



Wildlife and  
Countryside



## **Environment Links UK Statement: Access to Justice in the UK**

### **Summary**

Environment Links UK (formerly Joint Links) collectively represents voluntary organisations with more than 8 million members across the UK. It 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 Sixth Meeting of the Parties (MoP) to the Aarhus Convention with a written statement about the UK's compliance with the access to justice provisions of the Convention.

In recognising that the framework of the Aarhus Convention provides for an effective system of procedural rights, the UK Government must ensure the scope for access to justice for the environment is appropriately provided. However, ongoing reforms to Judicial Review (JR) in England and Wales have seriously undermined the UK's compliance with the access to justice provisions of the Convention. The Department of Justice in Northern Ireland has made positive amendments to their costs regime for environmental cases following consultation in 2015. The Scottish Government has also effected positive changes to the JR regime in respect of costs and standing, but a recent consultation by the Scottish Civil Justice Council could pave the way for the £5,000 cap on financial liability granted by way of a Protected Expenses Orders (PEOs) to be increased as well as decreased.

The outcome of the EU Referendum in June 2016 has created a climate of uncertainty around the future of the EU environmental acquis in the UK. There are also deep concerns about access to justice and the enforcement deficit arising from the loss of the Court of Justice of the European Union (CJEU) and the EU complaints mechanism. In such uncharted territory, we call upon the MoP to ensure the UK upholds its responsibilities under the Convention. In particular, we ask the MoP to consider additional measures to bring the UK back into compliance with the Convention, including a caution or an expert mission to advise on possible ways to implement the measures referred to in Decision V/9n.

This statement is supported by Wales Environment Link, Scottish Environment LINK, Northern Ireland Environment Link and members of Wildlife and Countryside Link listed below:

- **Afonydd Cymru**
- **Angling Trust & Fish Legal**
- **Bat Conservation Trust**
- **Born Free Foundation**

- **Buglife**
- **Campaign for National Parks**
- **Cymdeithas Eryri - Snowdonia Society**
- **Friends of the Earth- England**
- **Friends of the Earth- Northern Ireland**
- **Friends of the Earth- Wales**
- **Open Spaces Society**
- **RSPB**
- **RSPCA**
- **Salmon & Trout Conservation UK**
- **Salmon & Trout Conservation Scotland**
- **The Wildlife Trusts**
- **Whale and Dolphin Conservation**
- **Wildfowl & Wetlands Trust**
- **WWF-UK**
- **ZSL**

### **Costs in England and Wales**

Despite overwhelming public opposition when consulted upon, the Civil Procedure (Amendment) Rules 2017<sup>1</sup> came into effect on 28<sup>th</sup> February 2017. The Amendment Rules introduced damaging amendments to the costs regime for environmental cases including:

- Claimants seeking Aarhus costs protection must now disclose personal financial information to the court when making an application for JR or statutory reviews covered by the scheme (including any actual or likely third party support). There is no guarantee this information will be considered and discussed in open court or in private. We believe this will deter legitimate claims and is unfair within the meaning of Article 9(4) of the Convention as implemented by the EC Public Participation Directive (PPD).
- The Court may, of its own volition or at the request of the Defendant, vary either party's cost cap at any time during the proceedings. It is therefore possible that Claimants will be exposed to considerable costs if they decide to withdraw on the basis of a new cap part-way through the proceedings. The "hybrid caps" proposal was opposed by 98.2% of those responding to the public consultation. We believe the loss of certainty at an early stage in the proceedings will deter many Claimants from embarking on litigation.

These changes are currently subject to a Judicial Review (JR) brought by the RSPB, Friends of the Earth and ClientEarth on the basis that they are incompatible with the PPD, the rulings of the CJEU in *Commission v UK*<sup>2</sup> and *Edwards*<sup>3</sup> and Article 9(4) of the Aarhus Convention concerning prohibitive expense<sup>4</sup>. In April 2017, the Honourable Mr Justice Dove granted

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<sup>1</sup> See [http://www.legislation.gov.uk/uksi/2017/95/pdfs/uksi\\_20170095\\_en.pdf](http://www.legislation.gov.uk/uksi/2017/95/pdfs/uksi_20170095_en.pdf)

<sup>2</sup> Case C-530/11

<sup>3</sup> *Edwards v Environment Agency* (Case C-260/11) and *R (Edwards) v Environment Agency* (No. 2) [2013] UKSC 78)

<sup>4</sup> See ACCC Communications C23, C27 and C33

permission for both grounds of the JR to proceed and expedited the case in view of its strategic importance for other cases. The High Court heard the case on 19<sup>th</sup> July 2017 and judgment is awaited.

There is also considerable Parliamentary concern about the changes. In February 2017, the House of Lords Secondary Legislation Scrutiny Committee (which scrutinises new secondary legislation) drew the SI to the attention of both Houses, concluding: “*While asserting that the changes are to “discourage unmeritorious claims”... [and] the MOJ states that its policy objective is to introduce greater certainty into the regime, the strongly negative response to the consultation and the submission received indicate the reverse outcome, and that as a result of the increased uncertainty introduced by these changes, people with a genuine complaint will be discouraged from pursuing it in the courts...*”<sup>5</sup>. Lord Marks of Henley-on-Thames has also laid a “Motion of Regret” in the House of Lords reiterating the above concerns. This will be debated in Parliament on 13<sup>th</sup> September 2017.

The changes to the costs regime compound other changes to JR (some of which were introduced under the Criminal Justice and Courts Act 2015), including:

- Increased court fees – now approximately £1000 simply to apply for JR in the High Court;
- Reduced time-limits within which to take a case (challenges to decisions on planning matters must be brought within a demanding six weeks deadline);
- The vague and unclear rule that a claim must be brought “promptly” within 3 months in cases challenging national legal provisions;
- Removing the right to an oral hearing in cases deemed “totally without merit”;
- The failure to extend costs protection for private environmental law claims (such as nuisance<sup>6</sup>);
- Further reductions in legal aid (NGOs do not qualify in any event); and
- Exposing JR interveners to potential costs orders.

These developments take the UK Government in the opposite direction of travel to compliance with Decision V/9n of the Meeting of the Parties to the Aarhus Convention concerning the UK and the prohibitive expense.

## **Northern Ireland**

The Department of Justice in Northern Ireland consulted on similar proposals to the MoJ in 2015/2016<sup>7</sup>, provoking a modest but strong reaction<sup>8</sup>. The Department published its response in September 2016<sup>9</sup>, acknowledging a “... *widespread opposition amongst respondents to the proposals made and a general consensus that they were a retrograde step in terms of the protection offered to environmental litigant*”. As a result, most of the damaging proposals,

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<sup>5</sup> See <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldsecleg/114/11403.htm> 6

<sup>6</sup> See Communications C85 and C86

<sup>7</sup> See <https://www.dojni.gov.uk/consultations/consultation-proposals-revise-costs-cappingscheme-certain-environmental-challenges>

<sup>8</sup> NIEL’s response can be found here: <http://www.nienvironmentlink.org/cmsfiles/NIEL-response-DoJ-Costs-Protectionconsultation.pdf>

<sup>9</sup> See <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/costs-protection-inenvironment-cases-responses.pdf>

including the mandatory disclosure of financial details and the possibility for the respondents to apply for the caps to be varied, were withdrawn. The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017<sup>10</sup> provide for a maximum cap on adverse liability of £5,000 and provide for the cap to be reduced where necessary to ensure costs are not prohibitively expensive for the applicant.

Other welcome measures that may improve access to environmental justice were proposed, including the fact that applicants can apply to the court for the respondent's cap of £35,000 to be increased if the default limits would make the proceedings prohibitively expensive, thus preventing cases from being "too expensive to win".

## Scotland

The Scottish Government remains non-compliant with the Aarhus Convention despite a number of proposed improvements to the Protective Expense Order (PEO) regime.

Scottish Environment LINK welcomed amendments to the Protective Expenses Order (PEO) regime in 2016 including extending the scope of the Rules to cover cases falling under Articles 9(1) and 9(3) of the Convention and the categories of persons eligible for a PEO to include Members of the Public and Members of the Public Concerned. While it is too early to evaluate the impact of these changes, we hope that community groups will now routinely obtain costs protection.

The Scottish Civil Justice Council (SCJC) consulted this year on proposals to further amend the regime for the granting of PEOs.

While we agree that the definition of 'prohibitive expense' in the current rules<sup>11</sup> implies a subjective test, and should be removed, we are concerned that the proposal to remove the definition entirely is not the correct approach. Given anecdotal evidence of lack of familiarity of members of the judiciary with the Aarhus Convention, and the clearly inconsistent approach of the courts in awarding PEOs<sup>12</sup>, some guidance should be retained to ensure applicants are treated fairly and equitably.

We welcome the proposal to simplify and accelerate the procedure for determining PEO applications and to cap liability for unsuccessful applicants. These changes should help to make procedure more accessible to the public. However, we note that sum of £500 is arbitrary, and consider no liability for the other side's costs would be more appropriate, given that the overall cost of litigation remains prohibitively expensive.

We also welcome the proposal to extend protection under a PEO awarded at first instance to the appeal stage where the appeal is filed by the respondent.<sup>13</sup> However we note that if the

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<sup>10</sup> Link

<sup>11</sup> at 58A.5 current Court Rules on Protective Expense Orders  
<https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chapter58a-1.pdf?sfvrsn=8>

<sup>12</sup> as demonstrated by the different approaches in *Gibson vs Scottish Ministers* and *John Muir Trust vs Scottish Ministers*

<sup>13</sup> at 58.A.8 Draft Protective Expense Order Rules  
<http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc->

applicant instigates an appeal they will have to apply for a new PEO, thereby increasing uncertainty for litigants and risking mounting costs.

Further, we are concerned about one aspect of the proposals not specifically consulted upon. The present regime caps the applicant's liability in expenses to the respondent to the sum of £5,000<sup>14</sup> and provides for that sum to be reduced - but not increased. As such, Petitioners benefitting from a PEO have absolute clarity and certainty as to the maximum extent of their financial liability in prescribed cases. The proposals consulted upon would give the Court the power to "*vary either or both of the sums mentioned in paragraph (1)*". Our understanding is that this means the cap can be increased as well as decreased, and therefore this is a significant departure from the current position, which we fear will deter legitimate claims from proceedings.

In its Report to the sixth session of the MoP, the Compliance Committee welcomes the significant steps taken by Scotland in meeting the requirements of paragraphs 8 (a), (b) and (d) of Decision V/9n.<sup>15</sup> However, we draw the attention of the Compliance Committee and the MoP to the fact that the SCJC proposals subsequently appear to include the possibility of increasing, as well as decreasing, the £5,000 cap on adverse liability for Petitioners.

Moreover, despite the above improvements, legal action remains, as a whole, prohibitively expensive for most individuals, communities and NGOs in Scotland. Barriers to legal aid mean that few awards are granted in environmental cases. Certain court fees have doubled in recent years - for example, hearing fees for the Court's time are now £500 per half an hour per party - and litigants' own legal costs remain high in complex JR cases. It is apparent that the terms of PEOs have been set without an assessment of the overall costs of litigation to an applicant. Furthermore, PEOs do not cover proceedings in private law claims.

In March 2016, LINK responded to a consultation inviting views on developments in environmental justice in Scotland, and submitted that the establishment of a specialist environmental court or tribunal should be considered to help improve access to justice, while the majority of responses are broadly critical of the limited approach taken to Aarhus matters in the paper<sup>16</sup>. The Government have yet to publish analysis and next steps following the consultation.

### **Intensity of Judicial Review**

Article 9(2) of the Aarhus Convention requires contracting Parties to provide the public with access to legal review procedures to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 of the Convention.

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[consultations/consultation-on-draft-rules-for-protective-expenses-orders/annex-e---draft-protective-expenses-orders-rules.pdf?sfvrsn=2](https://consult.scotland.gov.uk/courts-judicial-appointments-policy-unit/environmentaljustice)

<sup>14</sup> See Chapter 58A.4(1)

<sup>15</sup> Report of the Compliance Committee on Compliance by the UK with its obligations under the Convention with decision V/9 of the Meeting of the Parties, Advance Copy, 31 July 2017, para 69

<sup>16</sup> See, <https://consult.scotland.gov.uk/courts-judicial-appointments-policy-unit/environmentaljustice>

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, 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 (see an established pattern of planning cases including *R (on the application of Jones v Mansfield District Council)*<sup>17</sup>, *Evans*<sup>18</sup>, *Foster*<sup>19</sup>, *Smyth v Secretary of State for Communities and Local Government*<sup>20</sup>, *Viking*<sup>21</sup> and *Dilner*<sup>22</sup>).

Challenges that proceed rely almost wholly on procedural grounds, rendering 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 Aarhus Convention Compliance Committee (ACCC) questioned whether the UK provides the necessary standard of review to comply with Article 9(2) of the Convention and suggested that the proportionality principle (which is currently applied in UK human rights cases) may be a more appropriate alternative.

Environment Links UK, August 2017.

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<sup>17</sup> 10 [2003] EWCA Civ 1408, paragraphs 60-61  
<sup>18</sup> *Evans v Secretary of State for Communities and Local Government* [2013] EWCA Civ 115  
<sup>19</sup> *R (on the application of (1) Derek Foster (2) Tom Langton (claimants) v Forest of Dean District Council (Defendant) & (1) Homes & Communities Agency (2) Natural England (Interested Parties)* [2015] EWHC 2648 (Admin)  
<sup>20</sup> [2015] EWCA Civ 174, [79]–[80]  
<sup>21</sup> *Sustainable Scotland v The Scottish Ministers* [2014] CSIH 60  
<sup>22</sup> *R (on the application of Dilner) v Sheffield City Council* [2016] EWHC 945 (Admin)