



Wildlife and  
Countryside



## Environment Links UK Statement: Access to Justice in the UK 2019<sup>1</sup>

### Introduction

Environment Links UK, collectively representing voluntary organisations with more than 8 million members across the UK, comprises the combined memberships of Wildlife and Countryside Link (WCL), Scottish Environment Link (SEL), Wales Environment Link (WEL) and Northern Ireland Environment Link (NIEL). Each is a coalition of environmental voluntary organisations, united by common interest in the conservation and restoration of nature and the promotion of sustainable development across the terrestrial, freshwater and marine environments.

We welcome the opportunity to provide the Twelfth Meeting of the UNECE Task Force on Access to Justice with a statement on the UK's compliance with the access to justice pillar of the Aarhus Convention.

There have been ongoing reforms to the costs regimes for environmental cases across the UK and problems persist with regard to time limits and the intensity of Judicial Review (JR). We also have deep concerns about governance arising from the UK's imminent departure from the EU. These concerns centre on the loss of the Court of Justice of the European Union (CJEU) and the EU complaints mechanism, which currently provides civil society with a free and accessible mechanism to pursue potential infringements of EU law. In 2018, the Government in England consulted the public on the development of an Environmental Principles and Governance Bill. The draft Bill was published on 19<sup>th</sup> December 2018<sup>2</sup> and sets out how the Government proposes to maintain environmental standards (currently in relation to England and reserved matters) as it leaves the EU. We have significant concerns about the mechanisms that are being proposed and the access to justice deficit that will arise<sup>3</sup>.

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<sup>1</sup> This Statement summarises a joint submission to the Aarhus Convention Compliance Committee on the UK's progress on the implementation of Decision VI/8k of the Meeting of the Parties, which concerns the UK and costs (see [here](#)). For more information, please see the joint submission

<sup>2</sup> See [here](#)

<sup>3</sup> The Government's proposals manifestly fail to provide equivalence with EU mechanisms. The proposed Office for Environmental Protection is undermined by a lack of independence and has a narrow remit, potentially excluding important issues such as town and country planning and the historic environment from its enforcement functions. We are also concerned that duties in respect of new environmental principles (to

## England and Wales

Changes to the 2013 Environmental Costs Regime (“ECPR”) implemented by the Civil Procedure (Amendment) Rules (SI 2017/95)<sup>4</sup> came into effect on 28<sup>th</sup> February 2017. Certain aspects of the scheme were immediately challenged by way of Judicial Review<sup>5</sup>. The Claimants argued that the new Rules failed to provide early certainty with regard to costs and that potential JR claimants would be deterred from bringing claims for fear that their personal financial information, or that of the individual funders, would be discussed in open court. The claimants also sought a declaration that in assessing what is prohibitively expensive for the claimant, the court may take into account their own legal costs.

The judgment confirmed that the rules varying the default costs caps are consistent with EU law as regards to early certainty and reasonable predictability – but only when considered in the context of the surrounding rules and practice. The judge also held that the possibility that a claimant’s financial affairs would be discussed in public could deter meritorious claims, and the Rules should be amended accordingly. The necessary change to the Practice Direction concerning private hearings has yet to be implemented.

The judge also identified other amendments that could helpfully be made to the Civil Procedure Rules (CPR), including clarification that: (i) in relation to any financial support provided by third parties, it is only the aggregate amount that must be provided, rather than a breakdown of individuals’ donations; (ii) the court may vary a costs cap only on an application made by the claimant or the defendant; and (iii) an application to vary the costs cap must be made at the outset (either in the claim form or in the acknowledgment of service) and must be determined by the court at the earliest opportunity; an application may only be made at a later stage if there has been a significant change in circumstances. These recommendations were subsequently implemented by way of the Civil Procedure (Amendment) Rules 2018 (No.239/L.3) Statutory Instrument<sup>6</sup>, which came into force in April 2018.

While the new costs regime has been operational for less than a year, we can make some early observations based on our experience since April 2018. As a general point, the ECPR continues to play a crucial role in enabling many claims to get off the ground. In particular, we highlight legal challenges to the Airports National Policy Statement (which sets out the Government’s support for a new runway at Heathrow airport and expansion in the South East) currently before the High Court. Six claims were brought, five of which were granted Aarhus costs protection limiting their adverse costs liability to £5,000 (individuals) and £10,000 (organisations)<sup>7</sup>. The High Court refused permission for one of the cases brought by an individual on the papers. Following a hearing in October 2018, the judge ordered a “rolled-up hearing” (thus dealing with permission to proceed and full trial at a later date) in respect of the other five cases. At that hearing, the defendant public body served a pre-permission Statement of Costs for **£619,382.80**. Although the eventual costs liability (which will likely extend to millions of pounds) will be split between five claimants, it is inconceivable that anyone (other than the most exceptional claimant) would be able to contemplate legal action in the absence of Aarhus costs protection - the financial risk could potentially ruin them.

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replace those currently arising from the TFEU) are weak and could undermine existing obligations on public bodies to comply with participatory rights under the Aarhus Convention.

<sup>4</sup> The Statutory Instrument amended Section VII of Part 45 of the Civil Procedure Rules (CPR), related parts of the CPR and associated Practice Directions

<sup>5</sup> *The Royal Society for the Protection of Birds Friends of the Earth Ltd & ClientEarth v Secretary of State for Justice the Lord Chancellor* [2017] EWHC 2309 (Admin)

<sup>6</sup> See [here](#)

<sup>7</sup> The remaining Claimant comprised a number of Local Planning Authorities

Notwithstanding the above, costs remain prohibitive for some claimants. There are also problems with regard to the practical operation of the Rules and the limited scope of the ECPR, which excludes reviews under statute engaging Article 9(3) of the Convention (including private nuisance cases and other types of claims under tort law). We are aware of statutory reviews in which the claimants have been advised they have reasonable prospects of success but Aarhus costs protection is unavailable. Problems also persist with regard to Unincorporated Associations (UA) and resident's groups, which have no formal legal personality and require an individual to bring the case on their behalf. The CPR is not designed for such cases as it is the individual's financial resources that are examined with regard to the level of the cap as opposed to those of the organisation. In practice, clients are advised to provide a schedule of financial information for both the individual and the UA, which incurs unnecessary duplication.

Defendants have also challenged the amount of information provided by the claimant and difficulties persist around the variation of the caps. In one case, the defendant agreed to a pre-permission reduction in the default cap of £5,000 to £2,000. However, the reciprocal cap was also reduced from £35,000 to £14,000, which means that the claimant's legal team will be unable to recover their full costs if they are successful.

We also remain concerned about the effect of reciprocal caps, which have no legal basis in the Aarhus Convention. There is almost always an asymmetric relationship between the parties involved in Aarhus cases. Often these cases have poorly-resourced individuals, community groups or NGOs litigating against public bodies or well-funded private entities and reciprocal cost caps only serve to exemplify these inequalities. The Heathrow cases referred to above are cases in which such inequalities exist – and are again manifest if the claimants are successful. If they win, the costs recoverable from the Secretary of State will be capped at £35,000 *in total* despite the fact that their lawyers (five different legal teams as the separate claims have been joined) will no doubt incur far higher expenditure. Most of them will have some form of agreement with their lawyers enabling them to 'top-up' the reciprocal cap with any further sums raised towards the case to help to cover their full costs, but this will not be guaranteed and may amount to very little, or nothing given (as in Heathrow) there are many cases competing for public funds. Such cases can be 'too expensive to win' due to the lack of recovery, and prohibitively expensive in that way.

Finally, while it is helpful that the appeal court is directed to consider the need for a protective costs cap in Aarhus cases, it is by no means certain that a claimant will receive another cap, or (if so) what level it will be set at. This creates significant uncertainty and pressure for the claimant at an intense and time-pressured period. In addition, the requirement to provide a schedule of financial resources again, and without the additional guidance and clarity of the rules at first instance, re-creates further practical barriers.

## **Northern Ireland**

The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017<sup>8</sup> introduced a number of helpful modifications to the 2013 ECPR regime. The Regulations clarify the definition of a "member of the public" and cap the maximum amount of costs recoverable from an unsuccessful applicant (£5,000 for individuals and £10,000 in all other cases). Moreover, this figure can be lowered where necessary to avoid prohibitive expense to the applicant. Successful applicants can also apply to have the current reciprocal cap of £35,000 increased where necessary to avoid prohibitive expense.

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<sup>8</sup> See [here](#)

The amended regulations also allow for a separate cap to appeals in Aarhus Convention cases (set at the same level as the first instance case). However, the court has the same flexibility to vary the caps on appeal in order to avoid prohibitive expense. We also note that the Government in Northern Ireland (unlike England and Wales) decided against proceeding with a number of proposals consulted upon in 2016 regarding multiple applicants, the disclosure of applicant finances, third party support and costs in unsuccessful status.

The amending Regulations do not require an applicant to disclose their means or require the court to have regard to third party support or change to the costs position in cases involving multiple applicants or respondents. Additionally, the NI Regulations already extend costs protection to applicants in statutory reviews as well as JRs to the High Court of decisions within the scope of the Convention.

Finally, the Regulations also exempted the fees applicable to JRs (and statutory reviews) within the scope of the Aarhus Convention from a phased increase to most civil court fees in Northern Ireland from 1 April 2017. Also welcome, has been an amendment to the time limits for bringing JRs to a fixed period of three months from the date of the relevant decision.

However, it has yet to be seen how the power of the Court to increase/decrease limits to avoid cases being prohibitively expensive works in practice. This is of concern in challenges to major decisions (e.g. major infrastructure proposals) where it is simply impossible to provide adequate legal support within the reciprocal cap of £35,000.

Many of the concerns highlighted previously also apply including reciprocal caps, the scope of the ECPR (the NI Regulations do not cover nuisance) and own legal costs in the event that the claimant is unsuccessful. The marked rise in environmental legal challenges being brought by personal litigants in Northern Ireland is likely to be explained by the failure to address this latter aspect of affordability.

## **Scotland**

The Scottish Government published the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018<sup>9</sup> in November 2018. The new Rules contain two positive developments. Firstly, there is now a presumption that PEO applications will be decided without a hearing (thus reducing expense). Moreover, where a court refuses to award a PEO, the applicant's adverse costs liability is limited to £500 (where no previous cap existed). Together, these changes should reduce the costs of applying for a PEO, although the time-consuming nature of the work involved in applying may still render the process unaffordable for some. Secondly, the new Rules define the term "prohibitively expensive" by reference to objective and subjective factors derived from judgments from the CJEU and the UK Supreme Court. This should make the evaluation of prohibitively expensive simpler for the courts, although it remains to be seen how they will be interpreted in practice.

However, we wish to highlight three particularly concerning features of the rules.

- The previous Rules contained a "default cap" of £5,000 on the Petitioner's adverse costs when unsuccessful. Conversely, successful Petitioners were only able to recover up to £30,000 from their opponents. Whereas the old regime allowed for variations of the default caps in favour of a PEO applicant (i.e. downwards), the new Rules make it possible to change the default PEO caps in either direction "on cause shown". Despite constituting a significant change to the PEO regime, this change was

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<sup>9</sup> See [here](#)

not highlighted during public consultation to allow proper consideration of its impacts. We fear that it will be attractive for respondents to seek to use this change in favour of less generous caps for PEO applicants – the likely result being that legitimate claims are deterred from proceeding and uncertainty is added to the system.

- Under the previous Rules, a PEO only covered the proceedings being contemplated at the time of application. This meant that if someone applied for a PEO for proceedings in the Outer House and won their case, but the respondent then appealed – they would have to apply for a new PEO for the appeal in the Inner House. The new rules create a welcome change in that, where a PEO has been granted in the Outer House, its terms will also cover proceedings in the Inner House where the respondent appeals. Where the PEO holder appeals an Outer House decision however, they will have to apply for another PEO to cover the appeal in the Inner House. This is despite the Compliance Committee concluding that having to reapply for a PEO when filing an appeal “... leads to uncertainty and additional satellite litigation, which itself adds further cost, at the appeal stage and accordingly is not consistent with paragraphs 8 (a), (b) and (d) of decision V/9n”. Additionally, if a PEO remains in place, its caps are static on appeal. So, despite the legal costs increasing due to the additional work required of the PEO holder’s legal team to prepare and present their appeal (plus the additional costs of applying for another PEO if necessary), the ability of someone with a PEO to recover their expenses if successful will remain capped at £30K if successful on appeal. The likely result of the 30K cap remaining static when carrying over on appeal is that the petitioner’s ability to pay for their legal representation will decrease when a PEO is carried over. This perverse outcome further tilts the inequality of arms in these cases.
- Finally, it is impossible to establish whether individual decisions are being made according to the rules or assess how the PEO system is working without the systematic publication of PEO application decisions. Yet there is no requirement for this, and the current approach to publication is irregular. The Scottish Civil Justice Council was invited to address this in the consultation, but failed to make the necessary changes. We find it concerning that the necessity of transparency is not accepted in 2019.

Overall, the PEO system remains a limited mechanism to meet the Convention’s requirements. Access to environmental justice is an unaffordable luxury rather than a basic human right in Scotland.

### **Time limits**

In England and Wales, the onerous and vague requirement for claimants when starting domestic cases remains a problem. As the UK leaves the EU, there is scope for this problem to grow in application, as environmental cases will increasingly become based on solely UK law. As such, the certainty provided by the *Uniplex* case may be eroded. In Northern Ireland, the Rules of the Court of Judicature (Northern Ireland) (Amendment) 2017 removed the requirement of promptitude from the time limit for making an application for leave to apply for JR so that the time limit is three months from the date grounds for the application first arose. We welcome this development.

### **The intensity of Judicial Review in the UK**

The Aarhus Convention requires a review of procedural and substantive legality that provides for adequate and effective remedies and is set in a clear, transparent and consistent legal framework.

In the absence of illegality or procedural impropriety, *Wednesbury* unreasonableness (or irrationality) is the usual test for JR of administrative action in the UK. However, demonstrating that a decision is *Wednesbury* unreasonable is an extremely difficult threshold to reach, particularly when the decision-maker has discretion to balance a number of competing considerations. Thus, in the majority of planning cases, for example, the court's view is that it is entirely for the decision maker to attribute to the relevant considerations such weight as it thinks fit. Legal challenges relying almost wholly on procedural, as opposed to substantive, grounds can render JR a time-consuming, expensive and blunt instrument as the decision-maker can simply rectify any procedural flaws when forced through legal action to revisit the decision.

In Communication C33, the Compliance Committee questioned whether the UK provides the necessary standard of review to comply with the Convention and suggested that the proportionality principle (which is applied in UK human rights cases) may provide a suitable alternative. In 2017, three environmental NGOs and a law firm specialising in public law submitted a Communication to the ACCC arguing that the intensity of review in the UK does not comply with the Convention<sup>10</sup>. The Compliance Committee determined the Communication admissible in March 2018. The UK submitted a response in August 2018 on which the Communicants commented in October 2018. We look forward to the Committee's further deliberations on this issue.

**Environment Links UK, February 2019.**

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<sup>10</sup> See Communication ACCC/C/2017/156 United Kingdom [here](#)