr Dixon is plainly neither a busybody nor a mere troublemaker, even if the implications of his application are troublesome for the intended respondents.*

*He is, on the evidence before me, perfectly entitled as a citizen to be concerned about, and to draw the attention of the court to, what he contends is an illegality in the grant of a planning consent which is bound to have an impact on our natural environment. That his application, were it to succeed, would also unravel a series of environmentally beneficial steps represented by the nine ancillary agreements cannot reduce or qualify any illegality he can show in the grant which he seeks to challenge." (all emphases added)*

This stance by the courts can be seen in a more recent case where environmental protection issues were raised by way of judicial review by an individual. *R (on the application of Hammerton) v London Underground* ([2002] All England Reports (D) 141 (Nov) High Court) was concerned with the proper application of planning laws. The applicant did not have any property interest or otherwise than a passionate and long held interest and concern for the protection of the nature of the buildings in issue (old railway yards). The High Court applied the ruling of the Court of Appeal in a previous case of *R (Kides) v South Cambridgeshire D.C.* [2002] EWCA Civ 1370, 9th October 2002. The Court of Appeal there had disagreed with the conclusion of the High Court that the Applicant (Ms Kides) was abusing the process of the Court in so far as she was seeking to rely on an argument for quashing a planning permission that new policies on affordable housing had not been taken into account. The Court of Appeal said (per Jonathan Parker LJ):

*"132. That leaves the issue of standing. As to that, it seems to me that there is an important distinction to be drawn between, on the one hand, a person who brings proceedings having no real or genuine interest in obtaining the relief sought, and on the other hand a person who, whilst legitimately and perhaps passionately interested in obtaining the relief sought, relies as grounds for seeking that relief on matters in which he has no personal interest.*

*133. I cannot see how it can be just to debar a litigant who has a real and genuine interest in obtaining the relief which he seeks from relying, in support of his claim for that relief, on grounds (which may be good grounds) in which he has no personal interest.*

*134. It seems to me that a litigant who has a real and genuine interest in challenging an administrative decision must be entitled to present his challenge on all available grounds.": (emphases added)*

Additionally, in *R (on the application of Burkett and another) v Hammersmith and Fulham London Borough Council* [2002] 1 Weekly Law Reports 1593, House of Lords considered an application for judicial review of the grant of a planning permission in relation to which serious concerns of an environmental and public health nature had been raised. That grant of planning permission was challenged by a local resident. Her position was described by the court:

*"[21] The agreed statement of facts and issues explains the potential impact of the development on Mrs Burkett and her daughter. Mrs Burkett lives with her asthmatic daughter. Their home and garden are immediately adjacent to the site. Her husband died after the Court of Appeal decision. He had been a chronic diabetic with a liver disorder and had been housebound for much of the time. Works have regularly caused dust to cover all the surfaces in the maisonette. A particular concern has been the effect of the development on the health of the family. In 1999, at a tenants' association meeting, Mr and Mrs Burkett were advised that they could not remove the paving blocks from their garden and replace them with lawn because of problems of contamination. This was apparently due to previous contamination of the land. On 30 July 1999 Mrs Burkett's solicitors, Richard Buxton, then assisting a pressure group on a pro bono basis, wrote to the local authority warning that the environmental statement was inadequate and that it would be unlawful to approve the planning application. This letter was drawn to the attention of the relevant committee when it came to consider the planning application." and*

*[28] For the purposes of the appeal to the House it must be assumed-as Richards J and the Court of Appeal had done-that Mrs Burkett has an arguable case on the substantive merits of her judicial review application. The only issues on this appeal relate to the matters of delay."*

There was no challenge to the position of standing to bring the application.

### 2.1.2 Standing in relation to environmental matters of groups of persons

The same rules as to standing apply with regard to groups of persons seeking to raise a challenge by way of judicial review – see the *ex p BRAKE* case above. See also *R v Kent County Council and Southern Water Services Ltd ex parte Foreness Point Environmental Action Group* Unreported, High Court, 16 June 2000. In that case the application was brought on behalf of the Environmental Action Group which was an unincorporated association formed in 1997, primarily to oppose plans to extend the treatment works located at Foreness Point, which formed the subject of the grant of planning permission which was the object of the judicial review application. No challenge to the right to bring the judicial review proceedings appears to have been made by either defendant.

See, too, *Gillespie v First Secretary of State and another* [2003] All England Reports (D) 196 (Jan), High Court, where the court allowed an application for judicial review by the applicant, who lived near the site of a proposed development. At the prior public inquiry he had given evidence as part of the Save Stepney Campaign ("SSC"), a pressure grouping of persons concerned primarily with the retention of gas holders as historic structures and with proposals for decontamination of the site in question. No challenge was raised to the standing of the applicant.

### 2.1.3 Standing in relation to environmental matters of incorporated action groups

See, also, *R (on the application of PPG11 Ltd) v Dorset County Council and another* [2003] All ER (D) 68 (Jun), High Court, where the applicant was a limited company formed as an action group from those opposed to the scheme in question.[9]

Such an open position has also been backed by the Law Commission in its Report number 226, *Administrative Law: Judicial Review and Statutory Appeals*, (p119):

> *"We recommend that unincorporated associations should be permitted to make applications for judicial review in their own name through one or more of their members applying in an representative capacity where the court is satisfied that the members of the [claimant] association have been or would be adversely affected or are raising an issue of public interest warranting judicial review, and that the members of the association are appropriate persons to bring that challenge."*

### 2.1.4 Standing in environmental matters of established NGOs

It can also be seen that the question of standing of well-established environmental NGOs is sometimes but often just taken for granted. In *R v Secretary of State for the Environment, ex parte Friends of the Earth Ltd* [1994] 2 CMLR 760, the High Court said (per Schiemann LJ):

> *"SUFFICIENT INTEREST*
>
> *No argument has been put forward by the Secretary of State to the effect that either of these Applicants does not have a sufficient interest to bring these proceedings. Mr Lees is a resident of the Thames supply area. The Friends of the Earth is a company of high repute limited by guarantee, founded in 1971, and accepted as having relevant expertise. The Secretary of State has not sought to argue that the existence of the European Commission charged with the duty of, as it were, policing the observance by Member States of their duties under the Treaty deprives the Applicants of sufficient interest themselves to carry out this function. Mr Richards, on his behalf, has made it plain that failure to argue this point on this occasion does not mean that anyone should have any expectation (legitimate or otherwise) that it will not be argued on another occasion.*

The difficulty which faces the court on these occasions is well exemplified by *R v Secretary of State for Social Services, ex parte Child Poverty Action Group* [1990] 2 QB 540, [1989] 1 All ER 1047 when counsel for the Secretary of State adopted a

[9] See also the case review tables, where numbers of unincorporated associations or groups of individuals (and companies) have been accepted as having standing in environmental judicial review cases.

similar attitude and the judge of first instance, I as it happens, spent no further time on the issue. Woolf LJ said, at p 1056 of the former report:

> *"The question of locus standi goes to the jurisdiction of the court and therefore the approach adopted by the Department in this case, while understandable, is not appropriate. The parties are not entitled to confer jurisdiction which the court does not have, on the court by consent and if the court had been minded to grant declaratory relief, the Respondents would have had to advance any arguments which were available to them or accept the consequences of not doing so."*
>
> *It seems to me that, the question being one of jurisdiction, I have to decide at the outset whether this court has jurisdiction to entertain an application by one or other of these Applicants for a declaration of the type sought. Leave has twice been granted by other judges. In the absence of any argument to the contrary and basing myself on the evidence before the court, which in the circumstances it is not necessary for me to set out, I hold that the court has jurisdiction to embark upon the inquiry as to whether the breach of the secondary obligation has been made out. The status of the Applicants may once more become relevant should a breach be made out and the question arises whether or not the court should grant relief."*

Further, in *R v. Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [2000] Environmental Law Reports 221 (application for a declaration that the licensing regime in the North East Atlantic was contrary to Community law [see further the UK Case Study]), it was said by Kay J:

> *"This is an application by Greenpeace Limited, the corporate identity of Greenpeace UK, which is part of Greenpeace International. I shall refer to the Applicant as 'Greenpeace'. <u>It is a well known campaigning body, the prime object of which relates to the protection of the natural environment. Its legal standing to bring proceedings such as the present application is well established</u>."(emphases added)*

In a large number of cases, especially where known environmental organisations are involved, there is no discussion of the question of standing because it is assumed/accepted to be obviously established[10]: for examples, see *R v Secretary of State for the Environment ex p Royal Society for the Protection of Birds* [RSPB] -

[10] It is important to note in this context that the courts have said frequently that standing cannot be conferred by consent, that it is a question of <u>jurisdiction</u>, and that it should be established as a condition precedent to obtaining a remedy by way of judicial review: *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (House of Lords); *R v Secretary of State for Social Services, ex parte Child Poverty Action Group* [1990] 2 Queens Bench 540, High Court; *R v Brent London Borough Council, ex parte Connery* [1990] 2 All England Reports 353, High Court, and *R v Secretary of State for the Environment, ex parte Friends of the Earth Ltd* [1994] 2 CMLR 760, Court of Appeal.

House of Lords, 09.02.95; *R (on the application of Friends of the Earth Ltd and Greenpeace Ltd) v Secretary of State for the Environment, Food and Rural Affairs and another* [2001] EWHC Admin 914, CO/402/2001, 15 November 2001, High Court; and *R (Greenpeace Ltd) v Secretary of State for the Environment, Food and Rural Affairs and another* [2002] 1 WLR 3304, Court of Appeal (as to unlawful timber importation from Brazil to the UK, said to be in breach of CITES).

### 2.1.5 Likelihood of challenges to standing in environmental cases

It is often now the situation that no challenge to standing on the bringing of judicial review proceedings is taken even in the case of individuals in environmental matters – see for example, *R (on the application of Vetterlein and others) v Hampshire County Council* [2002] Journal of Planning Law 289, High Court (challenge to a decision to grant planning permission for a waste incinerator); and *R (on the application of Marchiori) v The Environment Agency* [2002] All England Reports (D) 220 (Jan), Court of Appeal, where the Court noted

> *"The appellant's interest in the authorisations in question springs from her "Longstanding and deeply held opposition to the manufacture of nuclear weapons, and the threat to use them. If ever used they would kill thousands of ordinary people indiscriminately and cause an ecological disaster of unimaginable proportions" (witness statement 10th April 2000, paragraph 5). …The proceedings are a vehicle to give effect to her objection to nuclear weapons. It is submitted by Mr Fordham on her behalf that the manufacture and maintenance of Trident nuclear warheads is contrary to international law. Save as regards a discrete and subsidiary part of the case, neither the respondent nor the interested parties have suggested, here or below, that the appellant should be denied standing."*[11]

### 2.1.6 Conclusions on rights of access in terms of standing in Judicial Review Proceedings

Since 1990, at the latest (see the case which gave rise temporarily to concerns that access in judicial review cases was to be reduced – *R v Secretary of State for the Environment, ex parte Rose Theatre Trust Co.* ([1990] Queens Bench 504, High Court - now generally disapproved), the issue of standing generally has been widened. In cases where there is alleged to be an environmental issue at stake (construed widely for these purposes to include concerns as to public health), it is rare that the question of standing is challenged, local residency and expressions of concern and/or stated opposition and/or attendance at a public inquiry to oppose generally being considered to suffice to establish standing for the purposes of bringing the judicial review proceedings.

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[11] The "discrete and subsidiary" part related to the point that defence issues have been held by the courts (as held here, too, by the Court of Appeal) to be "non-justiciable". That is, they relate to an area of state policy and action that is outside the review powers of the courts. Hence the argument that no standing could be engaged as there was no remedy that could be sought from the court.

The important point is that the courts do not treat the question of standing in isolation from the other issues in the case. The citations from the case law above indicate that standing is intimately linked with a consideration by the courts as to the merits of the applications and whether there is likely to have been a misuse of power[12] by a public authority. As the case study illustrates, the courts are slow to leave a misuse of power without redress, and the question of standing is construed widely to allow for such. It might be noted that in cases where there is said to be a breach of Community law affecting the rights of individuals bringing the judicial review, the courts seem to accept without argument that standing has been proved – see for example, *Berkeley v Secretary of State for the Environment* [2001] 2 Appeal Cases 603, House of Lords.

## 2.2 Third Party Interventions in environmental matters

### 2.2.1 Third Party interventions in Judicial Review

The CPR, Part 54.1(2)(f) provides that "interested party" means "any person (other than the claimant or defendant) who is directly affected by the claim". The Claim Form for judicial review should identify relevant third parties, and it is necessary for an applicant to serve the application and supporting evidence on such persons (CPR, Part 54.7).

In a non-environmental case, *R v Rent Officer Service, ex parte Muldoon,* [1996] 1 Weekly Law Reports 1103, House of Lords, Lord Keith said "That a person is directly affected by something connotes that he is affected without the intervention of any intermediate agency".

The approach of the courts to this issue in environmental cases can be illustrated by a selection of cases.

In *R v Secretary of State for the Environment, ex parte Kent County Council* (1995) 93 Local Government Reports 322, High Court, in a case concerning the proper designation of rights of way across land, it was noted in the judgment "as almost invariably happens in this class of case, the Ramblers' Association was permitted to appear as having a general interest in the subject matter of the litigation". It does not appear from the ruling that any objection was made to their participation.

In *R v Secretary of State for Trade and Industry, ex parte Duddridge and Others* Times, 26 October 1995, Court of Appeal, in a case concerning an asserted requirement to lay down regulations to protect against Electro-Magnetic Radiation, the Court allowed the National Grid plc to be joined. No discussion appears to have taken place as to whether such permission should have been given.

In *R v Secretary of State for the Environment, ex parte North Yorkshire County Council* Unreported, High Court 14 October 1998, permission was given on a planning permission challenge to join as a third party a local resident who had opposed the grant of planning permission. The court considered that to allow joinder was an act of discretion, and exercised it in favour of the third party applicant.

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[12] This is not regarded by the courts as required any moral condemnation. It relates to the fact of a lack of legal justification for the public authority's actions in issue.

In *R (on the application of Anglian Water Services) v Environment Agency*, Unreported, 20 October 2000, High Court, per Tomlinson J, accepted evidence from a local resident concerned at plans for sewerage pipes being brought to a village on the grounds that he was "thus an interested party". (emphasis added)

Conclusion as to the issue of third party status in judicial review cases

The cases accessed indicate that the courts tend to take an open and liberal approach also as to which person should be considered a relevant "interested party", whether for the purposes of requiring service of the application on such person, or for considering otherwise whether to permit a third party to intervene.

### 2.2.2 Further rights to file evidence or make representations in judicial review proceedings

The CPR, Part 54.17 provides that any person may apply for permission to file evidence or to make submissions at a judicial review hearing.

### 2.2.3 Third party rights in other types of environmental proceedings[13]

There are, as the documentation at Appendix 5 to this Report illustrates, a variety of cases where appeals before judicial or administrative tribunals occur in England and Wales. The question of third party access is addressed in this section in a generic fashion.

### 2.2.4 Third party rights on land-use appeals from decisions of the relevant public authorities

If an applicant for a planning permission is granted the permission, a third party can only challenge the grant of the permission by judicial review proceedings. Thus there is no "third party right of appeal".

If the permission is refused, the applicant has a right of appeal to the Secretary of State. Statutory provisions provide for the Secretary of State to delegate to an Inspector within the Planning Inspectorate to take the decision on appeal in the name of and place of the Secretary of State. The Secretary of State then normally just ratifies the decision as a decision in his name. No cases have been identified where the Secretary of State has overruled the Inspector's decision in such instances.

The alternative is that the Secretary of State delegates the hearing of the appeal to the Inspector, but reserves to him/herself the actual decision based on the recommendation of the Inspector. It may happen, but is relatively rare for the Secretary of State to go against the recommendation of the Inspector – see *Alderney Estates Ltd v Secretary of State for Transport, Local Government and the Regions and*

[13] Of interest as to the rights of third parties on consultation, is the case of *R (on the application of Wainwright) v Richmond upon Thames London Borough Council* Unreported, High Court, 11 April 2001, where the court, on the application on one concerned resident, quashed a decision of a public authority in a transport-related case because there had been a substantial failure to comply with a duty to consult.

*another* [2003] EWCA Civ 346, Court of Appeal[14]; and *Wandsworth London Borough Council v Secretary of State for Transport, Local Government and the Regions* [2003] All ER (D) 250 (Feb), Court of Appeal, for recent examples where the Secretary of State has disagreed and not followed the recommendations of the Inspectors.

An alternative scenario is where the application for planning permission is made to the planning authority, but the application is considered to have a greater significance than normal because it raises question of policy or construction of statutory instruments with implications for other cases. In such circumstances the Secretary of State may "call in" the application, and cause the matter to be determined through the intervention of an Inspector, who will then make a recommendation to the Secretary of State.

There are three forms that such appeals (including and/or "call ins") may take (i) in writing; (ii) by way of a "hearing", which is a very informal, round-the-table process; and (iii) an inquiry.

The conduct of the process/hearing is in the hands of the Inspector. However, that conduct is to be fair and open. At Appendix 6-8 are the relevant Statutory Instruments related to these types of appeals in planning cases.

In each case third parties are entitled in fact to make written submissions to the Inspector. Also, third parties are entitled to be heard when a public hearing of some sort takes place. Although the legal basis for such entitlement to participate was considered to be based on a right to participate where there had been prior involvement in the consultation process, the entitlement may now be considered to rest (subject to compliance with the threshold or qualification tests therein) on the ECHR, Articles 8, Protocol 1, Article 1 coupled with Article 6(1), given effect domestically through the Human Rights Act 1998. In practice, on such appeals any third party wishing to be heard is given the opportunity to make submissions. Reported cases where it is held that there has been a breach of the right to participate are very rare – see, for one example, *R v Secretary of Sate for the Environment, ex parte Slot* [1998] 4 Planning Law Reports 1.

In fact, the majority of cases where there might be some form of representation of local groups or environmental NGOs are dealt with in these unreported appeals within the administrative system, to the Secretary of State, but dealt with by the Planning Inspectorate.

That entity deals with about 14,000 land use appeals every year, but these are predominantly appeals against refusals to grant planning permission. There are no comprehensive statistics even about the composition of such appeals, nor about who or what entities attend to raise observations or objections.

However, it is estimated that the Planning Inspectorate handles about 200-230 environmental appeals a year, but the majority in recent years (c. 260-270) have tended to be technical and industry specific, for example, appeals against the grant,

[14] In fact, in this case the Courts overturned the decision of the Secretary of State as legally flawed and remitted the case for re-consideration.

refusal or modification of water discharge consents. Of the others, a small number deal with waste management appeals, IPPC permits, water abstraction licences, and anti-pollution works. Of the 260-270 or so, some 30% are withdrawn or ruled out of time.

The number of actual decisions from the Planning Inspectorate is low. In the year April 2002-2003, only some 8 decisions were issued, although the average is about 20. One reason for this is that the Planning Inspectorate also aims to get parties to seek resolution if possible.

Potentially structural problems arise from the fact that (i) Planning Inspectorate decisions are not legally binding on any other inspector, nor on the Secretary of State in any subsequent case – see *Granchester Retail Park plc v First Secretary of State* [2003] EWHC 92 (Admin), 15 January 2003, although an earlier decision could constitute a material consideration that the Inspector would have to take into account in deciding the matter then currently before him (see *R v Secretary of State for the Environment, and Chiltern District Council, ex parte David Baber* [1996] Journal of Planning Law 1034).

### 2.2.5 Third party rights on environmental licence appeals from decisions of the regulatory authorities

These appeals may follow the same process as with planning appeals. However, the procedural rules are those adapted from the rules applicable to planning appeals. Appendix 9 sets out the relevant rules from the Planning Inspectorate.

As with planning appeals, third parties are entitled to make written submissions, and, as applicable, attend and make representations at any public hearing or inquiry.

### 2.2.6 The right to a public hearing/inquiry

However, there is no general right to a public inquiry, although it has been said by the Court of Appeal (see *R (Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] 1 Weekly Law Reports 2515) (albeit with regard to the initial stage going to determination of the decision to grant planning permission) that:

> *"If, in short, the court were satisfied that exceptionally, on the facts of a particular case, the local planning authority had acted unfairly or unreasonably in denying an objector any or any sufficient oral hearing, the court would quash the decision and require such a hearing to be given."*.

### 2.2.7 Third party rights on statutory appeals/applications to the courts

As Appendix 5 indicates there is a variety of instances where appeals/applications against decisions of public authorities on matters affecting the environment are expressly provided for by statute. Illustrations only are given of the position of third parties in such cases.

For example, under the Town and Country Planning Act 1990, section 287 (relating to applications to the court against adoption of a minerals local plan or waste local plan) application may be made by a "person aggrieved". The courts have held in the circumstances of this section that a liberal construction should be given to this term - *Times Investment Ltd v Secretary of State for the Environment and another* [1990] 3 Planning Law Reports 111, Court of Appeal. As a result, it is considered that any person who had attended and objected at an earlier public inquiry would have standing – see *Turner v Secretary of State for the Environment* (1973) 28 Planning and Compensation Reports 123, High Court. This would thus permit environmental groups to assert that they were entitled to be heard on such applications to the Court, although no such case has been located.

However, under section 289 of the same Act, the rights of standing on appeals in relation to enforcement notices (for breach of planning law) are more restricted, and limited to the appellant (ie person on whom an enforcement notice was served), the local planning authority or any other person having an interest in the land in question. Interestingly, in *Wycombe District Council v Secretary of State for the Environment and Another* (25 February 1992) the High Court refused locus to the local authority which wished to pursue a case of illegality on procedural grounds, namely that a local resident living in land adjacent to that in question had not had an opportunity to be heard at the prior public inquiry. The court stated that third parties in fact have no right to be heard on such inquiries relating to this section of this Act (note that this is before the adoption of the Human Rights Act 1998 in any event), that the person in question had in fact had a chance to be heard and had not exercised it in time, but had still had the opportunity to have his views taken into account, but that as the person in question had not had any identifiable rights interfered with, it was an improper use of the local authority's powers to bring the proceedings.

Of general interest, too, is the case of *Marriott v Secretary of State for the Environment, Transport and Regions* of 10 October 2000, High Court. There the court considered rights under the statutory appeal process against designation of pathways as roads for all users. The relevant provision provides for any "person who is aggrieved" by the order made to apply to the court for the order to be quashed. "Persons aggrieved" include those who raised objections at an earlier public inquiry – see *Marriot*. However, it can also include persons not at the Inquiry but whose rights may have been infringed because of changes of procedure or scope of the inquiry without notice. It is unclear that an environmental group which had not attended the inquiry would have standing, but the possibility cannot be excluded (see above as to construction of "person aggrieved").

<u>Conclusions as to third party rights of access under statutory appeals</u>

Generally, these are more restricted than with regard to judicial review. However, the approach of the courts, unless constrained by specific statutory provisions, is still to allow access to those likely to have a sufficient interest in the subject matter in issue.

### 2.2.8 Third party rights of "access" to the criminal courts in environmental matters

As indicated above, in principle, any person may bring criminal proceedings, provided that a power to prosecute is not reserved to a particular public official, including in relation to environmental matters – see, for example, *R v Environment Agency, Ex parte Dockgrange Limited and Another* The Times 21 June 1997, High Court. This includes power to prosecute in relation to environmental matters where there is not a personal private law interest - see *Cutts v Southern Water Authority and another*, Unreported, 31 January 1990, Court of Appeal (as to prosecution for breach of legislation protecting salmon).

In principle, a successful public interest criminal prosecutor is entitled to receive his costs out of central funds (the state central budget fund that pays generally the costs of successful defendants) – see *R v Feltham Justices ex parte Tesco Stores Limited* Unreported, 11 March 1986, High Court.

There is no general provision for third party intervention in criminal cases to bring civil action-style claims for damages.

Sentencing guidelines have been drawn up by the Environmental Law Foundation, with the Magistrates Association, in relation to environmental cases where environmental damage is caused – see *Costing the Earth*. This publication does not seem to have been adopted formally by the court system, nor appear to be generally freely available. Its status for sentencing purposes appears opaque.

## 2.3 Standing in criminal cases and environmental matters

As indicated above, it is open to any person to take a criminal prosecution. However, it is rare that individuals do so – see above for the *Cutts* decision for an example.

The costs of a private prosecutor may be ordered by the courts to be paid out of the state central funds budget, and where an application is made for such payment of costs, it is normally to be made unless there is good reason not to do so.

Most environmental offences are prosecuted by public authorities, such as, the Crown Prosecution Service, the Environment Agency, Local Authorities, English Nature, the Drinking Water Inspectorate, Ports Authorities, and the Health and Safety Executive.

Environmental groups do not usually prosecute environmental offences.

However, against this, it should be understood that (i) generally, there is a large number of public prosecuting authorities, who are quite active in this area; and (ii) environmental matters that affect most people in their daily lives are prosecuted by way of statutory nuisance abatement orders and prosecutions for their breach.

There is a large number of statutory nuisance notices issued every year – some 14,700[15]. Of these some 3,000 are estimated to be served on trade and industry, with

[15] See the *Modernising Environmental Justice* Report for up-to-date figures.

some 135 of these going to appeal. There are some 3,000 prosecutions of statutory nuisance breaches every year.[16]

[16] There is an extremely wide-ranging and interesting review currently underway and which is due to report provisional findings in October 2003 on criminal environmental matters. This is part of the Environmental Justice Project Report, sponsored by the Department for the Environment, Food and Rural Affairs.

# 3 Discussion of barriers to access to justice

## 3.1 Potential hurdles to access to justice in environmental matters

### 3.1.1 The obligation to pay the costs of the other parties in judicial review proceedings if the application fails

In principle, in court cases, costs follow the event, although there is always a discretion as to any award of costs (CPR, Pt 44.3(2)). This "usual rule" has been applied so as to make costs orders against established environmental NGOs whose applications for judicial review have failed – see for example, *R (Greenpeace Ltd) v Secretary of State for the Environment, Food and Rural Affairs and another* [2002] 1 Weekly Law Reports 3304, Court of Appeal. It has also been applied against "ad hoc" environmental groups – *R v Secretary of State for the Environment and another, ex parte Kirkstall Valley Campaign Ltd* [1996] 3 All England Reports 304, High Court.[17] Note that it has been said by the Court of Appeal that the fact that a judicial review application of brought by a group of residents (acting as an action group) who are concerned with protection of the environment is not a good reason in itself not to award costs against them if they are unsuccessful in their application – *R v Bedfordshire County Council, ex parte O'Dell & Sons Ltd* Unreported, 29 October 1999, Court of Appeal.

It is possible that the courts will in fact make no order as to costs against an environmental organisation in certain cases where they consider that the application was in the public interest – *R v Secretary of State for the Environment, ex parte Greenpeace Ltd* [1994] 4 All England Reports 352. See, also *R v Swale Borough Council and Medway Ports Authority, ex parte Royal Society for the Protection of Birds* (1990) 2 Administrative Law Reports 790, where the court only provided for payment by the RSPB of the costs of the third party.

It is possible that the costs will reduce the costs to be borne otherwise by such groups on public interest grounds, but such orders may be regarded as "exceptional" – see *R (on the application of Friends of the Earth Ltd & another) v Secretary of State for the Environment, Food and Rural Affairs and others* [2001] EWCA Civ 1950, Court of Appeal:

> *"[5] We think there are two special features of this case. The first is that the public interest in this particular area, the area of public health and well-being, is obviously very great and very exceptional, and it is right that that public interest be borne clearly in mind and that all issues be properly examined in the light of it. Secondly, the appellants here, though they have failed before us, at least succeed on one important point of principle, the question as to whether ordinarily capital costs would fall to be brought into account, and they have*

[17] This case also illustrates that the courts do not make a distinction as concerns orders as to costs dependent on the legal form of the applicant in environmental cases.

*thereby corrected what we identify as an error in the main ground of decision below.*

*[6] We bear in mind that we are not asked to disturb, and do not disturb, the order for costs below which was against the applicants (the appellants before us) so that on any view they must bear not merely their own costs of the proceedings throughout, but also the costs they were ordered to pay the Secretary of State below. We do not think it right that they should be ordered to pay in addition the costs of the appeal.*

*[7] That, of course, is to be regarded as a highly exceptional course. It should not encourage public interest groups generally to suppose they will be immune from any adverse orders for costs on appeal, but we make none here."*

Practitioners in this area seem agreed that the usual rule of having to pay the costs of the other side in the event of losing a case is the single-most effective barrier to access to justice in environmental cases.

Costs are rarely awarded in the vast number of appeals that are determined at public hearings or public inquiries, such as go to the Planning Inspectorate for determination. However, they may be awarded against a party where it has behaved unreasonably causing extra costs to be incurred unnecessarily.

### 3.1.2 Restricted access to "pre-emptive" costs orders

1. It is possible, again in rare cases, in environmental (as in other) public interest litigation, to apply to the courts for a "pre-emptive" costs order to the effect that, if the application fails, the costs payable should be limited to a specific sum – see *R v London Borough of Hammersmith & Fulham ex parte Council for the Protection of Rural England London Branch (re: costs)* High Court, 26 October 1999, reiterating the position laid down in *R v Lord Chancellor ex parte Child Poverty Action Group* [1998] 2 All ER 755, which set out again the relevant criteria in such cases:

"***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." (emphasis added)*

An alternative, and potentially more liberal approach by the courts, may be seen in *R v Leicestershire County Council, ex parte Blackfordby & Boothorpe Action Group Ltd (2000),* Unreported, High Court[18], where the Judge ordered, on an application for security for costs against the environmental action group, that a more limited sum be provided. This had the effect, in practice, of capping the costs that were sought by the defendant to the judicial review proceedings. It is not know whether this example has been replicated in other cases.

### 3.1.3 Seeking an interim injunction where there is a requirement to give a cross-undertaking in damages

In principle, where any person, including environmental interest groups, seek an interim injunction from the courts on grounds of environmental protection, they should provide a cross-undertaking in damages. That is, they should undertake to the court that, if they are ultimately unsuccessful in their application, they will pay (and be able in fact to pay) damages shown to be suffered as a result of the interim injunction having been granted – see, by way of illustration, *R v Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds* [1995] Journal of Planning Law 842.

This factor is not always a barrier and interim injunctions have been granted in such environmental cases – see *R (on the application of Prokopp) v London Underground Limited and others* [2003] EWHC 960 (Admin), 2 May 2003, High Court.

It may also happen that the courts for example on a judicial review application will order the interim injunction without requiring a cross-undertaking or notwithstanding that the applicant is unlikely to be able to make good the undertaking if he loses where the environmental consequences are sufficiently serious – see *R v Durham County Council, ex parte Huddlestone* Unreported, 29 July 1999, High Court.[19]

However, the usual case is that a cross-undertaking in damages is required.

This requirement is not in itself a hurdle to access to justice in principle, but is a barrier to access to justice in particular cases as a matter of substantive result.

### 3.1.4 Restricted access to public legal assistance

Public legal Assistance is provided through the Legal Services Commission, and is available to individuals subject to a "means test" (ie, it is available depending on level of income). In practice, it is likely that only persons on state benefits may qualify. The vast majority of persons thus fall outside this provision of assistance.

The main benefits of legal assistance for the purposes of this review study are that (i) the assisted person does not have to pay for their own legal representation, and (ii) there is protection against an adverse costs order if the assisted person loses, as the adverse costs order can only be enforced against the assisted person with the

[18] Reported to the author by a barrister involved in the case.

[19] In fact in the latter case, after succeeding before the High Court, the developer undertook not to commence development when the case went to the Court of Appeal, where the developer lost.

permission of the court. That permission is very rarely granted, and usually only if the assisted person subsequently comes into an appropriately large sum of money.

The legal assistance guidelines make special provision for "public interest" litigation. That guidance, in common with the usual rules for legal assistance, required consideration whether other persons not eligible for legal assistance might not take the litigation instead, or might not make a contribution. In such cases, even where there were no other contribution in fact, it was likely that legal assistance would be refused. Following representations to the Legal Services Commission, and after due consultation, the Guidance now provides that legal assistance may be made available in such cases of "public interest" litigation, including environmental public interest. However, the actual provision of legal assistance to an assisted person may be made conditional on others, who may benefit from the grant of legal assistance, making a contribution to the costs involved – for example, members of a village opposed to the siting of a waste treatment plant at the edge of the village. If that contribution is not forthcoming, no legal assistance is provided.

Legal assistance is not available to corporate entities, so if protesters organise themselves into a company (for examples of which see above), no benefit in legal assistance terms is obtained.

In addition, public legal assistance is not available to persons who seek representation before hearing held by the Planning Inspectorate. As these hearings constitutes the highest number of cases where environmental interest groups are likely to wish to be heard, this represents a major lacuna in access to legal representation (and in fact also specialist technical advice) – see *R (on the application of Challenger) v Secretary of State for the Environment, Transport and the Regions,* Times, 15 June 2000.

### 3.1.5 Access to pro bono and similar representation

There are various systems for pro bono representation in England and Wales which may apply to environmental interest cases – for example, the Bar's Pro Bono Unit, the free assistance offered by the Environmental Law Foundation (offering free assistance in the years 1999-2002 to 2,319 queries, and in relation to which, some 668 inquiries were referred on to legal representatives (not all cases lead to free representation)); and ad hoc cases accepted to be run by lawyers for free. However, for obvious reasons, access to pro bono representation.

Although there are many layers who are prepared to act on a pro bono basis, this facility is clearly not available in every case. The costs of affording one's own legal representation thus remains a potential barrier to practical access to justice. In addition, the fact of obtaining pro bono representation does not prevent a court ordering the litigant to pay the costs of the other side if the "pro bono litigant" loses the case. Thus, pro bono representation is not in itself a full protection against adverse costs orders.

### 3.1.6 The disparate nature of environmental proceedings

The report above indicates the variety of cases concerning appeals against decisions regarding activities with potential impact on the environment (in particular, see

Appendix 5 to this report). This variety of cases means that it is problematic to third parties to understand what procedure is entailed. This is despite the fact that those who register objections are told of their option to have information concerning rights of appeal.

The *Modernising Environmental Justice* Report, with its suggestion for an Environmental Tribunal, would be able to provide a focus point for all such types of appeals, and a single point for information about the appeals process and rights of participation.

### 3.1.7 Difficulties in accessing environmental appeals and case reports

It is only relatively recently that the Administrative Court has started to put its cases on the web. However, not all cases are accessible, and go back only to 1996. See at http://www.courtservice.gov.uk/judgments/judg_home.htm. Even now, the number of cases accessible this way is limited to 200 at any one time. Clearly, the more recent cases only can be accessed in this fashion.

The Court of Appeal has started to put summaries of its cases on the web (http://www.lawreports.co.uk/ca-civ.htm), but there is no access to the full report of cases in this fashion.

All cases decided by the House of Lords are accessible in full at http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldjudgmt/ldjudgmt.htm, which is very helpful. However, these cases only go back to 14 November 1996.

Decisions from the Planning Inspectorate are not available as yet online, although this is planned. There is no simple or easily accessible and free manner to obtain copies of Decisions of the Planning Inspectorate. However, otherwise their website is very helpful – see at http://www.planning-inspectorate.gov.uk/pins/index.htm.

It is suggested that were all relevant court and tribunal decisions freely accessible for example via the web, this could lead to either individuals or groups considering to participate in environmental decisions that may have an effect on the environment in their vicinity. A focussed Environmental Tribunal, along the lines suggested by the *Modernising Environmental Justice* Report, could provide just such a single access website.

# 4 Cases Review

## 4.1 Analysis of the Case Review Results

The case review table (at Appendix 10 to this report) indicates the results of a review of available material concerning reported actions taken by environmental NGOs, citizen groupings or individuals where there is an environmental public or community interest. The vast majority of these cases are judicial review cases. No purely "civil" cases of relevance concerning environmental NGOs or groupings/individuals were identified. Such "civil" cases would involve parties acting for their "personal" interests rather than for "community interest" cases, as the "community interest" cases before the courts only arise by way of judicial review cases.

The other source of cases where there are potential issues of "access to justice" relate to matters dealt with by the Planning Inspectorate. Experience demonstrates that there is no barrier to attendance at such hearings by environmental NGOs, groupings or individuals who wish to make representations. As indicated above, there is no comprehensive system for the classification of appeals nor of decisions, and such decisions as there are, are not accessible in any generally-available systematic manner.

The focus of the case review therefore has been on recorded cases. The total number of such recorded cases for the period 1995-2001is 110. This is an average of some 18/19 cases a year.

However, there are some 21 of these cases recorded as started at the High Court which went to the Court of Appeal, and two of such cases which went to the House of Lords. If these cases are "discounted", then some 87 cases were initiated or finally determined within the 6 year review period. This gives an average of some 14.5 cases each year.

These figures appear low, but they disguise (i) the participation of individuals or environmental groups which make representations to the relevant authorities before initial decisions are taken; (ii) the attendance of such persons before administrative appeals such as concern environmental licences; (iii) the cases where the environmental interest is pursued by the relevant public authority which itself takes judicial review proceedings; (iv) the large numbers of statutory nuisance actions (some 14,700 per annum), which are predominantly in relation to private persons (11,700). but still involve a significant number concerning trade and industry (3,000), but which may replace the environmental actions taken in other countries as regards interference by nuisance-type activities.

The total number of cases by category of applicant/intervenor is set out at Table 1.

**Table 1**

| Category of Applicant/Intervenor | Case numbers | Total number of cases |
|---|---|---|
| Established environmental NGO[20] | 1, 2, 3, 7, 15, 21, 35, 36, 40, 45, 48, 63, 64, 67, 68, 70, 71, 72, 73, 78, 88, 96, 99, 106, 108 | 25 |
| Ad hoc identifiable NGO/environmental grouping[21] | 13, 14, 27, 28, 30, 37, 42, 43, 50, 51, 52, 55, 66, 74, 77, 81, 84, 90, 93, 104 | 20 |
| Ad hoc collection of individuals[22] | 25, 26, 31, 32, 33, 41, 44, 46, 47, 54, 58, 62, 87, 91, 98, 100, 101, 103, 109, 110 | 21 |
| Individual Applicants, reflecting interests of the community[23] | 4, 5, 8, 9, 10, 11, 12, 16, 17, 18, 19, 23, 29, 38, 39, 56, 59, 60, 61, 65, 69, 75, 76, 79, 80, 82, 83, 86, 89, 92, 94, 95, 97, 102, 107 | 34 |
| Individual applicants, but defending community interests[24] | 6, 20, 22, 24, 49, 53, 57, 85 | 8 |
| Other[25] | 34, 105 | 2 |
| | | **Total - 110** |

These cases can be identified as affecting various subject areas, as set out in Table 2. The cases are classified according to what was considered to be the dominant issue in the case ruled upon.

20 This category includes NGOs like Greenpeace Ltd, Friends of the Earth Ltd.

21 This category includes groups such as single issue campaign groups, or unincorporated associations of individuals and/or companies – eg Surfers Against Sewage, the Crystal palace Campaign.

22 This category includes applicants who have stated that they represent a collective community interest, such as other residents in a village.

23 This category includes individual applicants, where the case reflects ain interest of a community-wide concern, such as a parent taken legal action to reduce air pollution, but suing on behalf of his/her own children.

24 This category includes individual applicants who seek top defend environmental public interests, such as protecting against radio mast radiation.

25 This category includes cases where a public environmental interest was engaged – for example, a complaint of air pollution, but where no private property interest was involved and there was no stated community interest.

**Table 2**

| Subject Area | Case numbers | Total |
|---|---|---|
| Air | 8, 18, 103, 105 | 4 |
| Costs | 66, 68 | 2 |
| EIA | 10, 11, 12, 13, 25, 26, 39, 41, 42, 44, 46, 52, 54, 56, 60, 63, 64, 69, 70, 71, 72, 75, 76, 77, 84, 86, 87, 90, 91, 92, 94, 101, 104, 107 | 34 |
| Environmental Information | 7, 50, 51, 55, 58, 59 | 6 |
| GMO | 49 | 1 |
| Habitats | 1, 15, 21, 32, 36, 37, 48, 67 | 8 |
| IPC/IPPC | 109 | 1 |
| Land | 17, 27, 30, 35, 73, 78, 80, 96 | 8 |
| Nuclear | 98, 106, 108 | 3 |
| Nuisance | 16 | 1 |
| Public Participation | 14, 19, 20, 22, 24, 28, 29, 31, 33, 38, 43, 61, 74, 79, 81, 93, 99, 100, 110 | 19 |
| Public Health | 6, 53, 57, 95 | 4 |
| Waste | 4, 9, 23, 34, 40, 45, 47, 65, 83, 85, 88, 89, 97, 102 | 14 |
| Water | 2, 3, 5, 62, 82 | 5 |
| | | **Total - 110** |

**Table 3**

| Category of Environmental Applicant/Intervenor | Case numbers | AIR | COST | EIA | Env. Info. | GMO | Hab-itats | IP/P/C | Land | Nuclear | Nuis-ance | PubPart | P. Health | Waste | Water | Total No. of cases |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Established environmental NGO | 1, 2, 3, 7, 15, 21, 35, 36, 40, 45, 48, 63, 64, 67, 68, 70, 71, 72, 73, 78, 88, 96, 106, 108 | - | 1 | 5 | 1 | - | 6 | - | 4 | 3 | - | 1 | - | 3 | 2 | 25 |
| Ad hoc identifiable NGO/environmental grouping | 13, 14, 27, 28, 30, 37, 42, 43, 50, 51, 52, 55, 66, 74, 77, 81, 84, 90, 93, 104 | - | 1 | 7 | 3 | - | 1 | - | 2 | - | - | 6 | - | - | - | 20 |
| Ad hoc collection of individuals | 25, 26, 31, 32, 33, 41, 44, 46, 47, 54, 58, 62, 87, 91, 98, 100, 101, 103, 109, 110 | 1 | - | 9 | 1 | - | 1 | 1 | - | - | - | 4 | - | 1 | 1 | 21 |
| Individual Applicants, reflecting interests of the community | 4, 5, 8, 9, 10, 11, 12, 16, 17, 18, 19, 23, 29, 38, 39, 56, 59, 60, 61, 65, 69, 75, 76, 79, 80, 82, 83, 86, 89, 92, 94, 95, 97, 102, 107 | 2 | - | 13 | 1 | - | - | - | 2 | - | 1 | 5 | 1 | 8 | 2 | 34 |
| Individual applicants, but seeking to defend community interests | 6, 20, 22, 24, 49, 53, 57, 85 | - | - | - | - | 1 | - | - | - | - | - | 3 | 3 | 1 | - | 8 |
| Other | 34, 105 | 1 | - | - | - | - | - | - | - | - | - | - | - | 1 | - | 2 |
| **Total** | | **4** | **2** | **34** | **6** | **1** | **8** | **1** | **8** | **3** | **1** | **19** | **4** | **14** | **5** | **- 110** |

Table 3 indicates which category of participant took which number of category of case. It shows that EIAs were the main target for most categories, that for established NGOs being Habitats by only one action, and that concerning public participation being the second. However, it is interesting that established NGOs were only involved in one case concerning public participation issues.

# 5 Conclusions

## 5.1 Conclusions

A number of conclusions as regards access to justice in environmental matters for environmental citizen and other groups relevant to England and Wales can be drawn from the material set out above.

A. The question of formal procedural barriers to standing in environmental matters

1. In procedural terms there is no material legal barrier to standing as a litigant in judicial review proceedings, in environmental appeals within the system of public administration (eg appeals handled by the Planning Inspectorate) or in criminal prosecutions;
2. In procedural terms there is no material legal barrier to standing as a third party intervenor in judicial review proceedings or in environmental appeals within the system of public administration (eg appeals handled by the Planning Inspectorate);
3. In procedural terms, there may be barriers to standing as a third party intervenor in statutory environmental appeals, but such barriers as exist can be overcome by pursuing judicial review proceedings;

B. The question of systemic or substantive barriers to access to justice

1. The risk of adverse costs orders is low and does not act as a practical or effective barrier to access in terms of representation by attendance before administrative environmental appeals;
2. The risk of adverse costs orders is real and acts as a practical and effective barrier to access to justice before the courts;
3. The opportunity to reduce the risk by way of adverse costs orders is slight (see above as to "pre-emptive costs orders" and as to the chance for no or lesser adverse costs orders in environmental public interest litigation);
4. Reduced legal assistance provision in environmental litigation, although alleviated by recent Guidelines and procedures, and although also alleviated by pro bono representation, is still a real and effective barrier to access to justice before the courts;
5. The lack of a right to public inquiries/hearings in environmental matters may have the result of reducing access to justice as decision-making may be, or be seen to be, operating behind closed doors;
6. The lack of a right to legal representation in public inquiries/hearings is able to act as a barrier to an effective right of access (likewise with regard to a lack of a right to access to scientific representation in complex cases);

7. The obligation, usually imposed, to give a cross-undertaking in damages when seeking an interim injunction in environmental cases, may prove a barrier to access to substantive justice;
8. The less-than-total and free access to relevant court and administrative appeal decisions is a barrier to effective access to procedural and/or substantive justice especially for individual citizens and ad hoc citizen groups in environmental matters;
9. The disparate routes whereby environmental matters are determined may act as a barrier to effective access to justice as there is no single clear and obvious centre for information as to rights to attend and to make representations and/or as to costs implications (this barrier is heightened by the jurisdictional complexities concerning such disparate routes).

# United Kingdom Case Study – R.v. Secretary of State for Trade and Industry, Ex Parte Greenpeace LTD [2000] Environmental Law Reports 221

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# 1 Introduction

This case concerned an application by Greenpeace Ltd for judicial review of the legality of the regime intended to be applied by the Secretary of State for Trade and Industry in deciding whether to grant, and if so on what terms, licences for the exploration for oil and gas in a part of the North East Atlantic known as the Atlantic Frontier. Such licences are awarded after the Secretary of State has identified which specific areas should be the subject of applications for and the grant of such licences. Invitations to apply for such licences take place on an occasional basis. Each set of invitations for applications for the exploration licences is called a "Round".

Greenpeace had earlier attempted to judicially review the legal regime applied by the Secretary of State in the course of the Seventeenth Round. That application had been dismissed at a "threshold" or first stage point, on grounds of delay, and the Court refused to exercise its discretion to permit the application to be brought out of time. No real examination of the merits was undertaken by the court at that point in time.

When the areas to be subject to applications for exploration licences were subsequently announced for the Nineteenth Round, Greenpeace sought to apply for judicial review of the legal regime intended to be adopted in assessing those applications, in deciding to award any such licences and as to what conditions to be imposed in any licences granted.

The key legal issue raised by Greenpeace was whether the relevant legal regime in the UK for assessing the applications for and the grant of such licences, and which was intended to be applied in relation to the same by the Secretary of State in the Nineteenth Round, was in conformity with EC law. The UK Regulations relevant were those adopted to implement the Habitats Directive (Council Directive 92/43/EEC). However, they did not apply to areas outside the 12 mile territorial seas zone around the UK.

Greenpeace contended that the Habitats Directive applied to all areas of "EC territory" and that "EC territory" for these purposes extended up to 200 miles from baselines, another 188 miles beyond the seaward limits of the UK territorial seas.

Greenpeace also contended that the Habitats Directive was intended to apply to lophelia pertusa reefs, and to cetaceans, which were to be found "in their natural range" within the Atlantic Frontier areas in question.

The Secretary of State, supported by ten oil companies, contended that the application was again not brought in timely fashion, that is, that Greenpeace was guilty of delay; and so should be dismissed. They said that the judicial review process should therefore be stopped at the first stage.

If that were not accepted, their position was that in any event the Habitats Directive did not extend, for the UK, beyond the 12 mile territorial sea zone. The Secretary of State and the oil companies accepted that lophelia pertusa could form reefs and could be within the Habitats Directive otherwise, but denied that cetaceans were within their "natural range" in the Atlantic Frontier areas in question.

The case is of particular interest because of the approach of the court:

(i) to standing in applications for judicial review by environmental NGOs;

(ii) to the process required for legally and factually complex judicial review applications;

(iii) to "second" applications for judicial review on the same subject matter;

(iv) to consider extensively international and EC legal instruments in construing domestic legislation;

(v) to the question of delay in bringing judicial review proceedings;

(vi) to the exercise of the court's discretion to extend time for out-of-time judicial review applications;

(vii) to a purposive construction of EC legislation.

## 2 Setting in which the case took place

1.

**1. General background to applications for permission to apply for judicial review:** The case concerned an application for permission to apply for judicial review brought before the changes in the Civil Procedural Rules in April 1999, and before the coming into force of the Human Rights Act 1998. Applications for judicial review are brought before the High Court, acting as a "first instance" court.

Applications for judicial review involve a two-stage process in English law: the first stage involves the application for permission to apply, when the court acts as a filter against obviously unmeritorious or vexatious applications. Usually the review of the merits are addressed superficially or after a "quick perusal", but applications should only be rejected at this stage where it is clear that there are no relevant merits in the application. Also at the first stage, challenges to the bringing of the application may be raised, such as asserting that the Applicant lack relevant interest in making the application, that the application be rejected for delay, or to raise objections to permission being granted notwithstanding any determined delay. At the second stage, the legal and factual merits of the case are examined in detail, and the case ruled on substantively.

The courts had hitherto generally adopted a strict approach in requiring all such applications in any event to be brought "promptly" and at least "within three months" after the adoption of the relevant public authority challenged. The justification for this was often given as upholding "sound administration". The position was further complicated when third party interests were involved, as they were in this case. There was also generally a degree of confusion as to what factors determined identification of the relevant act sought to be challenged. When one sought to challenge the legality of specific decisions based on allegedly unlawful secondary legislation, the courts often construed the challenges to the decisions as "disguised" attempts to challenge the legality of the underlying legislation, and hence, were more likely to consider that an application should fail for delay.

**2. Introduction to the process adopted by the court in this case:** This case is interesting because the court exercised its discretion not to operate the usual process of two separate stages, but to combine the (second-stage) extremely detailed examination of and the making of a substantive ruling in principle on the factual and legal merits with and for the purposes of its consideration of the (first stage) review of whether to grant permission. The latter process included consideration of whether there had been delay in bringing the application, and if so, whether the court should exercise its discretion and grant permission notwithstanding any judicially determined delay, and so give effect in legal fact to the substantive determinations on fact and law.

**3. The parties in the case:** The parties involved in the case, which concerned an application for permission to bring judicial review proceedings in relation to anticipated decisions of the Secretary of State for Trade and Industry to award, in a "Nineteenth Round", licences to explore for oil and gas in an area of the North East

Atlantic known as the "Atlantic Frontier", and for declarations as indicated below, were:

(i) **The Applicant:** Greenpeace Limited ("Greenpeace"), the corporate identity of Greenpeace UK, itself part of Greenpeace International;

(ii) **The Respondent:** The Secretary of State for Trade and Industry ("the Secretary of State"), the nominal person in whose name the Department of State acts, and whose (potential) decisions to award the licences were in issue;

(iii) **The Intervenors:** Ten Oil and Gas Companies whose interests as potential applicants for and recipients of such licences were engaged ("the Oil Companies"). The Oil Companies applied for and were granted (in the face of neutrality of Greenpeace and the Secretary of State) the formal status as Respondents.

2. The actions which were the subject of the legal proceedings were:

(iv) **the considerations relevant to the award, and the potential decisions** of the Secretary of State actually to award, licences to explore for oil and gas in the Atlantic Frontier area; and to that end

(v) the **declaration** sought by Greenpeace as to the illegality of the award of any such licences based on the then applicable legal regime and the matters to be taken into account in terms of environmental impact prior to and so informing any grant of such licences and the terms on which any such licences might be awarded; and hence also, within the scope of the same,

(vi) the **declaration** sought by Greenpeace as to what the legal regime should require as to the relevant matters to be taken into account as far as potential impact of the environment was concerned as regards the decision to grant, and if so, on what terms, any such licences.

3. The reasons why the parties involved were present before the Court were:

(vii) as regards *Greenpeace* – to ensure that any decisions to award any such licences (and if so the terms of such licences) were in accordance with the proper legal regime for the protection of natural habitats and for the protection of flora and fauna under Council Directive 92/43/EEC ("the Habitats Directive"), and in particular to ensure that the UK implementing Regulations applied throughout the whole area of continental shelf and sea-bed and superjacent waters within and up to the 200 mile

boundary of the UK's Exclusive Fishing Zone ("EFZ"); and to that end, to obtain declarations as to the same[1];

(viii) as regards *the Secretary of State* – his presence was required as he was the Respondent to the proceedings and necessarily therefore before the Court. The interests of the Secretary of State were (a) to challenge the bringing of the judicial review proceedings because of delay; and (b) if not so able to prevent the judicial review being allowed to be brought, to uphold the legal regime then having been and intended to be applied in relation to the future decisions to award such licences and as regards the terms of such licences awarded, and in particular to uphold the then applicable regime applying the Habitats Directive only to the land mass of the UK and at most up to the limits of the territorial sea, namely, up to 12 miles from the UK's baselines;

(ix) as regards the *Oil Companies* - they were present to aim to protect their interests in preserving the manner in which the licences were awarded and the terms on which licences were awarded. Their specific interests in being present, and for this purpose their wish to be registered as Respondents, were as with those of the Secretary of State under items (a) and (b) above.

4. As regards the question of previous history of the case, and points of legal principle or precedent:

(x) there had been a previous application by Greenpeace for permission to bring judicial review proceedings of such decisions to award licences in the Atlantic Frontier, in the previous Seventeenth Round, which had failed (*R v Secretary of State for Trade and Industry , ex p Greenpeace* [1998] Environmental Law Reports, page 415, High Court decision);

(xi) in that case, the Court had not had (because it considered the same not appropriate on applications for permission to apply for judicial review (as opposed to a consideration of the merits of the case once permission had been granted)) full regard to the issues of law, the legal arguments for Greenpeace were not set out as fully as in the present case, it was held that there had been delay, and because of that, and the scant regard to the legal arguments or factual merits of the case, the application for permission was refused;

[1] It might also be said that Greenpeace's ultimate objective in bringing the proceedings was to have the grant of any such licences for the Atlantic Frontier ruled unlawful.

(xii) points of legal principle that emerged from the previous ruling related to:

(a) what amounts to a substantive act or decision for the purpose of counting time for the bringing of judicial review proceedings;

(b) the date from when time should be regarded to run for the purposes of bringing judicial review proceedings;

(c) the time within which judicial review proceedings should be brought, in particular, whether "within three months" of the act or decision sought o be challenged and/or "in any event, promptly"; and

(d) as regards the obligation of "public interest plaintiffs" in respect of "public interest litigation" to bring judicial review proceedings in timely fashion and that "delay will be tolerated much less readily in public interest litigation"

(e) that the "public interest" considerations (in the absence of a detailed examination of the merits of the case) as to whether nevertheless to allow such applications to be made "out of time" came down in favour of not extending time because of the need for particular promptitude by "public interest" applicants in such "public interest" litigation.

5. As to the implications of the instant case for groups of members of the public or the public at large, the implications of the instant case were:

(xiii) underlining the fact that where applications for permission to apply for judicial review are made by established [environmental] groups it is less likely that the courts will consider of their own motion in any detailed whether "locus standi" has positively been made out in the particular case[2];

(xiv) in like vein, in such cases, challenges to the "locus" of such groups are likely to be less frequent (as in fact can be seen to be the case);

(xv) and hence, in the event of a challenge to "locus" on such applications by such groups, it is less likely that a court will accept the challenge and prevent the application being made for lack of sufficient interest;

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[2] The courts must in legal fact always satisfy themselves that the "sufficient interest" test has been met in any judicial review application. It is not for the parties to confer jurisdiction by consent – see for example *R v Secretary of State for the Environment, ex parte Friends of the Earth Ltd* [1994] 2 Comon Market Law reports 760, Court of Appeal (applying *R v Secretary of State for Social Services, ex parte Child Poverty Action Group*, [1990] 2 Queen's Bench, 540, High Court).

(xvi) the courts are not likely to impose more stringent or different rules as to the promptitude of applications for judicial review taken in "public interest litigation" by "public interest plaintiffs", but should adopt the same approach to consideration of such applications without such regard to the nature of the applicant;

(xvii) in such cases, the courts may be readier to embark on a more detailed examination of the merits of the case, thus influencing the weight to be given to them for the purposes of deciding whether, if necessary, to extend time so as to allow the application to be made, and so be more willing to consider extending time and allowing the application to be made[3]; and

(xviii) in fact, by way of a partial influence of this case on future events, the courts have now adopted a more legally certain rule for assessing from when time starts to run for the purpose of considering whether an application is made in time (doubting thus the former requirement that in any event it was necessary to apply in any event "promptly"), and also and thus providing certainty as to how long an applicant has before making the application – see R (on the application of Burkett and another) v Hammersmith and Fulham London Borough Council [2002] 1 Weekly Law Reports 1593, House of Lords)4.

[3] This reflects, too, the position of the courts generally on standing, that the stronger the argument that there has been an abuse of public power, the more likely the court is to permit the application for judicial review to be brought, and the less likely it is to prevent it being made on grounds of "standing" of the applicant.

[4] The House of Lords said, inter alia, legal policy favoured simplicity and certainty, rather than complexity and uncertainty; that in public law the emphasis should be on substance not form, that uncertainty in public law could lead to a citizen being deprived of the right to challenge an undoubted abuse of power, where the challenge might involve not only individual rights but also community interests.

# 3 Environmental Effectiveness

1. The environmental factual matters in issues in the case were:

(i) whether there was evidence to show that the natural habitats of community interests (reefs of lophelia pertusa) were likely to be found in those areas of the UK continental shelf which the Secretary of State intended to offer for oil exploration in the Nineteenth Round or were likely to be affected by licensed activities in those areas

(ii) whether, therefore, lophelia pertusa was a reef-forming coral;

(iii) whether there was credible evidence of likely harm to lophelia pertusa from drilling and exploration operations off-shore;

(iv) whether cetaceans existed "in their natural range" in the waters of the Atlantic Frontier;

(v) whether there was credible evidence that harm can be caused to cetaceans by a variety of aspects of oil exploration and production.

The answers of the court to the above issues were:

(i) yes. The evidence put forward by Greenpeace included evidence from Government sources, and the Government effectively conceded this point;

(ii) yes. Situation as to evidential proof, as with (i);

(iii) yes. The court had regard to evidence to this effect put forward by Greenpeace and considered it "reasoned and specific". Neither the Secretary of State nor the Oil Companies responded on this point;

(iv) yes. The court considered that, on the evidence before it, the matter was "beyond dispute";

(v) yes. The court was persuaded of this by the evidence and materials put forward by Greenpeace, and considered that there was "no real evidence to the contrary" before it.

2. As regards the relevant legal issues in the case concerning the standing of Greenpeace, and other relevant procedural issues:

(vi) the Court noted that the Applicant was "a well known campaigning body, the prime object of which is relates to the protection of the natural environment". The court went on "Its legal standing to bring proceedings such as the present application is well established."

(vii) the other procedural issues related to the timing for bringing such applications, and are identified at paragraphs 4 and 5 under Section 1 above.

3. As regards a description of the substantive principles or rules of law relating to the environmental issues in issue in the case:

(viii) These were set out clearly in the case, based on the list from Greenpeace, as:

1. Does the geographical reach of Articles 4 and 12 of the Habitats Directive extend beyond a Member State's land, internal and territorial waters, to apply to areas over which a Member State exercises sovereign rights, viz the continental shelf and superjacent waters? This included a consideration of the proper construction in the Habitats Directive of the term “territory”.
2. If so, do those provisions of the Habitats Directive apply to the area of the UK continental shelf which the Secretary of State intended to offer for oil exploration in the Nineteenth Round?
3. In forming his proposals for the Nineteenth Round, had the Secretary of State complied with the requirements of the Habitats Directive?
4. Had the Government correctly transposed the requirements of Article 12 to the protected species within any waters over which it has sovereignty or exercises sovereign rights?
5. Should Greenpeace be refused permission to apply for judicial review or be refused the relief which it seeks on the basis of delay?

(ix) For the purposes of reaching its determination on these issues the court had regard to the following legal documents:

<u>International Law</u>:

(a) the United Nations Convention on Law of the Sea;

(b) the Convention on the Conservation of Migratory Species of Wild Animals of 1979 (the Bonn Convention);

(c) the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas of 1991 (ASCOBANS);

(d) the Biodiversity Convention of 1992;

(e) the Convention on the Protection of the Marine Environment of the North Sea of 1992 (the OSPAR Convention;

EC Law:

(f) the EC Treaty, especially Article 174;

(g) the Habitats Directive 92/43/EEC;

(h) Conservation of Wild Birds (79/409/EEC

(i) Council Directive on the Transfer of Undertakings 77/187/EEC;

(j) Council Directive 85/337/EEC, as amended by Council Directive 97/11/EEC on environmental impact assessment;

(k) Directive 90/531/EEC concerns public procurement procedures in the water, energy, transport and telecommunications sectors;

(l) a Commission Communication on Fisheries Management and Nature Conservation in the Marine Environment, addressed to the Council and the European Parliament (COM (1999) 363).

(m) Opinion of the Council Legal Service in May 1998 in the context of a proposed Directive relating to the reduction of the sulphur content of certain liquid fuels;

(n) various ECJ rulings;

UK Law:

(o) The Whaling Industry (Regulation) Act 1934

(p) the Continental Shelf Act 1964,

(q) the Fishery Limits Act 1976;

(r) Food and Environmental Protection Act 1985

(s) the Environmental Protection Act 1990

(t) the Transfer of Undertakings (Protection of Employment) Regulations 1981;

(u) the Conservation (Natural Habitats etc.)Regulations 1994;

(v) the Merchant Shipping (Oil Pollution Preparedness, Response and Cooperation Convention) Regulations 1998

(w) Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999;

(x) various UK court rulings.

4. The results of the case from the environmental points of view were significant, and include the following:

(x) ratification of the established willingness of the courts to accept standing on judicial review applications of this seriousness by well-established environmental action groups and environmental non-governmental groups;

(xi) endorsement of the willingness of the courts to be flexible in principle in their approach to serious environmental issues of fact and law (ie addressing the issues by combining the two stages of judicial review proceedings);

(xii) application of a flexibility in fact by the courts to permitting applications to be brought notwithstanding a determination of delay in bringing the application;

(xiii) acceptance of the factual environmental issues;

(xiv) determination that the Habitats Directive has effect as regards the UK (and implicitly for all other Member States) up to 200 miles from baselines and not only up to 12 miles from baselines, a significant territorial and environmental extension;

(xv) ready acceptance by the courts in such cases to have regard to international legal instruments for the purpose of construing EC legislation, and with it, domestic legislation; and

(xvi) with the above, and overall, a positive result from the environmental point of view.

5. An assessment of the effects of the decision as regards protection of the environmental matters in issue in the case gives the following results:

(xvii) in procedural terms specifically as regards locus standi – positive (see above);

(xviii) in procedural terms generally otherwise – positive (see further above, and rejection by the court of the "special position" of environmental action groups in "public interest litigation");

(xix) in factual terms – positive (see acceptance of the evidence submitted on behalf of Greenpeace);

(xx) in general substantive legal terms – positive. The court endorsed a greater integration of international environmental instruments with EC law, and thereby and therethrough, domestic law;

(xxi) in specific substantive legal terms – positive. The court determined the greater territorial reach of the Habitats Directive as regards EC Territory, and specifically with regard to waters superjacent to continental shelf areas up to 200 miles from baselines.[5]

[5] Note, however, that the court did not accept Greenpeace's submissions with regard to the legal position concerning cetaceans.

# 4 A consideration of the legal or "democratic" aspects of the case

1. As assessment of the decision as regards the correct application of the relevant procedural and substantive law:

(i) in terms of the determination of legal standing – the ruling was correct. Standing is an assessment generally accepted to be one of fact and law and not an act of "discretion" (*R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, House of Lords; *R v North West Leicestershire District Council, ex parte Moses* Unreported, 19 September 1999, High Court) and this case endorsed a development of some years whereby the courts have adopted generally a liberal approach to standing, coupled with an approach that public interest considerations favour testing the legality of executive power[6]. Thus the courts have for long accepted that groups of persons can pass the hurdle for any application for judicial review of the need to be able to show a "sufficient interest" in the decision or act challenged and in the remedy sought (see for recent clear endorsement of this, in addition to the Greenpeace case itself, *R v Ministry of Agriculture, Fisheries and Food, ex parte British Pig Industry Support Group* [2000] European Law Reports 724, High Court). Further, as regards groups as well established as Greenpeace, the fact of having standing on such applications seems simply to be accepted as established law (see further above);

(ii) in terms of the determination of the factual matters in issue, the decision correctly applied the relevant rules as to proof. Where there is otherwise credible evidence in support of a contention from one party, the courts should accept that evidence. The courts are not bound to accept as credible evidence from one party which is not specifically contested by another party;

(iii) in terms of the determination of the substantive law, the decision was correct. There was a genuinely open question whether "EC territory" was limited to the classic definitions of "territory" in international law, namely, land mass and seaward physical continuous extensions of that landmass (ie the physical continental shelf) and territorial waters, or whether it had its own autonomous meaning, which included the waters superjacent to the physical continental shelf. The court decision supports the latter construction. It may further be said to support a construction that Community law may be applicable to waters in areas in relation to which Member States claim "sovereign rights", even where there is not a subjacent physical continental shelf, as the court seemed to have been influenced by the 1982 UNCLOS which itself

[6] A very useful brief overview of the courts' approach to standing can be found in Judicial Review Handbook, Michael Fordham, 3rd Ed, Hart Publishing, Section 38.2, pp607-615. Consider also the statements cited above from the House of Lords in *Burkett's Case*.

provides for states to claim an Exclusive Economic Zone (including in relation to superjacent waters) up to 200 miles from baselines in any event. It might, however, with some justification, be said that the matter was not *acte claire* so that a reference to the ECJ should have been made. It may be thought telling that the Government did not seek to appeal the High Court's ruling. It is very probable that the ECJ would have come to the same conclusion as did the High Court Judge;

(iv) in terms of the decision as from when time started to run for making an application for judicial review, the situation is problematic. Greenpeace did not identify a specific date or act or decision it sought to challenge by the application. Rather it was challenging the whole process and legal regime. The Judge himself did not identify specifically what act or decision should be considered relevant for the purposes of deciding when time started to run for the obligation to act promptly in bringing the application. The Judge identified that time started to run sometime, but not specified when, after the ruling in the previous Greenpeace case, that being after a determination of the areas of the Atlantic Frontier that might be relevant for any final decisions to award such licences in question. In the face of an inability to identify or the lack of specificity on the part of Greenpeace in identifying an actual decision or act it sought specifically to challenge by the application, the Judge had to identify some starting date. It is arguable that the inability of the Judge to fix on a specific date means that the determination of delay was flawed. It might be said that the Judge should have considered a specific moment in time, and that with regard to specific relevant actions of the public authorities. However, and in the face of Greenpeace's own inability to identify a specific date itself, it is difficult to conclude that the Judge was incorrect as to identification of the relevant principles to apply or as to their application regarding this point;

(v) in terms of the extension of time, this act is one within the "discretion" of the court. It is considered that the decision was well within the scope of the discretion of the court, and that the discretion was properly exercised in a required judicial manner;

(vi) in terms of the decision to grant the declaration sought, this is again an act within the discretion of the court, but it is rare for a court to consider all other elements required for an application for judicial review as established but to refuse to proceed to grant the remedy sought (see for a recent example, however, where the court did not make the order because it considered the public authority would follow the court's substantive ruling anyway – *R (on the application of Barry) v Liverpool City Council* [2001] Local Government Reports 361, Court of Appeal; and one where the court considered there was no practical purpose in making any further order – *R v Southwark Coroner's Court*,

*ex parte Epsom Health Care NHS Trust* [1995] Crown Office Digest 92).

2. The implications of the case for the future as regards procedural issues concerning standing of environmental NGOs or citizen grouping are:

(i) to endorse the position of the courts as regards standing for well-established environmental groups;

(ii) to underline the flexible and generally open position of the courts as regards standing of such groupings of persons in such applications before the courts;

(iii) to allow again for the two-stage procedure to be followed in suitably appropriate cases – see for example, the subsequent air quality challenge in *R (on the application of Vetterlein and others) v Hampshire County Council* [2002] Journal of Planning Law 289, High Court;

(iv) to underline the possibilities of permitting applications to go forward notwithstanding the issue of delay.

3. The implications of the case for the future as regards matters of substantive environmental law are:

(i) to make it easier to have the courts look to international legal instruments in construing EC or domestic environmental legislation;

(ii) to encourage the purposive approach to construction of environmental legislation (already well underway in the UK);

(iii) to make determinations as to the applicable legal regime in appropriate environmental cases even where there are not the usual specific acts or decisions normally required as the pre-requisite for judicial review;

(iv) to ensure the application of other relevant EC legislation and national implementing legislation in the extended areas of continental shelf and superjacent waters determined to apply in the case.

4. The impact of the case on Greenpeace, for example, whether it made them consider being more active in the legal arena, whether it assisted in raising the profile of Greenpeace and/or the environmental concerns is:

(i) Greenpeace is a well established environmental NGO on the UK and international stage. However, the case undoubtedly assisted in maintaining, if not promoting, Greenpeace's profile;

(ii) similar responses apply with regard to increasing any wish on the part of Greenpeace to be more active in the legal arena;

(iii) the case also raised the profile of the reach of Community law, the case being commented on widely in legal and other commentaries and periodicals;

(iv) it undoubtedly and necessarily has had an impact on how and what those involved in exploration or exploitation of resources in the Atlantic Frontier area can be allowed to do;

(v) the case undoubtedly raised the profile of the Atlantic Frontier area, and the situation with lophelia pertusa reefs. The case was reported by the national and international media, including in oil and gas industry publications, environmental publications and commercial publications. In its report to the UK Parliament on UK Bio-Diversity the National Environmental Research Council referred expressly to the case and its outcome and the increased impetus for protection of lophelia pertusa reefs. In addition, it provided an impetus for focussing on the Community position on impacts in sea areas outside of territorial waters, and not just from the oil and gas industry. Commentaries and reports for further studies in related areas of activity, such as passenger and cargo ferries and fisheries (bottom and other) have been influenced by the major extension to what had appeared to be the scope or reach of Community law in the waters off the UK

5. The implications of the case for third parties are:

(i) as regards specific public licensing authorities, there will be an extension of their responsibilities as regards licensing activities within the UK's continental shelf and superjacent waters;

(ii) as regards public authorities generally in the UK, the case is likely to have had an influence in raising the profile of the reach of Community law and the need for respect for Community law in their activities where actual ro potential impacts on the environment are concerned;

(iii) as regards oil and gas operators, and others exploring or exploiting the continental shelf and superjacent waters, the case will have increased their need to have regard for environmental matters generally, but within Community law specifically;

(iv) as regards other third party environmental interest groups, the case will have had an influence generally because the reach of Community law has been extended, and there was a "sympathetic" response of the courts to an environmental law challenge, encouraging the making of submissions on environmental legal grounds, and also for bringing challenges where the merits of the case can only be shown properly after a detailed analysis has been undertaken on the two-stage approach to judicial review applications (see also above);

(v) as regards the courts, see the reference to *Burkett's Case* where this Greenpeace case was referred to favourably as to the proper approach to considering environmental judicial review cases and timing, and the earlier Greenpeace case disapproved.

6. The case led to an increase in environmental awareness of lophelia pertusa reefs in the Atlantic Frontier and North Sea, but it is difficult to identify an actual increase in

general opposition to the granting of and the terms for the grant of and conditions to be imposed in the actual or type of licences in question.

7. The case is likely to have contributed to a greater degree of respect for environment, especially in the Atlantic Frontier, but also generally in the oil and gas fields, the fisheries industry, and also the ferries sector. It would also have contributed to the growing awareness and respect for Community environmental law requirements amongst public authorities whose activities require such respect to be manifested. Also, as the case underlined the relevance and immediate applicability of Community environmental law, it also had an effect of raising awareness generally, and with it respect for Community law, and for environmental law in particular. It is very common to see court proceedings where reliance on the application of Community environmental law features prominently.

# 5 Socio-economic aspects

1.

| No. | Court | Date | Source | Subject | Association /grouping/individual | Relevant Issue | Outcome |
|---|---|---|---|---|---|---|---|
| 1 | House of Lords | 09.02.95 | [1995] JPL 842[1] | JR of decision to exclude marshland from wetland Special Protected Area | Royal Society for the Protection of Birds | Whether economic considerations able to be taken into account for this purpose, and whether to make a ref. to ECJ | Referred to ECJ, so won[2] |
| 2 | H Court | 24.05.95 | Lexis-nexis[3] | JR of grant of licence to dispose of Radioactive waste | Greenpeace Ltd | Jurisdiction re disposal of oil rig | won |
| 3 | Crt Appeal | 25.05.95 | Times 8.6.95[4] | EC Drinking Water Directive | Friends of the Earth Ltd | Legality of Undertakings to comply with Directive | lost[5] |
| 4 | H Court | 10.08.95 | Lexis-nexis | JR of Grant of Waste Disposal Licence | Mr James | Compliance with EC Groundwater Directive | lost[6] |
| 5 | H Court | 13.09.95 | [1996] Env LR[7] 234 | JR of decision to permit sewage treatment works | Ms Moreton | Whether grant affected by economic considerations, failure to apply EC | Lost, and lost |

[1] Journal of Planning Law. Note that these and other Law Reports cited in this table are available usually only on private subscription, but some may be available in public libraries, and/or through local Law Society offices (ie of the Regulatory Body for Solicitors)

[2] Note, RSPB stance later vindicated by the ECJ

[3] This is a private sector legal database provider. It is available usually on a general subscription basis, and pay per use.

[4] The Times newspaper maintains a series of law reports complied by their own legal journalist. It is now accessible on-line. Subscription may be required

[5] In fact, subsequent case law from the ECJ partially vindicated the stance of FoE.

[6] See case number 9 (Mr James also lost on appeal)

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| | | | | | | Water Directives | |
| 6 | Crt Appeal | 06.10.95 | Times 26.20.95 | Electro-magnetic radiation | Mr Duddridge (on behalf of children) | Obligation under EC law to issue EMR regulations | Lost |
| 7 | H Court | 11.10.95 | Lexis-nexis | JR for ruling on point of law as to reasons required (issue being "academic" in the case) | Mr Chapman (and Friends of the Earth) | Whether to rule on academic issue | lost |
| 8 | H Court | 19.12.95 | [1996] Env LR 266 | Declaration that local authority obliged to exercise highways powers to protect children against air pollution from traffic | Mr Williams (on behalf of children) | Duty to protect against health effects of traffic pollution | lost[8] |
| 9 | Crt Appeal | 15.01.96 | [1996] JPL 832 | JR of Grant of Waste Disposal Licence | Mr James | Permission to appeal, scope of Groundwater Directive | Lost, lost[9] |
| 10 | H Court | 26.01.96 | [1997] Env LR 44 | Whether "pipeline" cases within EIA Directive | Mt Haughian and others | Scope of temporal effect of EIA Directive | lost[10] |

[7] Environmental Law Reports

[8] See case number 18 (Mr Williams also lost on appeal)

[9] See case number 4 (first instance ruling)

[10] See case number 12, where Mr Haughian also lost on appeal

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| 11 | H Court | 13.02.96 | Lawtel[11] | Possession – whether EIA Dir applied to "pipeline" | Mr Goillon and others | "pipeline case" within EIA Directive | Lost |
| 12 | Crt Appeal | 27.02.96 | [1997] Env LR 59 | Whether "pipeline" cases within EIA Directive | Mr Haughian and others | Scope of temporal effect of EIA Directive, and right of trespassers to assert EIA Directive rights in land possession cases | Lost, and lost[12] |
| 13 | H Court | 28.02.96 | [1997] Env LR 170 | JR of planning permission for extension of quarry | Mr Andrews (and Middleton Quarry Action Group) | Discretion to quash decision where there had been a breach of delegated powers as to whether and EIA was required | lost |
| 14 | H Court | 06.03.96 | [1996] 3 All ER 304[13] | JR of Planning permission for superstore | The Kirkstall Valley Campaign Ltd | Bias by planning authority | lost[14] |
| 15 | H Court | 26.03.96 | [1997] Env LR 73 | Compliance of Compulsory Purchase powers and the Habitats Directive | Mr Fillingham and others | Whether UK in breach of Habitats Directive, and whether any UK breach exercisable as defence to land possession cases | Lost, and lost |

[11] This is a private legal database service, available on subscription basis

[12] See case number 10, for the first instance ruling

[13] All England Reports

[14] Application for permission to appeal dismissed by Court of Appeal on 23 August 1996

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| 16 | H Court | 03.04.96 | 95 LGR 620[15] | Abatement notice re nuisance by sewerage | Mr Shelley | Whether local authority not entitled to refuse to issue notice | won |
| 17 | Crt Appeal | 25.04.96 | Lexis-nexis | Rights of way and costs orders | Mrs Calder | JR of diversion of right of way, and order to pay costs of 2 defendants | Lost on both |
| 18 | Crt Appeal | 26.04.96 | [1997] Env LR 190 | Appeal re obligation of local authority to use highway powers t protect children against traffic air pollution | Mr Williams (on behalf of children) | Duty to protect against health effects of traffic pollution | lost[16] |
| 19 | H Court | 23.05.96 | Lexis-nexis | JR of decision to permit open cast mining | Mr Woods | Error of law in material considerations review | Lost[17] |
| 20 | H Court | 04.06.96 | [1996] 4 All ER 1 | JR of refusal to open up rights of way across open land | Mr Emery | Whether failure to apply proper consultation | won |
| 21 | H Court | 25.06.96 | [1997] Env LR 80 | Whether rare fauna to be protected under Habitats Directive | Berks, Bucks and others Naturalist Trust Ltd | To stay development pending inclusion of SAC list | Lost |
| 22 | H Court | 30.07.96 | Lexis-nexis | JR of grant of extraction rights of | Mr Bryant | Rationality of decision and lack of | Lost |

[15] Local Government Reports

[16] See case number 8 for first instance ruling

[17] See case number 29, where Mr Woods also lost on appeal

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| | | | | minerals on seashore | | consultation | |
| 23 | H Court | 21.01.97 | [1997] Env LR D17 | JR of outline planning permission for waste recycling centre | Mrs Driver | Whether necessary to have specified this particular use in multiple use application, and whether waste regulatory authority had to be so informed | Lost, and lost |
| 24 | H Court | 09.07.97 | [1998] 4 All ER 367 | JR of refusal to open up rights of way across open land | Mr Emery | Breach of effective consultation duty | Won |
| 25 | H Court | 26.07.96 | [1997] Env LR 100 | JR of "deemed" decision process of quarry | Mr Brown (and other residents) | Breach of effective consultation duty | Won |
| 26 | H Court | 06.11.96 | Lexis-nexis | Application of EIA Directive to "deemed" consents to operate mines under old permissions | Mr Brown and another | Whether "deemed consents" were "projects" under the EIA Directive | lost[18] |
| 27 | H Court | 28.10.96 | Lexis-nexis | JR of Planning permission for village, and diversion of rights of way | Mr Kyte and Others and Save Lyminge Forest Action Group | Flaws in assessment of evidence and in reasoning | lost[19] |
| 28 | H Court | 10.12.96 | Lexis-nexis | Planning permission in conservation area | Ms Searle (on behalf of The Save Coneygar Hill Protest Group | Irrationality of decision, failure to consult | lost[20] |

[18] See case number 41, where Mr Brown won on appeal

[19] See case number 30, where Mr Kyte and others lost also on appeal

[20] See case number 43, where Ms Searle also lost on appeal, and case 74 where a subsequent JR application was dismissed due to the earlier lost cases

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| 29 | Crt Appeal | 07.02.97 | [1997] JPL 958 | JR of decision to permit open cast mining | Mr Woods | Error of law in material considerations review | Lost |
| 30 | Crt Appeal | 14.03.97 | Lexis-nexis | JR of Planning permission for village, and diversion of rights of way | Mr Kyte and Others and Save Lyminge Forest Action Group | Error of law in H Court decision as to environmental policy | lost[21] |
| 31 | H Court | 24.03.97 | [1997] JPL 1015 | JR of planning decision for a quarry | Mr Garnett and others | Standing, delay and merits | Won, lost and lost |
| 32 | H Court | 26.03.97 | NewLawOnline | JR of planning permission in conservation area | Mr Fulford and others | Whether substantially prejudiced by late notice of date of inquiry | Lost |
| 33 | H Court | 18.04.97 | 75 P & CR 175[22] | JR of planning permission to extend mining works | Mr Dixon (and others) | Standing and non-compliance with ancillary agreements rendering void the planning permission | Won, and lost |
| 34 | H Court | 22.05.97 | Times 21 June 1997 | EC Waste Shipment Regulations | Dockgrange Ltd | Prosecution policy | won |
| 35 | H Court | 20.06.97 | [1997] 4 All ER 76 | enclosure common land | National Trust | Right of National Trust to enclose the land | Won |

[21] See case number 27, for the first instance ruling

[22] Property and Compensation Reports

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| 36 | H Court | 14.10.97 | [1998] Env LR 415 | JR of oil and gas licence regime | Greenpeace Ltd | Whether to grant permission because of delay | lost |
| 36 | H Court | 26.11.97 | Lexis-nexis | JR of planning permission for railway through nature trail | Mr Moore and Camel Trail Preservation Society | Irrationality of environmental assessment | won |
| 38 | Crt Appeal | 27.11.97 | [1998] 4 PLR 1[23] | Appeal against refusal to quash pathways decision | Mrs Slot | Breach of rights to participate in pubic inquiry | won |
| 39 | H Court | 17.12.97 | Lexis-nexis | JR of planning permission for chemical processing plant | Mrs Gray | Requirement for Env Ass't. under EIA Directive | Lost |
| 40 | H Court | 19.12.97 | NewLawOnline | JR of planning permission for waste incinerator | Mr Kirkman (with backing of Friends of the Earth Ltd) | Failure to apply the waste hierarchy | Lost[24] |
| 41 | Crt Appeal | 27.01.98 | 76 P & CR 433 | Application of EIA Directive to "deemed" consents to operate mines under old permissions | Mr Brown and another | Whether "deemed consents" were "projects" under the EIA Directive | Won[25] |
| 42 | Crt Appeal | 12.02.98 | [1998] 3 PLR 39[26] | JR of planning permission for breach of EIA Directive | Mr Berkeley | Whether planning permission void if material breach of EIA Directive, or if | Lost[27] |

[23] Planning Law Reports

[24] See case number 45, where Mr Kirkman also lost on appeal

[25] See case number 26, for the first instance ruling, and 54 for House of Lords where Mr Brown won

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| | | | | | | discretion to void | |
| 43 | Crt Appeal | 06.03.98 | [1999] JPL 331 | Planning permission in conservation area | Ms Searle (on behalf of The Save Coneygar Hill Protest Group | Irrationality of decision, failure to consult | Lost[28] |
| 44 | H Court | 23.03.98 | Lawtel | JR to compel Secretary of State to give "adequate" reasons for not requiring an EIA | Mr Marson and others | Whether EC or UK law required SoS to give further reasons | lost[29] |
| 45 | Crt Appeal | 05.05.98 | [1998] JPL 787 | JR of planning permission for waste incinerator | Mr Kirkman (with backing of Friends of the Earth Ltd) | Failure to apply the waste hierarchy | Lost[30] |
| 46 | Crt Appeal | 08.05.98 | 77 P & CR 202 | JR to compel Secretary of State to give "adequate" reasons for not requiring an EIA | Mr Marson and others | Whether EC or UK law required SoS to give further reasons | Lost[31] |
| 47 | H Court | 08.05.98 | [1999] Env LR 73 | JR of decisions of Env. Agency to permit use of waste solvents as fuel | Mr Gibson and others | Whether EA obliged to carry out full review of compliance with BATNEEC/BPEO | Lost |
| 48 | H Court | 21.07.98 | Lawtel | Whether economic considerations | World Wide Fund for Nature, UK | Whether to refer the question to the ECJ | Won[32] |

[26] Planning Law Reports

[27] See also case 84, where Mr Berkeley won in the House of Lords

[28] See case number 28, for the first instance ruling, and case 74 where a subsequent JR application was dismissed due to the earlier lost cases

[29] See case number 46, where Mr Marson also lost on appeal

[30] See also case number 40, for the first instance ruling

[31] See case number 44, for the first instance ruling

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| | | | | applied to designation of sites under the Habitats Directive | | | |
| 49 | Crt Appeal[33] | 21.07.98 | [1999] Env LR 310 | JR of GMO trials | Mr Watson | Irrationality of grant of permission, and illegality of GMO trial | Lost, won, but lost overall as court could not see what remedy open to it to grant |
| 50 | H Court | 29.07.98 | [1999] JPL 231 | Access to Env Info Directive, and confidentiality | Alliance against the Birmingham Northern Relief Road and others | Whether the document was "environmental information", and whether confidential | Won, and partially won |
| 51 | H Court | 20.10.98 | [1999] JPL 426 | JR of decision for permission for toll roads and failure to provide material and have proper consultation | Alliance against the Birmingham Northern Relief Road and others | Whether refusal of access to document means improper consultation | Lost[34] |
| 52 | Crt Appeal | 21.12.98 | Lexis-nexis | JR of "outline" planning permission | Crystal Palace Campaign | Application for permission to appeal on whether "outline" planning permission permissible under EIA Directive | Lost[35] |

[32] The ECJ subsequently upheld the WWF contention

[33] This was an appeal against a refusal to grant permission to apply for judicial review on 10 July 1998

[34] See also case number 55, where the applicants also lost on appeal

[35] This case was part of a long-running campaign. See case number 75 below for a continuation of this campaign. The first instance ruling is unreported.

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| 53 | H Court | 14.01.99 | [1999] Env LR D24 | JR of planning permission for radio mast | Mr Al-Fayed | Whether proper consideration given to objections, and whether to quash decision | Won, and lost[36] |
| 54 | House of Lords | 11.02.99 | [2000] 1 AC 397 | Application of EIA Directive to "deemed" consents to operate mines under old permissions | Mr Brown and another | Whether "deemed consents" were "projects" under the EIA Directive | Won[37] |
| 55 | Crt Appeal | 23.03.99 | Lexis-nexis | Appeal to quash planning permission for new roads | Alliance against the Birmingham Northern Relief Road and others | Whether substantial prejudice from non-disclosure of document | Lost[38] |
| 56 | H Court | 13.04.99 | [2000] JPL 733 | JR of planning permission for commercial development | Mr Walton | Failure to require EIA | Won |
| 57 | Crt Appeal | 15.04.99 | [2000] Env LR D23 | Appeal re JR of planning permission for radio mast | Mr Al-Fayed | Whether proper consideration given to objections, and whether to quash decision | Won, and lost[39] |
| 58 | H Court | 07.05.99 | [1999] 3 PLR 74 | JR of planning permission and compliance with EIA | Mr Tew and others | Compliance with obligations to provide full | won |

[36] See case number 57, where Mr Al-Fayed also lost on appeal

[37] See cases 26 and 41 for first instance and Court of Appeal rulings respectively

[38] See case number 51, for first instance ruling

[39] See case 53, for the first instance ruling

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| | | | | Directive | | environmental information | |
| 59 | H Court | 27.05.99 | [2001] Env LR 204 | Declaration as to scope of Access to Env. Info. Directive | Mr Maille | Whether preparatory information within scope of duty to provide information | lost |
| 60 | H Court | 30.07.99 | [2000] Env LR 359 | Legality of "deemed" consents for old mineral planning permissions with EIA Directive | Ms Foster | Whether process towards grant of deemed consent failed to comply with EIA requirements to provide environmental information | won |
| 61 | H Court | 14.09.99 | NewLawOnline | JR of planning permission for a runway extension | Mrs Moses | Standing of lone applicant not living in the area concerned | Lost[40] |
| 62 | H Court | 30.09.99 | [1999] Env LR 266 | JR of compulsory purchase order | Mr Moase and others | Failure to ensure compliance with EC water directives | lost[41] |
| 63 | H Court | 26.10.99 | [2000] Env LR 544 | JR of refusal to revoke planning permission for breach of EA directive | Council for the Protection of Rural England (London Branch) | Whether CPRE could obtain pre-emptive costs order | Lost |
| 64 | H Court | 26.10.99 | [2000] Env LR 533 | JR for declaration whether EIA Directive required | Council for the Protection of Rural England (London | Whether point arguable | won |

[40] See case number 79, where Mrs Moses also lost on appeal

[41] See case number 82, where Mr Moase also lost on appeal

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| | | | | planning authority to revoke earlier planning permission in breach of Directive | Branch) | | |
| 65 | H Court | 29.10.99 | [2000] Env LR 715 | JR of informal view of Env Agency as to disposal of waste | Mr Turnbull | Whether informal view subject to JR, did EA consider all material matters | Won, and lost |
| 66 | Crt Appeal | 29.10.99 | Lexis-nexis | Application by successful developer against local environmental action group on JR application | O'Dell & Sons Ltd | Costs against environmental action group | lost[42] |
| 67 | H Court | 05.11.99 | [2000] Env LR 221[43] | JR of legal regime for oil and gas licences in North East Atlantic | Greenpeace Ltd | Application of Habitats Directive beyond 12 mile territorial sea area of UK | Won |
| 68 | H Court | 27.11.99 | Lexis-nexis | JR of Environment Agency's decision not to require an Env. Ass't of the operation of a barrage leading to meadows | Mr Beevers and other, including the Yorkshire Wildlife Trust and the World Wildlife Fund for Nature | Costs of bringing the proceedings, agreement having been reached as to practical steps to take | Lost (each side to bear their own costs)[44] |
| 69 | H Court | 13.12.99 | [2000] Env LR | JR of deemed | Mr Huddleston | Whether the courts | Lost[45] |

[42] This was an appeal against an unsuccessful JR application of 13 July 1999

[43] Environmental Law Reports

[44] An application for permission to appeal on the costs order was refused on 21 March 2001 (Lexis-nexis).

[45] See case number 76, where Mr Huddleston won on appeal

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| | | | 463 | planning permissions for mining without EIA requirement | | could impose requirements of compliance with EIA Directive on third party, even if regulatory authority could not | |
| 70 | H Court | 21.12.99 | Lexis-nexis | Application to revoke a planning permission for major urban development (and for breach of EIA Directive) | Council for the Protection of Rural England (London Branch) | Delay and discretion not to quash decisions where delay | lost[46] |
| 71 | Crt Appeal | 21.12.99 | [2000] Env LR 549 | Appeal re JR – whether outline planning permission permissible under EIA Directive | Council for the Protection of Rural England (London Branch) | Whether EIA Directive permitted "reserved matters" to be left for future consideration, and whether should be assessed under prior required EIA | Won, lost |
| 72 | H Court | 12.01.2000 | [2000] Env LR 565 | JR of refusal to revoke planning permission for breach of EA directive | Council for the Protection of Rural England (London Branch) | Whether CPRE could assert directive rights enforceable before the courts | Lost |
| 73 | H Court | 24.01.2000 | | JR of decision to delete pathway from map | Mr Trevalyn on behalf of the Ramblers Association | Whether a presumption of use had been displaced | Lost[47] |

[46] In the light of subsequent House of Lords authority in *Berkeley* it is likely that this outcome would not be the same today

[47] See case number 96, where the Ramblers Association also lost on appeal

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| 74 | H Court | 21.02.2000 | Lexis-nexis | JR of planning permission in conservation area | Ms Searle | Whether JR should not be dismissed due to earlier failed challenges on same issue and same area of law | lost[48] |
| 75 | H Court | 03.03.2000 | [2001] Env LR 1 | JR of "outline" planning permission | Mrs Barker | Whether "outline" planning permission permissible under EIA Directive | lost[49] |
| 76 | Crt Appeal | 08.03.2000 | [2000] Env LR 488 | Appeal re JR of deemed planning permissions for mining without EIA requirement | Mr Huddleston | Whether the courts could impose requirements of compliance with EIA Directive on third party, even if regulatory authority could not | won[50] |
| 77 | H Court | 15.03.2000 | [2001] Env LR 35 | JR of planning permission for mineral extraction | Blackfordby and Boothby Action Group Ltd (2000) | Whether Co. could seek JR for interference with interests of members but not of company, whether Art 4 of 75/442/EEC required strict application of waste objectives | Won, and lost |

[48] See case numbers 28 and 43, where Ms Searle lost at first instance and on appeal, and this case where a subsequent JR application was dismissed due to the earlier lost cases

[49] Mrs Barker's appeal was dismissed on 23 November 2001 by the Court of Appeal, see case number 105.

[50] See case number 69, for the first instance ruling

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| 78 | H Court | 07.04.2000 | Lawtel | JR of decision to allow 6 wind generators when Inspector allowed only 4 | Campaign for the Protection of Rural Wales | Irrationality of decision | Lost |
| 79 | Crt Appeal | 12.04.2000 | [2000] Env LR 443 | JR of planning permission for a runway extension | Mrs Moses | Standing of lone applicant not living in the area concerned, and did EC law preclude refusal of JR application because of delay | Not addressed, and lost[51] |
| 80 | H Court | 13.04.2000 | [2000] JPL 1262 | Appeal against retrospective lawful use planning certificate | Mr Philcox | Whether retrospective "lawful use" could apply to validate past criminal acts | lost |
| 81 | H Court | 15.06.2000 | [2001] Env LR 209 | JR of Planning Inspector's decision not to provide for free legal assistance for protesters | Mr Challenger | Right of environmental objectors to free legal assistance in planning inquiry | lost |
| 82 | Crt Appeal | 16.06.2000 | [2001] Env LR 227 | Appeal re JR of compulsory purchase order | Mr Moase | Right to adduce new evidence under EC law, and need to comply with EC water directives | Lost, and lost[52] |

[51] See case number 61, for first instance ruling

[52] See case number 62, for the first instance ruling. Mr Moase and others also lost a further judicial review case against a refusal by the Environment Agency to revoke the discharge consent from the premises the subject of this challenge (H Court of 06.03.01 Unreported (Lexis-nexis)).

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| 83 | H Court | 21.06.2000 | [2001] Env LR 332 | JR of decision not to require planning permission | Ms Lowther | Whether use of waste solvent as fuel meant was a change in sue of land | lost[53] |
| 84 | House of Lords | 06.07.2000 | 81 P & CR 492 | JR of planning permission for breach of EIA Directive | Lady Berkeley | Whether planning permission void if material breach of EIA Directive, or if discretion to void | won |
| 85 | H Court | 28.07.2000 | [2001] Env LR 375 | JR of permit for animal waste incinerator | Thornby Farms Ltd | Whether BATNEEC applied properly | lost[54] |
| 86 | H Court | 31.07.2000 | [2001] Env LR 406 | JR of planning permission for development | Mr Milne | Whether for planning authority or court to decide if sufficient environmental information had been supplied to comply with EIA Directive, and whether sufficient information had been provided | Lost, and lost[55] |
| 87 | H Court | 24.08.2000 | [2001] Env LR 465 | JR of grant of planning permission for printing works | Mr[s] Bell and others | Delay, and discretion not to quash illegal act | Won and won |

[53] See case number 102, below, where Ms Lowther also lost on appeal

[54] Thornby Farms Ltd's appeal, and that at cases numbered 77 and 89, were dismissed by the Court of Appeal on 22 January 2002

[55] See case number 94, where Mr Milne lost, on slightly differently proposed grounds, before the Court of Appeal

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| 88 | H Court | 22.09.2000 | [2001] Env LR 473 | JR of planning permission for extension of landfill site | Ms Hardy | Obligation to have regard to all "environmental information" | won |
| 89 | H Court | 06.10.2000 | [2001] Env LR 494 | JR of planning permission for landfill site extension, and compliance with Directive 75/442/EEC | Mr Murray | Obligation to achieve environmental protection objectives in Art. 4 , and to apply precautionary principle | Lost and lost[56] |
| 90 | H Court | 11.10.2000 | [2001] JPL 660 | Consideration of need for EIA for development | Lady Berkeley, and ThamesBank | Whether need for EIA should have been considered, and an EIA ordered | Lost, and lost[57] |
| 91 | H Court | 07.12.2000 | … | JR of planning permission for use of airfield | Mr Barker and others | Whether planning authority taken anticipated interests of people in vicinity properly into account | won[58] |
| 92 | Crt Appeal | 08.12.2000 | Lexis-nexis | Appeal against retrospective lawful use planning certificate | Mr Philcox | Whether retrospective "lawful use" could apply to validate past criminal acts | lost |
| 93 | H Court | 13.12.2000 | [2001] 2 All ER | JR of decision of | Inter alia | Whether planning | won[59] |

[56] See footnote 52

[57] See case number 104, where Lady Berkeley also lost on appeal in June 2001

[58] See case number 100, where Mr Barker lost on appeal

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| | | | 929 | Secretary of State to determine planning appeals | Huntingdonshire Says No to Alconbury Proposals | appeals regime compatible with Art 6(1) ECHR | |
| 94 | Crt Appeal | 21.12.2000 | Lexis-nexis | JR of planning permission for development | Mr Milne | Whether "outline" planning permission permissible under the EIA Directive | lost[60] |
| 95 | H Court | 07.02.01 | Lexis-nexis | JR of planning permission for radio mast | Ms Anscomb (on behalf of others) | Whether rights to participate infringed | lost |
| 96 | Crt Appeal | 23.02.01 | (2001) 3 All ER 166 | JR of decision to delete pathway from map | Mr Trevalyn on behalf of the Ramblers Association | Whether a presumption of use had been displaced | lost |
| 97 | H Court | 22.03.01 | [2001] Env LR 813 | Variation of IPC authorisation | Ms Lowther (as interested party)[61] | Whether variation to control use of waste solvents as a fuel required regulatory control under EC law | won[62] |
| 98 | H Court | 29.03.01 | Times, 1 May 2001 | JR of grant of radioactive waste disposal authorisation | Ms Marchiori and others | Whether "justification" addressed, and whether legality of nuclear weapons justiciable | Lost and lost[63] |

[59] Reversed on Appeal to the House of Lords

[60] See case number 86, for the first instance ruling

[61] This seems to be the same Ms Lowther as in case number 83.

[62] The case was decided on this point, with Ms Lowther supporting the Environment Agency.

[63] Ms Marchiori also lost before the Court of Appeal on 25.01.02

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| 99 | H Court | 03.04.01 | Times, 17.05.01 | Legality of a reversal of a decision of the Secretary of State to "call in" a planning decision for himself | The Trustees of the Friends of the Lake District | Whether decision unlawful, and whether a breach of legitimate expectations | Lost, and lost |
| 100 | Crt Appeal | 05.04..01 | Lexis-nexis | JR of planning permission for use of airfield | Mr Barker and others | Whether planning authority taken anticipated interests of people in vicinity properly into account | lost[64] |
| 101 | H Court | 11.04.01 | [2002] Env LR 10 | JR of decision not to seek decision of Secretary of State as to whether EIA required | Mr Fernback and others | Whether EIA required, whether was obligation to seek secretary of state's decision, whether was procedural unfairness | Lost, lost and lost |
| 102 | Crt Appeal | 24.05.01 | Lexis-nexis | JR of decision not to require planning permission | Ms Lowther | Whether use of waste solvent as fuel meant was a change in sue of land | lost[65] |
| 103 | H Court | 14.06.01 | [2002] JPL 289 | JR of planning decision for waste incinerator | Mr Vetterlein and others | Whether unlawful because of failure to apply air pollution controls, and rights of participation | Lost, and lost |
| 104 | Crt | 29.06.01 | Lexis-nexis | Consideration of need | Lady Berkeley, and | Whether need for | lost[66] |

[64] See case number 90, for the first instance hearing.

[65] See case number 82, for the first instance ruling

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| | Appeal | | | for EIA for development | ThamesBank | EIA should have been considered, and an EIA ordered | |
| 105 | H Court | 21.10.01 | Lexis-nexis | JR of refusal of planning permission on adverse public health grounds | UK Coal Mining Ltd | Whether Secretary of State entitled to have the regard he did to adverse air pollution considerations | lost[67] |
| 106 | H Court | 15.11.01 | Unreported | JR of grant of authorisation for nuclear plant | Friends of the Earth Ltd and Greenpeace Ltd | Whether cost considerations to be taken into account | lost[68] |
| 107 | Crt Appeal | 23.11.01 | (2001) 49 EG 117[69] | JR of "outline" planning permission | Mrs Barker | Whether "outline" planning permission permissible under EIA Directive | lost[70] |
| 108 | Crt Appeal | 07.12.01 | (2001) 50 EG 91 | JR of grant of authorisation for nuclear plant | Friends of the Earth Ltd and Greenpeace Ltd | Whether cost considerations to be taken into account | lost[71] |
| 109 | H Court | 17.12.01 | (2002) Env LR 659 | JR of IPPC authorisation under prior IPC regime but for when IPPC regime applicable in | Mr Furness and others | Legality of authorisation, and whether all material factors taken into consideration | Lost, and lost |

[66] See case number 89, for the first instance ruling

[67] The challenge succeeded, but is indicated as "lost" as the public health concerns were not accepted on the evidence put forward by local community groups

[68] See case number 108, where FoE also lost on appeal

[69] Estates Gazette

[70] See case number 75, for the first instance ruling

[71] See case number 106 for the first instance ruling

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| 110 | H Court | 21.12.01 | Lawtel | JR of planning authority's decision to grant itself planning permission | Ms Cummins and others | Whether process violated Art 6(1) rights | Lost |