Fifteenth Meeting of the Task Force on Access to Justice, Geneva, 4-5 April 2023
Statement on behalf of Environment Links UK

1. Introduction

Environment Links UK (ELUK) 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.

ELUK welcomes the opportunity to submit a written Statement to the Fifteenth meeting of the Task Force on Access to Justice. This Statement sets out our ongoing concerns about the UK's non-compliance with Article 9 of the Aarhus Convention across the four devolved nations of the UK. We also take the opportunity to highlight the development of constructive initiatives, including the development of a proposal for an Environmental Rights Act in England and Wales and a proposed consultation on the establishment of an Environmental Court in Scotland.

2. Prohibitive Expense

The UK published an Action Plan to implement the recommendations of Decision VII/8S of MOP-7 regarding prohibitive expense on 1 July 2022. Despite our persistent efforts to engage with the substantive development of the Plan, including setting out in some detail the measures we would propose to see in it, the final document contained no tangible, substantive proposals. It simply stated: "*The UK Government will consider whether it is appropriate to amend the Environmental Cost Protection Regime (ECPR) in the Civil Procedure Rules (CPR) or make other changes following the conclusion of the Call for Evidence*".

The Plan was robustly criticised at an open session of the 77th Meeting of the Aarhus Convention Compliance Committee in December 2022. The Committee Curator noted that, as a planning tool, the Plans were expected to contain granular detail setting out how parties would bring themselves into compliance by 1 October 2024. In order to address the Committee's request for the UK to make the Plan "*sharper-edged and more specific*", we set out below our concerns and some possible solutions.

UK-wide concerns

- The current UK Environmental Costs protection Regimes (ECPR) set default adverse costs limits for unsuccessful claimants in Judicial Review (JR) proceedings. There are variations between the UK – in England and Wales the default cap on adverse costs is £5,000 for individuals and £10,000 in all other cases - in Scotland the default cap is £5,000 in all cases. In all jurisdictions there is a reciprocal cap limiting the costs that successful claimants can recover to £35,000.[1] These claimant caps can

[1] In Scotland there is just one cap of £5,000 for all petitioners. The reciprocal cap is universally £35,000 although the position with

still be prohibitively expensive for some JR claimants and while they can in theory be reduced, this very rarely happens. The Aarhus Compliance Committee has expressed concern about the lack of cases in which the default costs caps have been varied downwards, and that the relatively high proportion of cases in which defendants have sought an increase in costs cap for claimants can create a deterrent effect. Potential claimants may decide against bringing cases given concerns over lack of certainty on their cost exposure. Moreover, whilst there have been cases where claimants' cost caps have been increased (for example, ClientEarth had their cost cap increased by the High Court from £10,000 to £25,000 in *R (ClientEarth) v SSBEIS* [2020] EWHC 1303 (Admin)), we are not aware of *any* case in which a public authority defendant's cost cap has been increased (in the aforementioned *ClientEarth* case, the High Court declined to increase the defendant's cost cap, which remained at the default of £35,000) .

- The reciprocal cap can also in itself make cases "too expensive to win". That is particularly concerning given the Convention's requirements regarding the prevention of prohibitive expense are directed towards claimants, not defendants, and so the existence of reciprocal caps for defendants does not reflect the requirements of the Convention itself. That said, we believe the Northern Ireland regime, in which default caps can only be varied downwards and the reciprocal cap can only be varied upwards, represents a significant improvement on the regime operating in other administrations of the UK.

- Most private law environmental claims are excluded from the ECPR. This includes claims in nuisance and proceedings for contempt of court in relation to injunctions targeting environmental protestors (or applications to vary such injunctions).[2] The position regarding unincorporated community groups is also unclear. We believe it is necessary to include all environmental claims within the scope of the ECPRs, and to clarify that community groups benefit from the cap applying to individuals.

- The position regarding costs protection on appeal is unclear. We believe there is merit in introducing a rule confirming the default cap expressly covers the adverse costs of all stages of the proceedings.

- The current position regarding the provision of a cross-undertaking for damages in order to obtain injunctive relief fails to meet the requirement in the Convention for a clear, transparent and consistent framework. Our view is that where a default cap is already in place, or will be set, there should be no further requirement for the provision of a cross undertaking in damages to secure relief.

- Only interveners who join proceedings in support of the <u>defendant</u> can currently benefit from an Aarhus cap. We believe that costs protection under the ECPRs should be extended to interveners who join proceedings in support of the claimant, to ensure parity.

- There is no basis for the rule requiring separate default costs caps for each claimant, particularly where claimants make the same legal arguments on the same factual basis.

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regard to VAT (inclusive or exclusive) may vary. In England and Wales, the figures are inclusive of VAT, as held in *R (oao Friends of the Earth Ltd) v Secretary of State for Transport & Others* [2021] EWCA Civ 13, (13 January 2021)

[2] For example, Friends of the Earth sought to challenge an anti-protest injunction taken out by Cuadrilla in relation to its fracking sites. The court refused to grant cost protection, holding there was no provision for this under the Civil Procedure Rules. This meant that FoE had to withdraw from the proceedings, as Cuadrilla indicated that it might seek to obtain costs of £85,000 from FoE if it was unsuccessful.

England and Wales

There have been unhelpful developments in jurisprudence regarding costs. In *Bertoncini*,[3] the High Court held that an Interested Party to the proceedings has standing to apply for a variation of the default cap (successfully applying to increase the claimant's cost cap from £5,000 to £20,000). Also, in *CPRE v Kent*[4], the Supreme Court confirmed that where permission for JR is refused, a claimant may now be liable to pay the costs of more than one defendant and/or Interested Party (IP). The effect of these judgments is that IPs have been emboldened to submit excessive estimates of costs at an early stage in the proceedings and to apply for the cap to be varied upwards to accommodate excessive costs estimates.

On the plus side, in *Crondall Parish Council v Secretary of State for Housing, Communities and Local Government*[5], the High Court accepted that a Parish Council was a "member of the public" for the purpose of benefiting from an Aarhus cap. Equally, in *R (oao Lewis) v The Welsh Ministers (Rev2)* [2022] EWHC 450 (Admin) (04 March 2022), the Welsh Administrative Court decided that the Aarhus cost protection applied to the entirety of the applicant's claim despite the claim not being based on environmental grounds alone.[6]

While it is positive that the Court reached this conclusion, it is, in our view, unfortunate that defendants are emboldened to challenge whether claims qualify for Aarhus cost protection, bearing in mind the broad objectives and nature of the Aarhus Convention - and more so following changes to the award of costs for unsuccessful challenges from an indemnity costs basis to a usual costs bases. In addition to the *Welsh Ministers* case referred to above, in *R (oao Friends of the Earth Ltd) v UK Export Finance and others* [2022] EWHC 568 (Admin), the defendant UKEF argued that the claim did not qualify for the Aarhus cost protection under the Civil Procedure Rules. The claim concerned the lawfulness of UKEF's decision to provide over 1 billion US $ of public funds to finance a gas project off the coast of Mozambique, including on the basis that this was aligned with the UK's obligations under the Paris Agreement. In their summary grounds of resistance, UKEF argued that the claim was about a financing decision, and so it was not an Aarhus claim. Their secondary was position was that if it was an Aarhus claim, then the claimant's cost cap should be increased from £10,000 to £35,000 (making it equal to UKEF's cost cap). These arguments were rejected by Justice Thornton in the order of 14 May 2021, and the claimant's cost cap was set at £10,000.

Scotland

The Protected Expenses Order (PEO) regime is fundamentally flawed in failing to recognise that the actual costs incurred by an unsuccessful petitioner are not limited to the £5,000 default cap on adverse costs liability, but also include their own legal costs. Furthermore, in the event of a successful judicial review, a PEO limits the amount the petitioner can recover from the other side to only £30,000 (costs often amount to much higher than £30,000). Up until 2018, it was only possible to vary the cap down, but the introduction of powers under the 2018 PEO rules now allows for the default cap to be varied up or down "*on cause shown*", which has introduced legal uncertainty. The default levels of the cap and the cross cap are arbitrary and fail to reflect a realistic assessment of the overall costs faced by an

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3 *R (Bertoncini) v London Borough of Hammersmith and Fulham and Kendall Massey* CO/3213/2019 [2020] EWHC

4 *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36

5 *Crondall Parish Council v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1211 (Admin) – judgment here

6 See here and here

Aarhus petitioner.

There are also significant barriers to accessing legal aid in environmental matters. Civil legal aid is available only to 'persons' and therefore environmental NGOs and community groups are ineligible. Individuals applying for legal aid also face difficulties. The Civil Legal Aid (Scotland) Regulations 2002 limit any grant of legal aid where a person applying has a 'joint interest' in the matter with others. It is likely that in most environmental litigation there will be a number of individuals with similar concerns about the issue in dispute (e.g. in the case of a large development in a conservation area, or air pollution in a city).

There is an urgent need to review and overhaul the costs regime in its entirety. Consideration should be given to the overall costs faced by an Aarhus litigant, with options including introducing one-way cost shifting, exemption from court fees in all courts, and the reform of legal aid for Aarhus cases.

On the matter of court fees, we are pleased that the Scottish Government abolished court fees for cases heard in the Court of Session and falling within the scope of the Aarhus Convention in July 2022. Removing court fees was an important step towards reducing the prohibitively expensive nature of litigation. However, much more needs to be done to make such litigation affordable.[7]

Northern Ireland

Despite the welcome progress made in relation to the adverse costs protection regime, the Cost Protection Regulations only address part of the affordability problem. They do not address the difficulty an applicant may have in being able to afford their own legal costs in the event that they lose the case. The absence of Conditional Fee Arrangements and scant provision of legal aid for environmental cases in Northern Ireland make the burden of an applicant's own legal costs prohibitively expensive regardless of any cost capping arrangements. This explains why a significant number of applicants have felt obliged to bring applications to the High Court, in major environmental challenges, without the benefit of any legal representation.

3. **Intensity or standard of Judicial Review**

Article 9(2) of the Convention requires Parties to provide a review of procedural and substantive legality for decisions, acts and omissions falling within the scope of Article 6 of the Convention. Article 9(3) of the Convention requires public access to administrative and judicial procedures to challenge acts and omissions which contravene national environmental law. Across all jurisdictions, 'conventional/strict' *Wednesbury* unreasonableness is the usual test for administrative action in the absence of illegality or procedural impropriety or where proportionality is explicitly required.

However, the threshold for meeting the test is very high and, in reality, a court will not intervene and set aside an administrative decision unless it is perverse. The courts have repeatedly made clear that a more intensive standard of review is not available in environmental cases – the courts apply the 'strict *Wednesbury*' threshold throughout. In fact, the courts have often emphasised that in environmental matters, the scientific nature of the issues, means that an even more light-touch approach should be adopted by the court and a wider margin of discretion afforded to the decision-maker than in other areas. For example, in *R (oao Friends of the Earth Limited) v UK Expert finance & Others* [2023] EWCA Civ 14, the Court of Appeal held unanimously that UKEF had acted lawfully and reasonably and that "*There is a wider margin of appreciation in decision-making involving the*

[7] See https://www.ercs.scot/news/ercs-welcomes-exemption-of-court-fees-for-some-aarhus-cases-but-more-is-needed/.

application of scientific knowledge or expertise" (para 57).

The conventional (strict) Wednesbury approach was applied again by the Court of Appeal in *R (oao Finch) v Surrey County Council and others* [2022] EWCA Civ 187 (Friends of the Earth Limited intervening), where the Court of Appeal held (by a majority) that defendant's decision to grant planning permission for an oil development without quantifying the end-use/scope 3 emissions in the environmental impact assessment was rational and lawful. The high Wednesbury threshold is emphasised in Lord Justice Lewison's judgment: "*To demonstrate such unreasonableness is seldom easy for a claimant challenging a grant of planning permission*" (para 90).[8]

In 2017, ELUK members the RSPB, FoE England, Wales and Northern Ireland and FoE Scotland submitted a Communication to the Compliance Committee arguing that the standard of review applied in UK courts fails to provide a review of procedural and substantive legality in accordance with Article 9(2) and (3) of the Convention. A substantive hearing took place before the Compliance Committee in November 2019, and their findings are awaited.

In the interim, we note the Committee found that the failure by the High Court of Northern Ireland to undertake its own assessment of whether particular legal tests relating to an Environmental Impact Assessment were adhered to, amounted to non-compliance with the Article 9(2) requirement to provide for a review of the substantive legality of those decisions[16]. Should the Committee subsequently find the UK in non-compliance with Article 9(2) at a wider level, we call upon the Governments of the UK to introduce measures to ensure the appropriate intensity of review in JR and statutory reviews.

4. Other Developments

England and Wales

Judicial Review and Courts Act 2022

The passage of the Judicial Review and Courts Act 2022 unhelpfully broadened the menu of remedies the courts in England and Wales may choose to grant in JR. Section 1 of the Act gives a court discretion in how it makes a quashing order. The courts now have the option of suspending the quashing order in some cases, so that the public body is first given the opportunity to correct any failure that the court has identified. The court also has a discretion to limit the retrospective effects of the quashing order, so that things done by the public body before the quashing order was granted remain lawful.

These new forms of remedy raise the prospect of a Claimant winning a JR but with only a limited remedy to show for it. The Bill met strong opposition in the House of Lords because of the implications for the rule of law and the legal principle of fairness, preventing claimants from achieving meaningful redress as required by Article 13 of the European Convention on Human Rights (the right to an effective remedy) and Article 9(4) of the Aarhus Convention. Given the impact on claimants it is hoped the courts will only grant these new orders in exceptional cases only and where they do not impact negatively on the claimant, or the wider public interest is so significant as to outweigh that negative impact.

Environmental Rights Act 2025

Wildlife and Countryside Link is proposing an Environment Rights Bill to implement the Aarhus

[8] FoE has applied for permission to appeal to the Supreme Court in the UKEF case and the appellant, Sarah Finch, has obtained permission to appeal to the Supreme Court.

Convention in domestic law. Part 1 of the Bill would establish in UK law the basic right to a healthy environment for everyone which underlies 'the three pillar' rights of the Convention. The Act would also seek to protect the public's fundamental right to fight for environmental rights without fear of persecution and harassment. Parts 2, 3 and 4 of the Bill would implement the Aarhus right of access to environmental information (building on the Freedom of Information Act 2000 and Environmental Information Regulations 2004), the right to public participation in environmental decision-making and rights of access to justice respectively. Ensuring the full implementation of the Aarhus Convention will provide the tools to allow people to hold public bodies to account in meeting their statutory obligations and addressing the current failure to meet those standards in relation to air quality, water quality, biodiversity and the climate crisis.

Welsh legislation on environmental governance

The Welsh Government's Stakeholder Task Group on Environmental Governance recommended that the Aarhus Convention rights be articulated in Welsh law, together with EU Environmental Principles and the establishment of an independent environmental watchdog. This recommendation was accepted by the Welsh Government. Wales Environment Link is calling on the Welsh Government to bring forward long overdue legislation to address the governance gap in the next legislative programme (to be announced in July 2023). Wales is the only UK nation that has not introduced domestic environmental governance arrangements following Brexit, which means that Judicial Review may be the only way to challenge breaches of environmental law by public bodies in Wales, leaving Welsh citizens with the lowest level of access to environmental justice.

Scotland

Environmental Court Consultation

The Scottish Government is due to publish a consultation on 'whether the law in Scotland on access to justice on environmental matters is effective and sufficient, and whether and, if so, how the establishment of an environmental court could enhance the governance arrangements' by May 2023.

There is a strong case for establishing an environmental court or tribunal ('ECT') for several reasons.[9] One of the main reasons for creating an ECT is the need to improve access to justice. An ECT could be designed to make litigation over the environment significantly more accessible and affordable than the current arrangements in Scotland.

Enshrining Environmental Rights in Scots Law

We note the slow progress from the Scottish Government on its 2018 commitment to enshrining the right to a healthy and safe environment in Scots Law, with both procedural and substantive elements, with the pre-legislative consultation delayed to spring 2023.

[9] See B Christman, 'Why Scotland needs an environmental court or tribunal' (2021), available at https://www.ercs.scot/wp/wp-content/uploads/2021/12/Why-Scotland-needs-an-ECT-Oct-2021.pdf.

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This Enviroment Links UK statement is also supported by the following organisations:

Amphibian and Reptile Conservation
Butterfly Conservation
Buglife
Client Earth
Chartered Institute of Ecology and Environmental Management
Friends of the Earth (England, Wales and Northern Ireland)
Institute of Fisheries Management
League Against Cruel Sports
Marine Conservation Society
Royal Society for the Protection of Birds (RSPB)