

Wildlife & Countryside Link response to Costs Protection in Environmental Claims

Executive Summary

Judicial Review is an essential foundation of the rule of law and almost the sole mechanism for civil society to challenge unlawful decisions affecting the environment and achieve a remedy in the courts.

After a decade of domestic and international scrutiny, in 2013 the Government introduced bespoke provisions in the Civil Procedure Rules for environmental cases to comply with EU and international law. The new rules offer many claimants access to environmental justice for the first time in years.

The current consultation seeks to amend the Civil Procedure Rules governing costs in environmental cases. While the Government recognises the importance of maintaining the rule of law¹, these proposals compound previous restrictions on the process of JR. Their cumulative effect will make it extremely difficult for claimants to bring environmental cases and will thus take the UK in the opposite direction of travel to compliance with the EU law (the EC Public Participation Directive or PPD) and the United Nations Economic Commission for Europe (UNECE) Aarhus Convention.

The proposals are disproportionate in light of the Government's failure to adduce any evidence, data or even a credible narrative, to show that Environmental claims frustrate economic recovery or clog up the Administrative Court. In fact, evidence obtained from the Ministry of Justice in 2015² confirms the opposite. The number of environmental cases lodged annually in England and Wales has not increased following the introduction of the Aarhus costs rules in April 2013³. They also represent a very small (less than 1%) percentage of the total number of JRs lodged on an annual basis (some 20,000). There is therefore no argument to support the contention that the introduction of the costs rules has led to a proliferation of environmental litigation that must be stemmed.

Furthermore, between April 2013 and March 2015, nearly half (an average of 48%) of environmental cases were granted permission to proceed. This contrasts with a figure of 16% for all other Judicial Review cases in 2014 and 7% in the first quarter of 2015. Between April 2013 and March 2015, on average, 24% of environmental cases were successful for the claimant. This contrasts with a success rate of 2% for all cases in 2014. Thus, while environmental cases represent a very small proportion of the total number of cases lodged annually, they have high success rates when compared to JRs as a whole. Environmental cases therefore play an essential role in upholding the rule of law, protecting the environment and improving the quality of living standards.

The corollary of these proposals will be a move away from a situation in which fixed costs caused few delays to one in which satellite litigation (which in itself can be prohibitively expensive) is once again the norm. These costly and time-consuming proceedings will

¹ See the Ministerial Foreword to the Ministry of Justice consultation *The Reform of Judicial Review: Provision and use of financial information* (July 2015) at: https://consult.justice.gov.uk/digital-communications/reform-of-judicial-review-proposals-for-the-provis/supporting_documents/reformofjudicialreview.pdf

² As a result of information requests under the EIRs submitted by Leigh Day

³ The only published data covering environmental cases prior to 2013 can be found in the report of the 2008 Sullivan Working Group on Access to Environmental Justice. This report concludes there were 163 cases in 2002 and 155 cases in 2007 and that this "*would appear to represent a reasonable estimate as to the average number of cases*". Data obtained from the MoJ in 2015 confirms there were 118 Aarhus claims in March 2013-April 2014 and 153 between March 2014-April 2015



distract from the substantive issues. Furthermore, they will be a cause of great frustration to public bodies and interested parties as well as claimants and ultimately impact on the level of protection for health and the environment.

The Proposals

- **Definition of Aarhus Convention claim** – While the proposal to extend costs protection to certain statutory reviews is welcome, it will not make a significant difference to the current position. Statutory reviews covering key environmental issues, such as the meaning of harm in the Green Belt and the impact of wind farms and solar energy development will not be eligible for costs protection. The Government must ensure that statutory reviews covering all environmental issues are brought within the scheme - as is currently the case in Northern Ireland - if it is to comply with the Aarhus Convention;
- **Eligibility for 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 legislation impacting on the environment that does not specifically mention the environment in its title or heading (such as environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships) from review;
- **Costs protection and permission** – Proposals to make costs protection contingent on obtaining permission to proceed with an application for JR will prevent the UK from complying with the PPD and the Aarhus Convention;
- **Level of the caps** – Allowing defendants to challenge the level of the cap conflicts with the requirement for claimant's to have certainty with regard to costs exposure. Proposals to increase the caps from £5,000 (individuals) and £10,000 (other cases) to £10,000 and £20,000 respectively do not satisfy the requirement for costs to be objectively reasonable. It should also be noted that these figures do not represent the claimant's total costs liability – they must also pay the court fee (just under £1,000) and their own legal costs, which on average total at least £25,000. The total costs exposure of £31,000 – £36,000 is already prohibitively expensive for many claimants, particularly individuals;
- **Schedule of financial resources** - Requiring claimants to submit a schedule of financial resources specifying third party support is unnecessary and unworkable. Charity membership is an affordable way for people with limited resources to contribute to the protection and enhancement of the environment and civil society. Vulnerable people, such as children, the elderly and those with disabilities are often members of charities – but the knowledge that they might be exposed to court costs is likely to deter them from joining environmental charities and hence participating in activities associated with improving the environment;
- **Multiple claimants** – Applying separate costs caps to individual claimants could render the claimants' collective costs exposure objectively unreasonable;
- **Challenging Aarhus Convention claims** - Replacing the award of costs on an indemnity basis for challenging the status of an Aarhus claim with the standard basis will encourage defendants to challenge claims and lead to unnecessary satellite litigation;
- **Interim relief (injunctions)** – There is no basis for proposals to restrict the ability to obtain interim relief. Information disclosed by the MOJ in November 2015 confirms there were only twelve applications for injunctive relief in Aarhus claims between April 2013 and May 2015. Requiring applications for interim relief to be made by a member of





the public will prevent many claimants from being able to access relief. Proposals to introduce a subjective element to decisions on cross-undertaking in damages, and for the court to have regard to the combined financial resources of multiple claimants when making decisions about cross-undertakings in damages, also conflict with CJEU judgments in *Commission v UK* and *Edwards*, the PPD and the Aarhus Convention.

Link urges the Government to withdraw these unwarranted and damaging proposals. To press ahead will return the UK to a position of significant non-compliance with EU law and the Aarhus Convention and once again expose the Government to prolonged judicial and administrative scrutiny at domestic, European and international levels.

