Cyswllt Amgylchedd Cymru | Wales Environment Link

Northern Ireland environment link

Scottish Environment LINK

Environment Links UK Statement: Access to Justice in the UK 2021

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 Thirteenth Meeting of the UNECE Task Force on Access to Justice with a statement on the UK's compliance with the third pillar of the Aarhus Convention.

Since our last Statement in 2019, the UK has left the European Union. We have previously expressed deep concerns about the governance arrangements arising from Brexit, focusing on the implications of the loss of to the Court of Justice of the European Union (CJEU) and the EU complaints mechanism for access to environmental justice in the UK.

Measures to replace the monitoring, reviewing and enforcement of environmental law including a complaints mechanism are underway in most of the UK. In England and NI, proposals for an independent Office for Environmental Protection (OEP) can be found in Chapter 2 and Schedule 1 of the Environment Bill[1]. Pending Royal Assent for the Bill, an interim Environmental Governance Secretariat (IEGS) has been established to consider complaints of suspected breaches of environmental law by public authorities in relation to England, Northern Ireland, reserved and UK-wide matters. In Scotland the parliament has passed its Environment Bill equivalent and also have interim arrangements in almost in place for its Environmental Standards Scotland (ESS) established by the European Union (Continuity) (Scotland) Act. ESS has similar statutory functions to the OEP in terms of monitoring, reviewing and enforcing environmental law. But there are serious gaps in both compared to comprehensive European Commission and CJEU regimes. Even for their proposed functions and roles it is too early to gauge how effective these bodies will be, but it is already clear that they will have a restricted remit and a narrower range of remedies available to them. We also have concerns about the scope for Government to guide the OEP's work and the impact of this on its ability to act independently and strategically. Unfortunately in Wales even interim arrangements are not fully in place (although proposed and agreed by the relevant Welsh department) and not even draft legislation has been published. With elections due to take place this year, it is predicted legislation will be not passed and new governance mechanisms established for 18 months.

We look forward to updating the Task Force on how these new bodies are influencing the UK's obligations under the Convention.

[1] The most up to date text of the Bill can be found here with equivalent provisions for NI in Schedule 3

The repercussions of the global Covid-19 pandemic are acute in all parts of the UK. While recognising these pressures, we call on all of the devolved administrations to ensure that civil society is not further compromised in its ability to protect the environment from pressures that are no less diminished today than in previous years.

For further information, we refer the Task Force to a joint submission on the UK's Final Progress Report on the implementation of Decision VI/8k of the Meeting of the Parties to the Convention, which details our serious concerns about the UK's ongoing failure to comply with Article 9 of the Convention.[2]

England and Wales

A proposed review of the Environmental Costs Protection Regime (ECPR) has been delayed due to the onset of the pandemic. We look forward to further details of the Review, which we assume will involve appropriate stakeholder participation. Notwithstanding this delay, in July 2020, the Government did manage to set up an independent panel to examine JR more broadly.[3] The Panel will examine data, evidence and caselaw to consider whether the right balance is being struck between the rights of citizens to challenge executive decisions and the need for effective and efficient Government.[4] There is wide-spread concern about the apparent motivations and timing for this review, not least given the potentially damaging implications for the rule of law and access to justice. These concerns are exacerbated by the call for evidence[5], which is addressed to defendants and unnecessarily frames JR as a wholly antagonistic process as opposed to one that can clarify the law, improve services from public bodies and ensure good governance. The Panel's findings are due to be published imminently.

Our main concerns about compliance with Article 9 of the Convention are summarised below:

- **Types of claims covered –** we remain concerned that private nuisance claims are still exempt from costs protection despite the adoption of findings against the UK on this matter by the Compliance Committee in 2005 (see Communications ACCC/C/2013/85 and ACCC/C/2013/86).

- **Eligibility for costs protection –** the position regarding costs protection for Unincorporated Associations (UA) remains unclear and this continues to have a chilling effect on them as potential litigants. We are also concerned that recent caselaw may encourage defendants to argue claims must now be brought by UAs in their own right (therefore attracting a £10,000 cap as opposed to a £5,000 cap). We invite the ECPR Review to examine this issue.

- **Level of costs caps -** we are concerned that while there are provisions enabling the costs caps to be varied downwards to reflect the financial capacity of individuals or organisations, there is no evidence to demonstrate this is happening (indeed we are not aware of a single successful variation downwards). We believe the process remains inherently uncertain and a range of other factors have a chilling effect on the willingness of claimants to take claims in the first place.

- **Variation of costs caps** – recent data shows that defendants sought to vary the costs caps in 39 cases (13%) and the court ordered a variation in 7 cases (2.5%). We are concerned that the figure of 13% is relatively high, and while it is reassuring to note the court subsequently ordered a variation of the cap in only a small (2.5%) proportion of cases, it suggests defendants are

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2 The submission was made on behalf of the RSPB, Friends of the Earth England, Wales and Northern Ireland, Friends of the Earth Scotland, the Environmental Rights Centre for Scotland, Benjamin Christman and Roger Watts of C&J Black Solicitor, Belfast. Available here

3 The announcement can be found here

4 The Terms of Reference can be found here

5 The Call for Evidence can be found here

incorrectly applying for the caps to be increased. This shows that unnecessary satellite litigation on costs is resulting, which is exactly what the cost caps are supposed to avoid. We are also aware of cases in which applications to vary the cap have been made after the Acknowledgment of Service, confirming that the rules are not operating to provide certainty and reasonable predictability for claimants.

- **Costs for procedures with multiple claimants** – we remain concerned that when multiple organisations come together for the purpose of making an application for JR on an entirely common legal basis and with no distinguishing factual circumstances (with no increase in administrative costs, no increased complexity of argument and one common outcome) they attract their own cap on adverse costs liability. This can make cases prohibitively expensive for them when unsuccessful. Moreover, because Civil Procedure Rule 45.43(4) operates as a presumption against varying the reciprocal cap of £35,000, it can also render cases in which there is only one defendant "too expensive to win" for claimants. We are unaware of any cases in which the reciprocal cap has been increased. This is true for cases with multiple claimants, and also for those with just one claimant. It is also in sharp contrast to the fact that claimants' cost caps are sometimes increased by the courts. There is no basis in the Convention to protect defendants in this way. The purpose of cost protection under the Convention is to ensure that litigation is not prohibitively expensive for environmental claimants, not environmental defendants.

- **Schedule of claimant's financial resources** – the UK maintains there is no evidence that the requirement in CPR 45.42 to provide a schedule of the claimant's financial resources with the claim form has a chilling effect on claimants. We refer to the finding in *A Pillar of Justice*[6] that the number of overall claims has been decreasing since 2015, which could be broadly indicative of that. Moreover, the requirement to provide a schedule of financial resources should not be divorced from the fact that the statement provides a basis for the defendant to apply for an increase in the cap – which we know, from the data provided by the UK, happens in a disproportionate number of instances (see above).

- **Costs relating to determination of an Aarhus claim** – we are concerned about the clear increase in the number of challenges to the status of Aarhus Convention claims by defendant public bodies seeking to remove costs protection from claimants following the change in the rules.

- **Cross-undertakings for damages -** few applications for interim relief are made and it remains our experience that interim relief is rarely granted. Pending a review of the ECPR we assume this may be because of the high threshold that must be met – the claimant must be able to demonstrate that there is the threat of significant environmental damage and that an injunction is required to preserve the factual basis of the proceedings. Moreover, the rules as they are currently operating imply an additional financial burden in addition to the default cap.[7]

- **Costs orders against or in favour of interveners and funders of litigation** – it is our experience that JR interventions (certainly in support of the claimant) are now rare[8] following the passage of the Criminal Justice and Courts Act 2015.[9] This is unfortunate given that the purpose of granting such interventions is to assist the court in its deliberations.

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6 A joint Report published by Friends of the Earth and the RSPB in November 2019 available here

7 See CPR PD 25 available here

8 The only case we are aware of is *Plan B Earth and Others v. Secretary of State for Transport* [2020] EWCA Civ 214, in which WWF-UK intervened in support of the claimants

9 See here

Scotland

The Scottish Government suggests that the responsibility for the effectiveness of the Protective Expenses Rules (PEO) rests with the Scottish Civil Justice Council. The efficacy of the Rules rests ultimately with the Scottish Government - as all devolved administrations making up the UK as a Party to the Convention. The Scottish Government's failure to take adequate steps to reform the PEO regime, despite repeated findings of non-compliance, is relevant both in terms of the potential 'chilling effect' from recent adverse changes to the PEO rules and in terms of the UK's reliance on absence of evidence of such an effect (which is of course not the same as evidence of no effect).

We wish to highlight the following additional concerns:

- The recent case of *Martin James Keatings v The Advocate General for Scotland, The Lord Advocate, The Scottish Ministers*,[10] (which concerned the Scottish Parliament's power to legislate for a second independence referendum) demonstrates there is no evidence to support the Scottish Government's expectation "*that the costs cap covers all of the costs of the procedure*". We remain of the view that this should be clarified within the PEO rules. We also believe this judgment could create some difficulties for PEO applicants relying on the use of crowdfunding to finance litigation.

- **Types of claims covered** – it is our understanding that rules of court on qualified one-way costs shifting in personal injury cases will be introduced under section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, and that some, but not all, private Aarhus claims will be covered under this new costs regime.

- **Level of costs caps** - the rules should be changed to revert to the previous version where costs caps could only be varied in a way that is favourable to the PEO applicant, i.e. decreased in the case of liability for the other side's costs, and increased in terms of the cross-cap.

- **Variation of costs caps** - we believe that some of the changes made to the PEO rules in 2018 have moved Scotland further away from compliance with the Convention in that: (i) default PEO caps can be moved in either direction "*on cause shown"* (a low test), which leads to increased uncertainty for litigants, exacerbating the "*chilling effect*"; and (ii) PEOs are not carried over if litigants appeal, only if respondents appeal, and then the cap set is inflexible despite the inevitable incurrence of greater costs by the litigant.

- **Evaluation of expenses** - there is no justification to require an evaluation by the litigant of other parties' expenses. If the Court requires that information, it can ask those other parties to provide it, rather than adding to the applicant's risk – provided such an evaluation is binding on those parties.

- **Interveners and costs caps** – the Scottish Government concedes that the costs of interveners do not form part of the cost caps (i.e. there is no special provision within the costs regime for interveners). Even if granted a PEO, an applicant has no protection against paying the adverse expenses of a third-party intervener, which could be prohibitive by themselves. We refer to the case of *The John Muir Trust v The Scottish Ministers,*[11] in which the third-party intervener Scottish and Southern Energy initially sought expenses of £350K, reduced to £50K on negotiation,[12] which serves to completely undermine the PEO system. In order to improve compliance we recommend

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10 2020 CSOH 75 at paragraph 36

11 [2016] CSIH 61

12 The settlement for legal expenses is reported here

that: (i) consideration should be given to improving public information about upcoming and current cases; (ii) the Court of Session Rules on interventions in JRs should be amended to give interveners the right to receive court papers; and (iii) the Rules should provide expressly for PEOs in public interest interventions, in line with the UK Supreme Court rules on interventions, such that orders for expenses will not normally be made either in favour of or against interveners.

- **Court fees –** there is no evidence to support the contention that court fees would be included in the costs regime. This uncertainty could be prevented by explicitly including court fees within the scope of expenses which are covered by the PEO rules. We also refer the Task Force to comments in relation to the *Keatings* case (above), which suggests that court fees may not be covered.

- **Public hearings as part of a PEO application** - we note the UK has failed to clarify what measures are provided to protect financial information where a public hearing is needed as part of a PEO application. We are not aware of any measures which could be used to protect financial information in a public hearing.

- **Legal aid reforms** - we welcome the Scottish Government's commitment to legal aid reform. We hope it will take the opportunity in forthcoming legislation to address long-standing concerns about the operation of Regulation 15 of the Civil Legal Aid Regulations in order to ensure that litigants in public interest environmental cases can access legal aid and to open up legal aid to community groups, as well as addressing our concerns about legal aid caps.

- **Right to a healthy and safe environment** – we welcome the Scottish Government's consideration of incorporating the right to a healthy and safe environment and, as part of this, the provisions of the Aarhus Convention into Scots Law, and urge Ministers to commit to doing so. However, as a general point we would add that there is no guarantee that the incorporation of the Convention into Scots law alone will resolve the longstanding problems with access to justice and non-compliance with Article 9 of the Convention. This process should not be used as an excuse to further delay the reforms which are required in this area.

<u>Northern Ireland</u>

We remain concerned about the impacts of reciprocal (cross) caps in more significant environmental challenges and the unavailability of mechanisms, such as legal aid, to assist with the applicant's own legal costs. The cumulative effect of these factors can render legal challenges to the High Court prohibitively expensive – as evidenced by the number of cases brought by unrepresented litigants in Northern Ireland in recent years. Additionally, we are concerned that:

- **Types of claim covered** – as in other jurisdictions of the UK, we are concerned that private law claims concerning the legality of activities which may have a significant effect on the environment are excluded from the statutory cost protection regime.

- **Cross-undertakings for damages in case involving applications for injunctive relief** – the 2013 Regulations in Northern Ireland continue to regard the question of cross-undertakings as to damages in Aarhus Convention cases, which involve an injunction application, as a matter of wide judicial discretion. The Court is required to have particular regard to avoiding rendering the case prohibitively expensive for the applicant. Cross-undertakings, as to the respondent's losses resulting from the injunction, may have a place in commercial litigation but it is hard to see what justification there is for such a requirement in proceedings aimed at the protection of the environment and where the Court has determined, on the facts of that case, that an injunction is appropriate. We submit that due implementation of the Convention requires that such

undertakings are not required in Aarhus Convention cases or, at least, the Court is required not to impose them where that is liable to have the effect of rendering the proceedings prohibitively expensive or the court's procedures unfair or inequitable as between the parties.