



Wildlife and
Countryside



Environment Links UK Statement: Access to Justice in the UK 2018

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 Eleventh Meeting of the UNECE Task Force on Access to Justice with a written statement about the UK's compliance with the access to justice provisions of the Aarhus 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.

The ongoing debate around the UK's exit from the EU raises 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, which currently provides members of the public, community groups and NGOs with a free and accessible mechanism to pursue potential infringements of EU law¹. The Secretary of State for the Environment, Food and Rural Affairs, the Rt. Hon. Michael Gove MP, has acknowledged that Judicial Review does not provide an adequate replacement for the loss of these functions². The Government is expected to consult on a new body to undertake some of the important functions of the Community institutions, and the future application of fundamental EU environmental principles, later this month.

Against this backdrop, ongoing reforms to Judicial Review (JR) and the costs regime for environmental cases in England and Wales continue to undermine the UK's compliance with the Convention. This is in contrast to the Department of Justice in Northern Ireland, which 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. However, 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.

This statement is supported by Wales Environment Link, Scottish Environment LINK, Northern Ireland Environment Link Wildlife and Countryside Link.

¹ The infringements procedure is set out in Article 258 of the TFEU – see [here](#)

² See Evidence given to the Environmental Audit Committee on 1st November 2017 [here](#)

Costs in England and Wales

Despite widespread opposition, the Civil Procedure (Amendment) Rules 2017³ came into effect on 28th February 2017. Claimants seeking Aarhus costs protection are now required to disclose personal financial information when making an application for JR or relevant statutory reviews (including any actual or likely third party support), originally with no guarantee that such information would be considered in private. The new Rules also enabled the Court - of its own volition or at the request of the Defendant - to vary either party's cost cap at any time during the proceedings, thus making it possible for Claimants to be exposed to considerable costs if they decided to withdraw on the basis of a new cap part-way through the proceedings.

These changes were challenged by three environmental NGOs by way of a Judicial Review (JR) in February 2017⁴ on the basis of incompatibility with the EC Public Participation Directive (PPD), the rulings of the CJEU in *Commission v UK*⁵ and *Edwards*⁶ and the Aarhus Convention⁷. The RSPB, Friends of the Earth and ClientEarth argued that:

- The Rules fail to provide claimants with early certainty as to their likely costs exposure because the Amendment Rules allow for the default cap to be varied at any point in the proceedings; and
- Claimants will be deterred from bringing claims if there is a risk that their personal financial information, or that of the individual funders, will be discussed in open court.

In addition, the Claimants sought a declaration that in assessing what is prohibitively expensive, the court may take into account what the Claimant must pay for their own costs.

In September 2017, the Hon. Mr Justice Dove held that:

- The rules varying the default costs caps are consistent with EU law when considered in the context of the surrounding rules and practice. During the hearing, the Government had conceded that Defendants must make an application for a variation to the Claimant's costs cap at the earliest opportunity (i.e. when they file an Acknowledgment of Service) and that later applications may only be considered if the Claimant has lied or misled the court over his finances or their means have substantially changed. As long as the Amendment Rules operate in this way in practice they do not offend against EU law and the requirements of early certainty and reasonable predictability⁸; and
- The possibility that a claimant's financial affairs will be discussed in public could deter meritorious claims. The Rules should therefore be amended to ensure that hearings are held in private in the first instance. The judge also considered it helpful to define the nature and content of the financial information a Claimant must file with the court.

³ See [here](#)

⁴ *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)

⁵ Case C-530/11

⁶ *Edwards v Environment Agency* (Case C-260/11) and *R (Edwards) v Environment Agency* (No. 2) [2013] UKSC 78)

⁷ See ACCC Communications C23, C27 and C33

⁸ As the Secretary of State conceded this as the lawful position during the hearing, the judge awarded the Claimants their full costs in the proceedings (subject to the cap of £35,000) on the basis that the position was clarified by the case

As the Government had conceded that the court may take into account what the Claimant must pay for their own legal costs when determining what is prohibitively expensive, the judge held that it was not necessary to grant declaratory relief because the court's endorsement of their consensus confirmed the position.

We understand the Civil Procedure Rules (CPR) will be amended to reflect the judge's comments in relation to the timing of any application to vary the cap and the financial information to be provided to the court when making an application for JR or relevant statutory review. However, despite the judgment, the Government is unwilling to amend the CPR in respect of private hearings pending the outcome of a review of Open Justice (CPR Part 39 and PD 39). The Courts and Tribunals Judiciary has, however, confirmed that all hearings will be listed as private in the interim⁹. While the JR achieved as much as it could within the confines of the CJEU judgments in *Edwards* and *Commission v UK*, it remains to be seen what effect the new regime will have on environmental cases. There are new and ambiguous factors to be considered for determining if likely costs are objectively unreasonable and so prohibitively expensive (Civil Procedure Rule 45.44 (3) (b)) and different approaches taken by the judiciary may lead to inconsistency and further uncertainty overall.

There was also considerable Parliamentary concern about the changes. In February 2017, the House of Lords Secondary Legislation Scrutiny Committee drew the Amendment Rules 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...*"¹⁰. Lord Marks of Henley-on-Thames subsequently laid a "Motion of Regret" for the passage of the Amendment Rules in the House of Lords reiterating the above concerns. The Motion was debated in Parliament in September 2017, and the vote carried by 142 to 97, thus resulting in a loss for the Government¹¹.

The new costs regime compounds other recent changes to JR (some introduced under the Criminal Justice and Courts Act 2015), including:

- Increased court fees – approximately £1,000 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 six weeks deadline). Some prospective claimants have questioned whether such a demanding deadline is compatible with the requirement for "fairness" in Article 9(4) of the Convention;
- 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 to private environmental law claims (e.g. nuisance¹²);
- Further reductions in legal aid (NGOs do not qualify in any event); and
- Exposing JR interveners to potential costs orders.

⁹ Via a standing instruction as to listing in the Administrative Court Office announced on the judiciary website [here](#)

¹⁰ See [here](#)

¹¹ The debate can be viewed [here](#) (See 18.45.44 until 20.02):

¹² See Communications C85 and C86

These developments continue to take the UK Government in the opposite direction of travel to compliance with Decision VI/8k of the Meeting of the Parties to the Aarhus Convention concerning the UK and the prohibitive expense¹³.

Northern Ireland

The Department of Justice in Northern Ireland consulted on similar proposals to the MoJ in 2015/2016¹⁴, provoking a modest but strong reaction¹⁵. The Department duly withdrew most of the damaging proposals, including the mandatory disclosure of financial details and the possibility for the respondents to apply for the caps to be varied. The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 201710 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 (SEL) welcomed amendments to the 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. While it is too early to evaluate the impact of these changes, we hope that community groups will now routinely obtain costs protection.

In 2017, the Scottish Civil Justice Council (SCJC) consulted on proposals to further amend the regime for the granting of PEOs¹⁶. We welcomed the proposal to simplify and accelerate the procedure for determining PEO applications, to cap liability for unsuccessful applicants to £500 and to extend protection under a PEO awarded at first instance to the appeal stage where the appeal is filed by the respondent¹⁷. However, concerns were raised about the proposal to remove the definition of prohibitive expense in light of the inconsistent approach of the courts in awarding PEOs¹⁸. In particular, we also highlighted that views were not sought on one especially damaging change to the proposed Rules as consulted upon – to give the Court the power to "*vary either or both of the sums mentioned in paragraph (1)*" (i.e. that the cap can be increased as well as decreased). This is a significant departure from the current position, which we fear will deter legitimate claims from proceeding.

In October 2017, the SCJC published an Analysis of Responses to the Consultation¹⁹, concluding that: "*Overall, consultees were broadly supportive of the need for increased costs protection for applicants in environmental cases, and for changes to be made to the rules of court to that effect, in order to ensure compliance with the Convention*". The Council subsequently established a working group to

¹³ See [here](#), page 54-57

¹⁴ See [here](#)

¹⁵ NIEL's response can be found [here](#)

¹⁶ See [here](#)

¹⁷ At 58.A.8 Draft Protective Expense Order Rules [here](#)

¹⁸ As demonstrated by the different approaches in *Gibson vs Scottish Ministers* [2016] CSIH 10 and *John Muir Trust vs Scottish Ministers* [2016] CSIH 33

¹⁹ See [here](#)

consider the policy issues arising from the consultation and make recommendations to the Council for revised procedural rules. The working group has met once with further meetings planned for 2018.

SEL notes that the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill,²⁰ currently at stage 2 in the Scottish Parliament, intends to introduce qualified one-way cost shifting (QOCS) in personal injury cases, which will include certain private law Aarhus cases ('toxic torts'). The justification for this welcome intervention is that personal injury cases commonly involve a defender with far greater resources than the pursuer, and with the protection of liability insurance, and notes that the benefit to the pursuer may well be smaller than the costs, especially if the defender deploys a large and expensive defence, as such these issues risk obstructing access to justice. The same logic of course applies in public interest Aarhus cases, yet public interest Aarhus cases have to proceed through the more expensive and risky PEO regime to achieve cost protection. SEL is urging the Scottish Government to consider extending QOCS to all Aarhus cases.

Despite the above improvements, legal action remains, as a whole, prohibitively expensive for most individuals, communities and NGOs in Scotland. 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. 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 up to £600 per half an hour per party - and litigants' own legal costs remain high in complex JR cases which can run into several days in court. Further 'uplifts' of 2% or more are planned for each of the next three years²¹. Meanwhile, the Faculty of Advocates has warned the Scottish Government that its policy of full cost recovery in court fees could be illegal²².

In March 2016, SEL responded to a consultation inviting views on developments in environmental justice in Scotland²³. The Scottish Government published an analysis of the consultation in September 2017²⁴. The majority of respondents welcomed the establishment of an environmental court or tribunal as a means to reducing costs and improving access to justice in civil environmental matters. However, the Scottish Government decided not to take any further action on the basis that there was no clear consensus on other matters, such as whether a court or tribunal should deal with criminal cases and what types of "environmental" cases should be considered.

The intensity of Judicial Review in the UK

Read together, Articles 3(1), 9(2), (3) and (4) of the Aarhus Convention require a review of procedural and substantive legality that provides for adequate and effective remedies. This is to be set in a clear, transparent and consistent legal framework (Article 3(1)).

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 (see an established practice of

²⁰ See: <http://www.parliament.scot/parliamentarybusiness/Bills/104998.aspx>

²¹ See: <http://www.gov.scot/Publications/2017/10/4229/346286>

²² See: <http://www.advocates.org.uk/news-and-responses/news/2018/jan/court-fees-regime-could-be-unlawful-says-faculty>

²³ See [here](#)

²⁴ See [here](#)

jurisprudence throughout the UK including (i) in England and Wales: *Jones*²⁵; *Loader*²⁶; *Bowen-West*²⁷; *Evans*²⁸; *Foster*²⁹; *Smyth*³⁰; *Abbotskerswell*³¹; *Ribble*³²; *McMorn*³³; and *Dillner*³⁴ (ii) in Scotland: *Wordie*³⁵; *RSPB v Scottish Ministers*³⁶; *Douglas*³⁷; *Viking*³⁸; *Cairngorms Campaign*³⁹; and *Carroll*⁴⁰ and (iii) in Northern Ireland: *River Faughan*⁴¹; *National Trust*⁴²; *Young*⁴³; *Taggart*⁴⁴; and *Newry Chamber of Commerce*⁴⁵).

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 Aarhus Convention Compliance Committee 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 applied in UK human rights cases) may provide a suitable alternative. Three environmental NGOs and a private law firm have recently submitted a Communication to the ACCC arguing that the intensity of review in the UK does not comply with Articles 3(1), 9(2), 9(3) and 9(4) of the Convention⁴⁶. The Compliance Committee is due to determine admissibility at its next meeting in March 2018.

Environment Links UK, 15th February 2018.

²⁵ *R (on the application of Jones) v Mansfield District Council* [2003] EWCA Civ 140

²⁶ *R (on the application of Loader) v Secretary of State for Communities and Local Government* [2011] EWHC 2010 (Admin) and *R (on the application of Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869

²⁷ *R (Bowen-West) v Secretary of State* [2012] EWCA Civ 321

²⁸ *Evans v Secretary of State for Communities and Local Government* [2013] EWCA Civ 115

²⁹ *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)

³⁰ *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174

³¹ *Abbotskerswell Parish Council v (1) Teignbridge District Council (2) Secretary of State for Communities & Local Government* [2014] EWHC 4166 (Admin)

³² *R (the RSPB) v Secretary of State for the Environment, Food and Rural Affairs & BAE Systems (Operations) Ltd (Interested Party)* [2015] EWCA Civ 227

³³ *R (on the application of Richard McMorn) v Natural England & Defra* [2015] EWHC 3297 (Admin)

³⁴ *R (on the application of Dilner) v Sheffield City Council* [2016] EWHC 945 (Admin)

³⁵ *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345

³⁶ *Royal Society for the Protection of Birds v Scottish Ministers* [2017] CSIH 3

³⁷ *Douglas v Perth and Kinross Council* [2017] CSIH 28

³⁸ *Sustainable Scotland v The Scottish Ministers* [2014] CSIH 60

³⁹ *Cairngorms Campaign v Cairngorms National Park Authority* 2014 SC 3

⁴⁰ *Carroll v Scottish Borders Council* 2016 SC 377

⁴¹ *In the Matter of an Application by River Faughan Anglers Limited for Judicial Review and in the Matter of a Decision by the DoENI* [2014] NIQB 34

⁴² *In an Application for Judicial Review by the National Trust for Places of Historic Interest or Natural Beauty* [2013] NIQB 60

⁴³ *In the Matter of William Young for Judicial Review* [2012] NIQB 15

⁴⁴ *In the Matter of an Application by Michael Taggart for Judicial Review and In the Matter of a Decision of the Planning Appeals Commission for Northern Ireland* [2011] NIQB 8

⁴⁵ *In the Matter of an Application by Newry Chamber of Commerce and Trade for Judicial Review and In the Matter of a Decision by the DoENI* [2015] NIQB 6

⁴⁶ The Communication was submitted in December 2017 by the RSPB, Friends of the Earth, Friends of the Earth Scotland and law firm Leigh Day