Wildlife and Countryside Link Briefing

Costs Protection in Environmental Claims

November 2015

Introduction

Wildlife and Countryside is concerned that current Ministry of Justice proposals in relation to Judicial Review in England and Wales[1], and reforms to the regime of costs protection in environmental cases in particular, put the UK in breach of international legislation on human rights and access to environmental justice. We are appealing to members of the public and other interested parties to register their concern about these proposals via the consultation process and with their MP. The Government proposals have arisen from a fear that objectors and campaigning groups abuse the process of Judicial Review, by delaying proposals and taking weak cases, although the Government has provided no evidence to substantiate these allegations.

The most recent consultation on costs protection in environmental claims can be found here:

https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims

The foundations of democracy and the rule of law require that citizens have access to effective mechanisms to ensure the decisions of public bodies are lawful. Judicial Review is an essential foundation of the rule of law and often the last mechanism for civil society to challenge the decisions of public bodies and achieve a remedy in the courts. Many cases raise issues of wide public interest and strategic importance, including the lawfulness of additional runway capacity at Heathrow or the development of High Speed Two.

The current environmental costs regime

Following more than a decade of domestic and international scrutiny, the Government introduced bespoke costs rules for environmental cases in 2013 to comply with EU law and the United Nations Economic Commission for Europe Aarhus Convention. The current rules are simple and clear - providing many claimants with access to environmental justice for the first time in years - and enabling cases to progress swiftly through the courts.

Environmental JRs are currently defined very broadly – a case will qualify for costs protection if it concerns an environmental issue and defendants can be penalised quite heavily for challenging the status of a claim.

The Aarhus costs regime also modifies the usual rule in litigation that the "loser pays" (this means that if you win your case, you can recover all (or most) of your legal costs from the defendant public body. However, if you lose, you not only have to pay your own legal costs, but also those of the defendant public body). In complex cases, the legal costs can total tens (if not hundreds) of thousands of pounds. However, in environmental cases, the claimants' liability for the defendants' legal fees is capped at £5,000 for individuals and £10,000 in all other cases, thereby providing claimants with certainty about their costs exposure from the outset. It is this advance certainty that has enabled claimants to achieve access to justice for the first time in years.

[1] We understand the Aarhus costs regime is also being reviewed in Scotland and Northern Ireland and that similar proposals may follow

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The basis of the proposals

While the Government has repeatedly emphasised the importance of maintaining the rule of law, the current proposals will seriously undermine the current environmental costs regime, thereby exposing the UK to prolonged scrutiny at international levels and prompting a surge of costly and time-consuming satellite litigation.

These proposals are entirely disproportionate in light of the Government's failure to adduce any evidence, or even a credible narrative, to suggest environmental cases frustrate economic recovery or clog up the courts. In fact, evidence obtained from the MOJ in 2015 confirms that while environmental JRs represent less than 1% of the total number lodged of cases lodged annually, they demonstrate high success rates (approximately 24%) when compared with cases as a whole (2%). Such cases therefore play an essential role in protecting the environment, checking the abuse of power and upholding the rule of law.

The Government's plans to undermine the Aarhus costs rules compound recent proposals on the provision and use of financial information in Judicial Review. The Government has yet to confirm whether these proposals will go ahead but, if enacted, they will create profound difficulties for charities by threatening the general funding available to them and reducing their ability to pursue Judicial Review. The potential exposure of charity donors and funders to legal cost orders arising from indirect funding that a charity subsequently decides to use to fund a JR offends the basic principles of justice.

The current proposals

The Government's proposals for environmental claims include the following:

- **Definition of an environmental claim** – the proposals would extend costs protection to certain types of statutory review. However, while this is welcome, the proposals only include statutory reviews covered by EU law, which appears to comprise a very small proportion of the total number of cases. Statutory reviews covering other important issues, such as the meaning of harm in the Green Belt, flooding and Tree Preservation Orders, for example, will not benefit from costs protection under the proposed regime. The MOJ must therefore ensure that all statutory reviews covering environmental issues are eligible for costs protection (as is currently the case in Northern Ireland) if it is to comply with the Aarhus Convention.

- **Eligibility for costs protection** – at the moment, any claimant can benefit from costs protection. The proposal to confine eligibility to **a** member of the public could exclude community groups, Parish Councils and even environmental NGOs from costs protection. The proposals may also exclude challenges to legislation impacting on the environment (such as environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships) that does not specifically mention the environment in its title or heading from costs protection.

- **Costs protection and permission** – costs protection currently applies from the point the claimant makes an application to the court for JR. The proposals will make costs protection contingent on a claimant obtaining permission to proceed with an application for JR. This will remove advance certainty as to costs exposure and could expose the claimant to costs awards beyond their means – thus preventing the UK from complying with EU law and the Aarhus Convention.

- **Level of the caps on adverse costs liability** – the current of caps of £5,000 for individuals and £10,000 in all other cases will no longer apply. The Government's changes would enable defendants to challenge the level of the cap on a claimant's adverse costs liability depending on their circumstances, which conflicts with the requirement for advance certainty with regard to costs exposure. Proposals to increase the caps from to £10,000 and £20,000 have no evidential basis and do not satisfy the requirement for costs to be "objectively reasonable". It is important to recognise that the figures for adverse costs liability do not represent the claimant's total costs liability – the claimant must also pay the court fee (just under £1,000) and their own legal costs,

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which routinely total around £25,000. The total costs exposure of £31,000 – £36,000 is already prohibitively expensive for many claimants, particularly individuals.

- **Schedule of financial resources** – The Government's proposals will oblige claimants to submit a schedule of financial resources identifying any third party financial support for JR. These requirements are unsubstantiated and unworkable. It is also worrying that such information, which may contain the names and addresses of children and vulnerable people, could be made available to defendants.

- **Multiple claimants** – the £5,000 and £10,000 caps on adverse costs liability current apply no matter how many individuals or groups bring a case to court. The Government is proposing that in cases brought by more than one individual or group, separate costs caps will apply to each of them, therefore making the total costs liability much higher. This will render the total costs exposure objectively unreasonable under EU law and the Aarhus Convention.

- **Challenging Aarhus Convention claims** – it is currently quite onerous for defendants to challenge the status of a claim as an environmental (Aarhus) claim because they can incur high legal costs if they fail. The proposals seek to reduce the costs incurred by defendants following an unsuccessful challenge. This will encourage defendants to challenge claims, thus prompting costly and time-consuming satellite litigation.

- **Interim relief (injunctions)** – the Government's proposals include requiring applications for an injunction to be made by a member of the public, the introduction of a subjective element to decisions on cross-undertakings in damages[2] and a requirement for the court to have regard to the combined financial resources of multiple claimants when making decisions about cross-undertakings in damages. These proposals will prevent many claimants from being able to access relief, so will also therefore conflict with EU law and the Aarhus Convention.

Case study – Norwich Northern Distributor Road

Norwich residents have repeatedly highlighted that the County Council's plans for a 20km Northern Distributor Road (NDR) will cause irreversible damage to the environment, including the destruction of countryside, farmland and wildlife habitats, an increase in noise, air and light pollution and an increase in carbon emissions. As the NDR represented an almost complete ring-road around Norwich, residents also believed that it would increase pressure for a final link from the A1067 – A47 Norwich Southern Bypass across the River Wensum, a Special Area of Conservation (a site of European Importance) and the River Tud.

In October 2015, Parish Councillor Andrew Cawdron launched a Judicial Review of NCC's decision to approve further funding for the scheme on behalf of the Wensum Valley Alliance (WVA). The basis for the case was that the Full Council meeting was provided with misleading information, including errors in the financial data and pricing trends in the construction market. Later that same month, the Council accepted its decision was unlawful and it was duly quashed by the High Court.

Councillor Andrew Boswell, also involved in the legal action, said: "*It would have been impossible for WVA to contemplate legal action without knowing the extent of their financial liability in advance. The Council immediately conceded that it had acted unlawfully in approving the decision. A direct consequence of the legal action is that the Council's decision-making processes came under public scrutiny: we hope that future*

[2] In broad terms, a cross-undertaking in damages is when a claimant provides an undertaking to the court to reimburse a party (usually a third party) for any profit lost as a result of halting a project or activity that could cause environmental damage while the hearing takes place in the event that the claimant loses the substantive case and the third party has been prejudiced financially

decisions will be more informed, robust and environmentally sound."

What you can do to help

The MOJ consultation runs until 10th December. Link has set out its main concerns about the proposals in this briefing and we can provide a more detailed document on request. If you value your right to challenge the decisions of public bodies that may damage or destroy the environment, please do one or both of the following:

- Respond to the consultation via the online survey or email your response to michael.animashaun@justice.gsi.gov.uk;

- Express your concern to your local MP. Ask him/her to press for a debate in the House of Commons and to ask the Justice Committee and the All Party Parliamentary Group on Legal and Constitutional Affairs to hold an inquiry into the Government's proposals for Judicial Review.

For further information

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