EU Forum of Judges for the Environment Annual Conference 2016

Questionnaire answers from the United Kingdom

1. The right to be tried within a reasonable time

1.1 What usually triggers, in your country, the opening of a file on an environmental offence at the public prosecutor's office? The reception of a notice of violation recording the offence? Other triggers?

- It is a matter of discretion for the prosecuting authority. The prosecuting authorities responsible for the enforcement of most serious environmental crime are the Environment Agency ("EA") in England and Natural Resources Wales ("NRW") in Wales. Other bodies which prosecute environmental offences are local county and unitary authorities in England and county boroughs in Wales.

- A file is opened by the EA when:

    - A breach of the regulations is identified by an EA officer conducting a compliance check, visit or inspection.
    - There is non-compliance with the conditions of a permit regulated by the EA.
    - A pollution incident is substantiated. These are brought to the EA's attention via the incident hotline or via a member of the public contacting an officer directly

- Prosecuting authorities take into account the Code for Crown Prosecutors, and therefore generally no prosecution should be triggered until:

    - There is an objective sufficiency of evidence for a 'realistic prospect of conviction' in respect of each charge; and

    - It is in the public interest to prosecute (taking into account environmental effect, proportionality, forseeability, intent, history, any profit made from breach, detriment and personal circumstances).

1.2 What is on average the time required in your country in criminal proceedings to go from a citation to a first instance judgment and to an appeal judgment?

- Summary only matters can be completed within six months.
- Complex investigations often with multiple defendants can take a number of years to conclude. The defence often request adjournments for various reasons. Issues involving expert evidence extend timescales. And where a defendant pleads not guilty, and a long trial is required the court may not have availability to list the case for many months. The length of time varies greatly, and it is not possible to accurately calculate a time.
- The length of time for an appeal to be progressed will depend on the procedural steps required and the availability of the courts.

1.3 What procedural steps can take time?

- The prosecutorial steps for the EA are:

    1. A decision to prosecute is made.
    2. An arrest summons number is obtained and a case is listed for first hearing in court.
    3. Informations and summons are drafted and sent to court. At the same time the defendant will be sent a letter before action.
    4. The summons is signed and returned to the Environment Agency.
    5. The defendant is then served with the summons and the initial prosecution details and evidence.
    6. The first hearing takes place, at which point a plea is entered, or if the defendant is not ready to enter a plea the matter is adjourned to a later date.

- Generally the EA aims to initiate proceedings against a defendant, by laying informations at court within two months of the case file being completed and sent to legal services for review and decision.

1.4. Are you aware of difficulties with this guarantee?

- Although it does not hold information on how many prosecutions are discontinued or dismissed at trial due to delay, it is unaware of any recent cases where an abuse of process application due to delay has been successful. In part this is because the time taken to investigate an offence is a factor in deciding if a prosecution is in the public interest

1.5. What are the legal consequences of undue delay in your legal system?

- A permanent stay will only be granted where delay has caused serious identifiable prejudice such that a fair trial is impossible. Even where the delay was unjustifiable, a permanent stay of the proceedings should be the exception rather than the rule and where there was no fault on the part of the complainant or the prosecution, it would be very rare for a stay to be granted (*R. v S (Stephen Paul)* [2006] EWCA Crim 756).

2. The right to a fair trial as including the right to respect of judgments / implementation of judgments

2.1 What do you know about the implementation of judgments in your country? Are punitive sanctions (prison sentences, fines, other) implemented? Are remedial sanctions (reinstatement of the environment, compensatory action, other) implemented? Who is in charge? What goes well, wrong?

- Implementation of the courts' judgments is universally high in England and Wales.

- Where a prison sentence is imposed an individual will be imprisoned as sentenced.

- A fine will be collected or a confiscation order enforced by a magistrates' court and a term of imprisonment or detention may be imposed in default.

- Information is held by the EA on the number of remedial orders *successfully* obtained (see 2.2 below), but not for the number of remedial orders *sought.*
- No information is held on whether remedial orders are complied with within the required time.
- No record is kept of the number of remedial orders which the EA considers satisfactorily implemented.

2.2 Can criminal courts also impose remedial sanctions in your country? If so, can they do so ex officio or only on request by the prosecution or a civil party?

- The remedial sanctions are available for environmental offences but they are civil in nature, not criminal.

    - For most environmental offences these sanctions are found in Part 3 of the Regulatory Enforcement and Sanctions Act 2008. They include: (i) compliance notices, which require the offender to come back into compliance, and (ii) restoration notices, which require the offender to take steps to put right any damage caused as a result of the non-compliance and address any harm.
    - Breaches of the climate change regime (i.e. certain breaches under the EU Emissions Trading System, the CRC Energy Efficiency Scheme, Climate Change Agreements and the Energy Savings Opportunity Scheme) may also lead to civil penalties which are distinct from the civil penalties under RESA 2008. In the Climate Change Agreements (Administration) Regulations 2012/1976, regulation 16(b) provides for the EA, in addition to a financial penalty, to require the operator to remedy the breach which gave rise to the penalty.

- The prosecuting authority retains a high degree of discretion in the conduct of prosecutions, including in the sanction sought, although they will be guided by policy considerations and statutory requirements.

- The EA published its prosecution policy in 2011 in the form of three documents:
  - (a) Enforcement and Sanctions Statement;
  - (b) Enforcement and Sanctions Guidance, and
  - (c) Enforcement and Sanctions Offence Response Options.
- There is no equivalent prosecution policy for local authorities, except where they have a procedure of their own, locally, although each prosecuting local authority must take into account the Code for Crown Prosecutors.
- The prosecution policy guides the EA's decision, as prosecuting authority, to pursue criminal or civil sanctions.
- Civil sanctions may often be sought by the prosecuting authority as an alternative to criminal sanctions. Other than where this is specifically allowed for by the legislation, it is not normally possible for the EA to seek criminal and civil sanctions for the same offending. Remedial sanctions, in the context of environmental offences, are civil sanctions.

- Certain sanctions may or may not be available for certain offences. A list of possible options is found in the EA's Offence Response Options. The choice is for the prosecuting authority: the EA or the local authority.

  - A record of the number of cases in which remedial orders have been obtained shows that the EA has obtained remedial orders only under Regulation 44 of the Environmental Permitting Regulations. The breakdown of Regulation 44 orders obtained over the past years is:

Year	No. of Reg 44 Orders
2011	7
2012	4
2013	7
2014	6
2015	10

- The Environment Agency has not yet taken any remedial actions under Regulation 16(b) of the Climate Change Agreements (Administration) Regulations 2012/1976.

3. The right to be presumed innocent

3.1 What are the basic principles of evidence in the criminal law of your country? Are the means of proof free or restricted? What evidence is most often used in environmental cases? What type of evidence creates troubles (too costly, too difficult to obtain, too easily mismanaged by environmental inspectorates)?

- Legal burden and standard
  - There is a presumption of innocence in the UK and the prosecution must prove its case beyond reasonable doubt (*Woolmington v DPP* [1935] A.C. 462; Article 6 (2) ECHR). Where a legal burden does fall on the defendant the standard is the balance of probabilities (*Carr Briant* [1943] K.B. 607).
  - Many environmental crimes in the UK are strict liability offences (held to be compatible with the ECHR in *Sheldrake v DPP* [2005] 1 A.C. 264)

- Evidential burden and standard
  - Generally, whichever party bears the legal burden will also bear the evidential burden. The evidential burden will be discharged if such evidence, if believed, and if left uncontradicted and unexplained, could be accepted by the jury as proof (*Jayasena v The Queen* [1970] A.C. 618, at page 624)

3.2 How do you see the impact of the principle of innocence on the prosecution policy? Do you feel it has an overly restrictive impact, in general, for some type of cases?

- The presumption of innocence is not overly restrictive on prosecution policy. Many environmental crimes are offences of strict liability and therefore the "sufficiency of evidence" prosecuting hurdle is relatively low.

- When assessing what type of action should be taken (whether to prosecute or use other enforcement method) the following principles will be adopted:
  - Proportionality (based on risks posed and gravity of incident);
  - Consistency;
  - Transparency; and
  - Targeting (of high risk activity/deliberate criminality).

3.3 How do you see the impact of the principle on the assessment of facts and guilt (intentional / negligence) in the conviction decision ? Do you feel it has an overly restrictive impact, in general, for some type of cases?

- Where the assessment of guilt is concerned, evidence of intention and/or negligence is not material because many of the offences are offences of strict liability. As such evidence is relevant largely as a mitigating or aggravating feature in sentencing. In any event its impact is not "restrictive".

3.. How do you see the impact of the principle on the sanctioning decision? Do you feel it has an overly restrictive impact for some type of sanctions?

- There is nothing to suggest any material impact on "sanctioning decisions".

4. The privilege against self-incrimination

4.1. Does the environmental law in your country make (an extensive) use of self-monitoring and -reporting obligations? Does it provide in inspection rights to ask for information, sanctioned when not complied with?

- The Pollution Prevention and Control regime ("PPC"), comprising the Pollution Prevention and Control Act 1999 and the Pollution Prevention and Control (England and Wales) Regulations 2000, allows for self-monitoring of emissions by industrial process operators, the results of which are reported to the regulator. A regulatory programme is in place to test self-monitoring schemes, by making unannounced

checks or inspections. The terms of the PPC permits require permit-holders to self-monitor. Withholding the results of self-monitoring constitutes a breach of the permit conditions and continuing to operate without disclosing the results constitutes a criminal offence.

4.2 If so, are you aware of prosecution difficulties caused by the privilege against self-incrimination? Is it easy to draw the boundaries between evidence that can be used and evidence that cannot be used because of this privilege? Please illustrate your answer by case-law.

- There has been one case where the boundary was in dispute: *R. v Hertfordshire C.C. ex parte Green Environmental Industries Ltd.* [2000] 2 A.C. 412. In that case the appellant, a business not licensed to keep waste, refused to reply to a request for information under section 71(2) EPA 1990 served by the respondent, a local waste regulation authority, for information relating to the source of a large quantity of clinical waste found at their site, unless it received confirmation that its replies would not be used against it in a prosecution. The House of Lords dismissed the appeal, ruling that the jurisprudence underpinning Art 6(1) was concerned with the fairness of a trial and not with extra-judicial inquiries (*Saunders v United Kingdom* (19187/91) [1997] B.C.C. 872 distinguished). The respondent was entitled to request factual information, particularly in view of the urgent need to protect public health from an environmental hazard, even if potentially incriminating, but was not entitled to invite an admission of wrongdoing. Since none of the questions put to the appellant invited such an admission, the appellant was obliged to respond to them.

- The rules and boundaries in the UK are clear:
    - The privilege against self-incrimination may only be claimed by the person who would be incriminated, *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] A.C. 547, at page 637.
    - A company may claim such a privilege (*Triplex Safety Glass Co. Ltd. v Lancegaye Safety Glass* (1939) 2 KB 395) although this does not cover its office holders (*Rio Tinto Zinc Corporation*, page 637).

5. The protection against double jeopardy

5.1 Are criminal courts in your country confronted with double jeopardy when dealing with environmental offences? If so, what is the typical case-set: a combination with administrative fines, with penalties from other policy areas such for instance as agricultural policies?

- Double jeopardy in environmental and planning offences is not a common phenomenon. Where is does arise it usually concerns, as one might expect, the relationship between prosecution and other enforcement methods:
    - *R. (on the application of Ethos Recycling Ltd.) v Barking and Dagenham Magistrates' Court* [2009] EWHC 2885 (Admin)
        - After an information laid for alteration of a listed building without consent (section 9 (1) P(LBCA)A 1990) had been dismissed (because in a single information matters on which the judge was satisfied could not be separated from those with which he could not be satisfied), it was not a double jeopardy for the claimant to have to appeal against a subsequent enforcement notice which covered the same ground. This was because, by itself, criminal sanctions could not bring about sufficient remedial action, the criminal burden and standard of proof are too strict for effective listed building control, and dismissal of the appeal would lead to no criminal sanction (only non-compliance with the notice would).
    - *Tandridge D.C. v Powers* (1983) 80 L.G.R. 453
        - Where non-compliance with an enforcement notice is a continuing offence (in this case section 89 of Town and Country Planning Act 1971) a prosecution will not be barred by a previous acquittal. However, any penalty could not take into account the period to which the acquittal related.

- None of the statutory exceptions to double jeopardy in Schedule 5 of the Criminal Justice Act 2003 relate to environmental offences.

5.2 Are there discussions with regard to the scope of the guarantee? Areas of doubt, vagueness? What, for instance, about EU-regulations regarding extensive farming and mandatory cuts in the income support to farmers when infringing the cross-compliance conditions?

- Doubt rarely arises, but where it does it tends to be in the circumstances referred to in the answer to 5.1, above.

6. The right to proportionate penalties

6.1 Have you noticed, in your practice, environmental cases where the penalties inflicted were too severe?

- There have been some controversial recent sentences:
  - In *R. v Thames Water Utilities Ltd.* [2015] EWCA Crim 960 – a £250,000 fine was upheld. The court held that in appropriate circumstances a fine may be imposed of 100 per cent of pre-tax net profit, even where it is over £100m.
  - In *R. v Sellafield Ltd.* [2014] EWCA Crim 49 – a £700,000 fine was upheld.
  - In *R. v Southern Water Services* [2014] EWCA Crim 120 – a £200,000 fine was upheld.
  - In *R. v Ineos Chlorvinyls*_[2016] EWCA Crim 607 – a £166,650 fine was upheld

- There are safeguards in place in the UK to ensure penalties are proportionate:
  - The main purpose of enforcement is not punishment but compliance with a regulatory system.
  - Revised sentencing guidelines introduced since 2014[1] have addressed concerns that sentencing for environmental offences was very inconsistent. The new guidelines introduce a staged process for the courts to follow:
    - 1. Is the defendant an individual or a company?
    - 2. What category is the company, by turnover?
    - 3. What is the culpability and level of harm?

[1] //sentencingcouncil.judiciary.gov.uk/about/environment.htm

        - 4. Should ancillary orders such as compensation or compensation be imposed?
        - 5. Any aggravating/mitigating circumstances?
    - For very large commercial organisations, the starting point is in sections 142, 143 and 164 of the Criminal Justice Act 2004 (*Thames Water Utilities Ltd.*).
        - Under section 142- any court must have regard to the following purposes of sentencing—(a) the punishment of offenders; (b) the reduction of crime (including its reduction by deterrence); (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences.
        - Under section 143- culpability, harm caused and previous convictions are all relevant to level of punishment.
        - Under section 164- offender's financial circumstances is relevant to level of punishment.
    - Statements are agreed between the prosecution and defence so that defendants are sentenced on agreed terms. Where they are not agreed then the defendant may have the benefit of a Newton hearing.

6.2 If so, could you elaborate and tell why you felt the penalty was too severe?

- If one took the view that the penalties in cases referred to above are too severe, this opinion would no doubt be based on the amount of the fine (in real terms and/or percentage of turnover terms) for an offence in which fault is not an element.

- But it should be borne in mind that the most severe penalties will generally only be imposed where there is some element of intention or fault (factors relevant to sentencing) and/or unjust enrichment.

7. The right to respect for private and family life

7.1 Have you noticed an impact of the right to respect for private of family life on the environmental adjudication in your country? If yes, could you please provide examples form the case-law illustrating this influence?

- In a criminal context, Article 8 largely has an indirect role.
    - The regulatory and enforcement framework (and decisions to prosecute, undertaken to uphold that framework) form part of the state's positive obligation to take steps to protect its citizens' rights; particularly the right to a home, private and family life. An insufficiently robust regulatory scheme or failure to take action against those who breach it (e.g. prosecution or negotiation with a view to compliance) could see the UK in breach of its Article 8 obligations.
    - Article 8 also entails procedural obligations, including consultation and the right to be heard or challenge a decision (*Buckley v U.K.* (1997) 23 E.H.R.R. 101 at paragraph 76).

- Article 8 is not engaged on the basis of generalised concerns (*R. (Furness) v Environment Agency* [2002] Env. L.R. 26), nor is the fact that there are harmful effects sufficient to do so (*R. v Leicestershire C.C. ex p Blackfordby and Boothorpe Action Group* [2001] Env. L.R. 35).

- Finally, it is worth mentioning that environmental protection has been a legitimate aim justifying interference with Article 8 rights (*Chapman v U.K.* (2001) 33 E.H.R.R. 18)

7.2 Would you be willing to use this right in support of environmental adjudication and, if so, in which type of cases?

- As for the Strasbourg jurisprudence which, under section 2 of the HRA 1998, the UK courts must take account of:

- The ECHR has held that member states should endeavour to strike a balance between the interests of the community and individuals, and that member states have a wide margin of appreciation in doing so, *Hatton v U.K.* (2003) 27 E.H.R.R. 28. In *Lopez Ostra v Spain* (1994) 20 E.H.R.R. 277 and *Guerra v Italy* (1998) 26 E.H.R.R. 357 a lawful balance was found not to have been reached, because of the severe environmental effects of a breach and lack of available information, respectively.
- In *Tyler v U.K.* (1978) 2 E.H.R.R. 1 at paragraph 31 the court said that: "the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present day conditions". Those "present day conditions" arguably include the greater risk posed by environmental damage to people's well-being, and to their Article 8 rights, than when the Convention was drafted, as well as a greater understanding of those risks.

8. The right to life

8.1 Have you noticed an impact of the right life on the environmental adjudication in your country? If yes, could you please provide examples form the case-law illustrating this influence?

- As with Article 8 (question 7.1, above) the relevance of Article 2 is to the state's positive role to take steps to guarantee the rights concerned, usually where dangerous activities are being carried on by public authorities or private companies (*Oneryildiz v Turkey* (2004) 39 E.H.R.R. 12)[2] or natural disasters (*Budayeva v Russia* (2014) 59 E.H.R.R. 2). The extent of public authorities' obligations depends on factors such as the harm that could arise and the foreseeability of the risks to life. In *Oneryildiz v Turkey*, where there was a methane gas explosion at a rubbish tip, the inadequate nature of the regulatory framework (and the failure to enforce it) gave rise to a violation of Article 2.

- Article 2 is applicable to the criminal prosecution of those responsible for endangering life, *Oneryildiz v Turkey*. It does not entail, however, the right of an

[2] E.g. nuclear tests and operation of chemical factories with harmful emissions or waste

applicant to have a third party prosecuted or receive a particular sentence for a criminal offence (see *Perez v France* 2005 40 E.H.R.R. 39, at paragraphs 69 to 72)

8.2. Would you be willing to use this right in support of environmental adjudication and, if so, in which type of cases?

- See answer to 7.2.

9. The right to environmental protection

9.1. Do you consider this right to have impact on environmental adjudication?

- Not directly. Article 37 of the Charter has only been discussed in one reported domestic decision, *Walton v Scottish Ministers* [2012] UKSC 44. In that case Lord Reed described the SEA Directive as "part of a body of European Union legislation designed to provide a high level of protection for the environment" with reference to Article 37, at paragraph 10. *Walton* was a public law decision; it was not criminal law.

- Respect for a high level of environment protection as a general principle of EU law has arisen in the context of litigation, particularly in respect of waste.

    - In another public law decision, Carnwath L.J. (as he was then) discussed the term "discard" in the Waste Framework Directive in the context of a high level of protection, the precautionary principle and the principle of preventive action, see *R. (OSS Group Ltd.) v Environment Agency and DEFRA* [2007] EWCA Civ 611, at paragraph 14.

    - This has been cited in the criminal case of *R. v Ezeemo* [2012] EWCA Crim 2064 by Pitchford L.J. in the context of a prosecution for waste offences. Although the observations of Carnwath L.J. were not directly applicable to the facts of that case, they demonstrate the potential of Article 37.

9.2. Do you agree with the proposition that, in environmental adjudication, it is only fit to impact on the sanctioning policy, meaning choice and level of sanctions inflicted?

- The impact of Article 37 of the Charter has not been significant in this field in the U.K.