# COALITION FOR ACCESS TO JUSTICE FOR THE ENVIRONMENT

**Costs Protection for Litigants in Environmental Judicial Review Applications: Outline Proposals to Limit Costs for Judicial Review Applications which fall under the Aarhus Convention**

**Summary of points made by CAJE**

- Aarhus claims are inherently in the public interest. The applicant rarely has any personal financial interest in the outcome of the case and does not stand to profit from winning. Accordingly, it is inappropriate to maintain a system that seeks to put a commercial developer on the same footing as an environmental applicant. Aarhus cases merit special consideration.

- The scope of the proposals should be extended beyond judicial review to include statutory challenges falling within the scope of the Convention. As the Convention also encompasses private law environmental cases the government must make separate provision for them.

- A limit of £5,000 on the applicant's liability for adverse costs is too high and should be reduced to just above the maximum contribution an individual is required to make when publicly funded (i.e. between £2,000-3,000). This would ensure access to justice for the 'ordinary' individual on an objective basis.

- Neither the £5,000 limit, nor the £30,000 cross-cap (if the latter is retained), should be subject to challenge on the basis of publicly available information. This eliminates certainty and increases the likelihood of disproportionate satellite litigation.

- There should be no explicit cross-cap. Instead, successful applicant lawyers should be entitled to recover their fees at ordinary commercial rates on assessment.

- The corollary of the above is that the costs regime would be simple and certain.

- A decision as to whether a Protective Costs Order (PCO) will be granted must be made at the earliest opportunity, i.e. pre-leave. There should be no costs in favour of third parties and an absolute limit (lower than or equal to the proposed limit) on what the respondent can recover.

- The level of the limit should not be increased if there is one (or even two) appeal(s). If there is a cross-cap (aimed to represent a reasonable level for the applicant's costs), this would need to increase accordingly to cover the work involved in the appeal(s).

- The PCO should include a provision to the effect that there will be no order for costs in favour of an interested party.

- The 'chilling effect' of the requirement to provide a cross-undertaking in damages in order to obtain interim relief is linked to the question of prohibitive expense. CAJE continues to support the recommendations in Sullivan I and II as to the conditions to be satisfied in order to obtain interim relief.

## Introduction

1. This response is made by members of the Coalition for Access to Justice for the Environment (CAJE) represented in Northern Ireland, specifically WWF Northern Ireland, the RSPB Northern Ireland and Friends of the Earth Northern Ireland. CAJE is recognised as a significant commentator on UK access to justice issues.

2. CAJE's goal is to ensure that access to justice in environmental matters is fair, equitable and not prohibitively expensive; that it is genuinely accessible to all; and that the justice system, so far as possible, works to protect the environment in accordance with the law.

3. CAJE welcomes the opportunity to respond to the consultation paper issued by the Department of Justice (Northern Ireland) in December 2011. CAJE also welcomes the UK government's commitment to address the EU infraction proceedings and the findings of the Aarhus Convention Compliance Committee in Communications C23, C27 and C33. We hope the government will continue to move swiftly to ensure full compliance with the Convention and EU law at the earliest opportunity.

**Q.1 Have you deterred from bringing a judicial review within the scope of the Aarhus Convention because you considered that costs were prohibitive? If so, please provide details, including specifics about the matter you wished to challenge.**

4. We refer to a paper presented at a CAJE event '***Aarhus and Access Rights: the New Landscape'*** in October 2011[1], which discusses the extent to which practitioners and NGOs are aware of good arguable cases that have not gone ahead because of concerns about costs or exposure to costs. We recognise this research was primarily based upon a questionnaire to lawyers practising in England and Wales. However, many of the issues raised are common throughout the UK.

5. While based on a limited sample, the paper concludes that over three quarters (76%) of leading environmental practitioners and NGOs are aware of good, arguable cases that have not proceeded because of concerns about costs. One solicitor said that he could point to at least 10 cases in his first year of practice where clients were "*too scared of incurring huge costs – even with a Protective Costs Order"*. One barrister reported that he had advised many smaller environmental NGOs who have not litigated for fear of adverse costs or the costs involved in seeking a PCO where it is opposed, including in cases concerning air quality and transport issues. Friends of the Earth reported that it always advises that costs can be managed but that it "*loses count of the number of community groups who mention to us that they or others thought that they may have grounds for challenge, or were advised they did, but decided not to go ahead because they were put off by the costs risk*"[2].

---

[1] Paper available at: http://www.wwf.org.uk/wwf_articles.cfm?unewsid=5383

[2] See above, pages 17-18

6. CAJE members have also continued to conduct research on this topic in recent years. We refer the Department of Justice to a report by the Environmental Law Foundation in association with BRASS, which refers to a number of potential cases halted by cost considerations. This research identified 210 potential JR cases between 2005 and 2009, of which 97 were judged to have a reasonable prospect of proceeding at JR. Of these, over half (54 or 56%) did not proceed explicitly for reasons of cost[3].

7. Our members also report cases in which applicants are served with high costs estimates at an early stage in the legal proceedings. Whether such estimates are designed to dissuade applicants from continuing with legal action (or this is simply an unintended consequence) is a moot point. However, the effect is that such action does have a 'chilling effect' in many cases. In one recent (and on-going case) Greenpeace reports that the defendant, in this case the Secretary of State for Energy and Climate Change, is pursuing a costs order in the sum of just under £12,000 (to cover the costs of two QC's and a junior) simply to respond to an Acknowledgement of Service[4]. Greenpeace is arguing that an award in the order of £1,500 would more appropriately reflect the requirements of the Aarhus Convention.

8. CAJE's final introductory comment is that we make these observations on the basis that the Department of Justice (and the UK government generally) has ruled out the possibility of introducing Qualified One-Way Costs Shifting (QuOCS) for environmental claims[5]. CAJE remains of the view that the form of QuOCS advocated in Sullivan II[6] (which essentially promotes one-way costs-shifting unless the applicant has behaved unreasonably) remains the optimal mechanism for ensuring compliance with EU law and the provisions of Article 9(4) of the Convention concerning 'prohibitive expense'.

**The special nature of Aarhus claims**

9. Before addressing the questions in the consultation paper, we wish to make a general remark about the special nature of environmental claims. Aarhus cases are inherently in the public interest. The applicant rarely has any personal financial interest in the outcome of the case and does not stand to profit from winning – it is society as a whole that stands to benefit (or lose) from the outcome of an environmental case, be that a clarification on a point of law, the protection of biodiversity or adherence to environmental standards.

10. Accordingly, it is inappropriate to maintain a system that seeks to put a commercial developer on the same footing as an environmental applicant. The Aarhus Convention requires contracting Parties to distinguish between normal

---

3 Environmental Law Foundation and The Centre for Business Relationships, Accountability, Sustainability & Society (BRASS) (2009) *Costs Barriers to Environmental Justice,* section 6. Available from the ELF

3 *R (on the application of Greenpeace Ltd) v Secretary of State for Energy and Climate Change* (CO/8229/2011)

5 Consultation paper § 25

6 Working Group on Access to Environmental Justice (August 2010) *Ensuring access to environmental justice in England and Wales – Update Report.* Available at http://scotland.wwf.org.uk/wwf_articles.cfm?unewsid=4228

commercial and policy considerations and those of environmental interest. Put simply, Aarhus claims require a wholly different approach.

11. For this reason, we support a regime tailored specifically for environmental cases that does not encompass all public interest judicial reviews.

12. Whilst potentially representing a contribution towards improving access to environmental justice, the proposals do not recognise the unique nature of such claims and, if the 'worst-case scenarios' outlined in the proposals are adopted (essentially presumptive limits apply and respondents can challenge means on publicly available information), they will do little, or nothing, to improve access to environmental justice in Northern Ireland, or across the UK more widely. The problems arise from two fundamental (and linked) flaws in the basic premises on which the proposals are made.

13. Firstly, the indication that the purpose of an Aarhus costs rule is '*to keep down the overall cost of judicial review cases falling under the Aarhus Convention'* is incorrect[7]. Its purpose is to ensure that litigating Aarhus cases is not prohibitively expensive for the applicant, as required by EU law and Article 9(4) of the Convention. Secondly, the suggestion (in the same paragraph) that the granting of a limit and a cross-cap should be linked in some way, is incorrect. The limit and the cross-cap have unrelated 'purposes' (indeed we would argue that a cross-cap has no foundation, or explicit purpose, in the Convention) and must be considered separately. We discuss these issues in more detail below.

**Detailed comments on the consultation paper**
**Scope**

14. The proposal to apply the provisions of the scheme to all environmental judicial reviews is welcome. However, in order to fully comply with the requirements of the Convention the proposals must encompass other statutory challenges falling within the scope of the Convention.

15. Although the consultation paper does not address private law cases, it is clear the UK will need to make provision for them if they are to comply with the findings of the Aarhus Convention Compliance Committee in respect of Communication C23.

**Making an Application**

16. CAJE welcomes the proposal that applications for a PCO need not be supported by grounds and evidence unless an order other than the 'standard order' is sought. The CAJE conference paper reports that 72% of respondents to a recent questionnaire on access to environmental justice describe the current PCO regime as "*time consuming, random, complex, costly, inconsistent and ineffective*". One barrister pointed out that the process of applying for a PCO currently invites repeated exchanges of evidence and submissions – in one case alone, 10 separate witness statements referred to the PCO application[8]. Thus,

---

7 Consultation paper, paragraph 4.6

8 Day, C. (2011) *Tackling Barriers to environmental justice – Access to environmental justice in England and Wales: a decade of leading a horse to water.* Available at http://www.wwf.org.uk/wwf_articles.cfm?unewsid=5383

the proposal to streamline the process and remove the requirement to produce grounds and evidence is welcome.

17. In terms of timing, the consultation paper suggests that a PCO will only be granted when leave to apply for judicial review is granted. If it is done at that stage there also needs to be a clear and absolute rule on costs pre-leave, i.e. no costs in favour of interested parties and an absolute limit (lower than or equal to the proposed limit) on what the respondent can recover.

**The level of the limit**

**Q. 3 – Do you agree with the proposal to set the presumptive (i.e. standard) PCO limit at £5,000? If not what should the figure be? Please give reasons.**

18. The paper states that the PCO will limit the liability of the applicant to pay the respondent's costs to £5,000.

19. The consultation paper provides no explicit rationale for the £5,000 limit. However, reference is made to the case of *Garner*[9], in which the Court of Appeal awarded a PCO at £5,000[10]. It is also suggested later in the paper that this sum would not present an insuperable barrier to proceeding[11], i.e. that a figure of £5,000 is not 'prohibitively expensive' for most applicants.

20. However, we would argue that this sum is still too high. It is certainly not consistent with the objective approach proposed in 'Sullivan I'[12] and 'Sullivan II' of focusing on the 'ordinary person' (i.e. just above legal aid means eligibility).

21. In order to determine what an appropriate figure might be (and as a guide to what the 'ordinary person' might be expected to pay), it is helpful to reference the current public funding regime in England and Wales. For those in receipt of a monthly disposable income of between £315 and £733, the following monthly contribution is required:

| | |
|---|---|
| A £316 to £465 | 1/4 of income in excess of £311 |
| B £466 to £616 | £38.50 plus 1/3 of income in excess of £465 |
| C £617 to £733 | £88.85 plus 1/2 of income in excess of £616 |

The maximum monthly contribution is therefore £147.35

22. Working on the basis that an environmental JR should take no more than 12 months to conclude (and hopefully less), the maximum overall contribution an individual benefitting from legal aid would make to the case would be £1,768.20 (£147.35 x 12).

23. If the objective of a PCO is to ensure that access to justice is not prohibitively expensive for any member of society, it is logical for the applicant's liability to be set at a figure just above the maximum exposure under the public funding regime. Thus, we would argue that a more reasonable figure for the applicant's

---

9 *R (Garner) v Elmbridge Borough Council* [2011] 1 Costs L.R. 48 (8 September 2010)

10 It should, however, be noted that in this case the Court of Appeal assumed the figure of £5,000 would be shared between three applicants and not incurred solely by Mr Garner

11 Consultation paper, paragraph 4.12

12 Working Group on Access to Environmental Justice (May 2008) *Ensuring access to environmental justice in England and Wales* ("Sullivan I"). Available at http://www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf

liability would be £2,000-3,000. Given an objective approach to the limit, that should then be the generally applicable level.

24. While it may appear a modest sum, the difference between £2,000 and £5,000 is considerable and, if the higher figure were maintained, it would continue to have a significant chilling effect on most individuals and civil society groups. Moreover, it is likely that a number of applicants would seek to challenge the limit, thus resulting in vastly disproportionate sums on satellite litigation for the sake of two or three thousand pounds.

25. CAJE members report routinely spending a significant amount of time seeking costs protection when progressing cases. For example, it is Friends of the Earth's experience - both from bringing cases in its own right and acting on behalf of individuals and community groups through its Rights & Justice Centre - that in any piece of litigation, 20-30% of the time spent on the case is taken up with dealing with the question of costs protection[13].

26. Put simply, unless the limit is relatively modest and fixed, vastly disproportionate satellite challenges will persist.

27. With the limit set at what may be interpreted as a relatively modest level, some commentators will inevitably be concerned that the courts will be besieged by a flood of unmeritorious claims (the 'floodgates' argument).

28. This issue was addressed in the 'Sullivan Reports' in the context of England and Wales. In Sullivan I, the Working Group assessed the likely increase in the number of cases from the proposals then made and concluded that they would be relatively modest[14]. While now somewhat out of date, the Sullivan Working Group approached the Administrative Court for data on environmental cases, but unfortunately environmental cases are not categorised separately. However, figures were available by date lodged in the categories below:

| **Category** | **2002** | **2007** |
|---|---|---|
| Land | 40 | 37 |
| Pollution | 4 | 6 |
| Town & Country Planning | 119 | 112 |
| **Total** | **163** | **155** |

29. These figures confirm that environmental cases comprise a very small proportion of the total number of cases in England and Wales; around 20 cases per year of a total of 1.8 million[15]. The figures also confirm that there has been no great change in the volume or make-up of cases during the five year period studied. Even a 100% increase in the number of cases taken would represent an insignificant increase.

30. These figures are supported by information provided by environmental NGOs routinely pursuing judicial review as a mechanism to challenge the decisions of public bodies. Information supplied to WWF in 2007 from Friends of the Earth, Greenpeace and the Royal Society for the Protection of Birds on the number of JRs pursued between 1990 and 2007 shows that, at most, each organisation undertook an average of one environmental judicial review a year over the

---

13 Gita Parihar (Head of the Rights & Justice Centre at Friends of the Earth), *pers. comm.*

14 See Sullivan I (May 2008), Chapter 14, §§101-107

15 The total of 1.8 million being the figure discussed in a meeting between CAJE and Steve Uttley and Alasdair Wallace from the Ministry of Justice in December 2011

sample period, and in some years they brought no cases at all. We can confirm this trend has continued between 2007 and 2012.

31. In terms of any increase in the number of cases taken by environmental NGOs were the costs regime to be improved, CAJE anticipates that some of its member may take an additional case every 12-24 months. Pursuing judicial review is an inherently time-consuming activity and we would simply be unable to orchestrate many more cases than that. There may also be an appetite on the part of smaller, specialist NGOs currently prohibited by costs to bring a modest number of well-argued cases, however, in reality, this would be dependent upon them finding lawyers prepared to represent them in a field in which is notoriously high-risk and (if the present proposals are effected) and in which their costs when successful would be limited.

32. We would also point out that the Sullivan reports concluded that the leave requirement is a sufficient filter to 'weed out' unmeritorious cases[16]. However, it is important that the UK courts are adequately resourced (including through the deployment of specialist judges to deal with environmental cases) to ensure that sufficient consideration is given to applications.

**The level of the cross-cap**

**Q. 9 – Do you agree with the proposal to set the automatic cross-cap at £30,000? If not what should the figure be?**

33. Paragraph 4.13 of the consultation paper describes the 'purpose' of the cross-cap as a reflection of the "*reasonable limit for the bringing of a judicial review, taking into account that public resources are not unlimited and the general need to keep costs at a reasonable level*". However, this 'purpose' has no basis in the Convention – which concerns prohibitive expense from the applicants' point of view. However sensible or desirable, the Convention says nothing about the need to control the financial outlays of the public body involved. Furthermore, by virtue of the leave stage, applicants who then go on to lose their claims still had good arguable cases and, as such, it is right and proper that public bodies were required to respond. CAJE would therefore question the inclusion of a cross-cap that has no foundation in the Convention, particularly when it compounds the deleterious effect on the applicant's position – as discussed below.

34. As to the level of the proposed cross-cap, the paper also gives no basis for the £30,000 figure. However, we infer (from the reference to the purpose of the cross-cap in paragraph 4.13) that it would appear to represent a pre-estimate of the applicant's costs. We would agree this is a reasonable approximation - providing the case is not unduly complex.

35. However, as intimated above, the situation as regards the applicant's costs liability is complicated by the fact that the £5,000 limit does not operate on its own – the effect of it must be viewed together with the applicant's own costs, which will have to be paid to its own lawyers in the event that the case is lost.

36. Thus, in unsuccessful cases, either applicants must pay their lawyers' costs (thus facing a total liability of £35,000 - which is clearly prohibitively expensive) or applicant lawyers must work for free, which is wrong in principle,

---

16 See Sullivan II (August 2010), paragraph 37

not consistent with the Convention or a sustainable long-term answer to access to environmental justice.

37. Thus, when considering the underlying purpose of the proposals being consulted - whether they would meet the 'not prohibitively expensive' test under Article 9(4) of the Convention – the answer must clearly be "no". Even accepting that the proposed reasonable costs of bringing an environmental judicial review will rarely exceed £30,000, the Aarhus applicant can expect to face a costs liability of approximately £35,000 to access the Courts. The government's proposals proceed upon a false premise that prohibitive expense relates only to adverse costs - not the applicants' total costs liability.

38. CAJE believes there are a number of difficulties in setting an explicit cross-cap of £30,000, including:

(i) while this represents a reasonable figure in a 'normal' case, there are clearly occasions when the case is large and/or complex and the costs incurred will be considerably higher. In this case, applicants will find it difficult to obtain legal representation because applicant lawyers will be dissuaded from embarking on cases in which they will not be able to recover the majority of their costs if successful. For example, in the 1999 Greenpeace 'offshore case[17]', which raised new and complex issues, their solicitor reports that Greenpeace was served with a costs estimate of £80,000 for one of the interested parties to simply to respond to the Acknowledgement of Service;

(ii) recognising (a) current proposals in England and Wales to abolish the recoverability of success fees and (b) that only the wealthiest applicants would be able to pay their lawyers' success fees when a case is won - as a general estimate of costs - £30,000 provides no possibility for applicant lawyers to act on a no win no fee basis and 'spread their risk'. Again, the corollary of this that applicants will find it more difficult to secure appropriate legal representation; and

(iii) an inherent difficulty in setting any figure is that procedures will tend to normalise towards it – thus, in cases that are short and/or straightforward the costs will gravitate upwards towards this sum. This is not in the public interest.

39. For these reasons, we believe that it is unhelpful to have an explicit cross-cap. We have discussed this issue with other applicant lawyers in the environmental sphere and we believe that a better alternative would be for applicant lawyers to be entitled to recover their costs at commercial rates on assessment. This would provide a mechanism for them to spread their risk to a greater degree than they are currently able to and have the advantages of also: (a) not stifling more complex claims; or (b) over-inflating the cost of straight-forward claims.

40. We consider that the only circumstances in which the limit should not apply are when the applicant has behaved unreasonably (under the present proposals, it would appear that parties can act as unreasonably or vexatiously as they wish and not be penalised). This qualification necessarily permits an element of judicial discretion, but on a much more tightly defined basis.

41. Where a applicant has behaved unreasonably in the conduct of the litigation then s/he ought to be at risk of costs and the usual costs rules should apply such that the court will be able to have regard to a range of factors in deciding on the

---

17 *R v Secretary of State for Trade & Industry & Ors, ex parte Greenpeace Ltd* (2000) Env LR 221

level of any liability for costs. That is part of the discipline of ensuring not only that only properly arguable cases are allowed to proceed (hence the leave filter) but also that such cases are conducted responsibly. Even in Tribunals where the general rule is that each party has to bear its own costs, the Tribunal[18] invariably has power to order costs against a party that has behaved unreasonably. However, the threshold of unreasonable behaviour is a high one.

42. However, it would be important to ensure that a respondent or interested party who wishes to claim costs on the basis that there has been some unreasonable conduct has given proper and adequate notice to the applicant of his intention to do so and the basis of his proposed claim.

**Certainty and challenges to the cross-limit**

**Q.4 Do you agree that challenges to the presumptive limit of £5,000 should be permitted?**

**Q.5 If so, do you think respondents should only be entitled to apply to remove the limit or should it also be possible for respondents to make applications to raise the limit? Please give reasons**

**Q.6 In considering exceptions to the grant of a PCO in the presumptive amount, should the court only consider information that is publicly available? If not, what other information should be taken into account?**

**Q.7 Should challenges be permitted only against organisations, or should challenges also be permitted against wealthy individuals? Please give reasons.**

**Q. 8 If it were necessary to disclose financial information to obtain a PCO or vary it, would that fact deter you from seeking a PCO? Would your answer differ depending on the information you needed to disclose?**

**Q.10 Should it be possible to challenge the cross-cap of £30,000? If yes, what should the basis of that challenge be? Please give reasons.**

**Q.11 Do you think that if a challenge were introduced to the cross-cap that the £5,000 limit ought to be reviewed at the same time?**

43. The consultation paper confirms that the proposals are designed to provide a certain and affordable level of costs protection for applicants in judicial review cases[19]. It discusses whether clarity can best be achieved by setting either an automatic presumptive limit or an absolute limit on applicant's exposure to the respondent's costs[20]. In particular, the paper provides for the possibility for the respondent to challenge the £5,000 limit on the basis of publicly available information as to means. CAJE would strongly argue against this proposal on the basis of both principle and practicality.

44. Firstly, the approach should be objective: Aarhus recognises the inherent public interest in environmental matters and environmental decisions being subject to public scrutiny and challenge and it recognises not just the right of members of

---

18 See e.g. Rule 10(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and rules in relation to planning appeals

19 Consultation paper, paragraph 4.1

20 Consultation paper, paragraph 4.3

the public to secure adequate protection of the environment but also their duty to do so.

45. In this respect, not only does the consultation paper fail to recognise the distinguishing role of NGOs in bringing public interest environmental cases, it actually discriminates against them as a result of the respondent's ability to argue for an increased limit by reference to published accounts. Article 9(2) of the Convention makes explicit reference to the contribution made by NGOs in this regard. As such, we believe it incongruous that the consultation paper, unlike the Convention, fails to reflect and promote the important contribution made by NGOs to environmental protection. Specific reference to the role of NGOs with public interest environmental aims should be made.

46. Secondly, there are considerable practicalities implicit in these proposals. We assume that publicly available information can include land registry information (including whether, for example, an individual has a mortgage over their home). We are aware of a current case in which a local planning authority is challenging the level of the PCO obtained by the applicants on the basis of the value of their homes obtained via the Land Registry. There is no reason to assume this practice would not continue under a new regime.

47. For charities and public limited companies, it would also encompass published accounts. While it may appear that large sums of money are available for legal challenges, in reality most environmental NGOs have relatively limited "free funds". Most funding is 'restricted' (i.e. allocated to projects – most usually as a result of grant-in-aid) and finding resources to fund litigation at short notice is difficult.

48. If the codified PCO regime maintains provision for respondents to challenge means on public information, applicants will be required to rebut those arguments with personal information. In practice, therefore, we would continue to see intrusive time-consuming and costly satellite litigation, with the judiciary acting as means assessors in many Aarhus cases.

49. To conclude, CAJE believes that requisite certainty can only be achieved by the application of an absolute limit in relation to the applicant's exposure to the respondent's costs. Thus, respondents cannot argue that a particular applicant can afford to pay more than £5,000 (or the lower figure proposed above) if unsuccessful – equally, applicant lawyers cannot argue that an individual is of so little means that they should pay less.

50. As discussed above, removing the cross-cap would negate the opportunity for respondents to challenge the figure and avoids any misunderstanding that there should be a relationship between the limit and the cross-cap.

51. As such, the regime is simple and fair to everyone and all parties enjoy certainty as to costs liability at the outset in accordance with EU law[21]. In our view, to retain a presumptive limit in which 'exceptional' cases exist (no matter how limited they may be envisaged to be) maintains an inappropriate level of judicial discretion and scope for continuing satellite litigation.

**Interested parties**

[21] Case C-427/07 *Commission v Ireland*

52. The consultation paper says nothing about the position of interested parties. It should be made clear that the PCO will include a provision to the effect that there will be no order for costs in favour of an interested party, with the possible exception of the (rare) situation where the respondent drops out but the interested party carries on in which case they should take the place of the respondent in relation to the £5,000 and £30,000 (or whatever they are) figures. An alternative approach would be to state that the £5,000 (or whatever figure) represents the applicant's maximum costs exposure in the proceedings in respect of all parties, to be allocated as appropriate by the court at a later stage.

**Appeals**

**Q.12 – should the standard limit as proposed earlier (in the sum of £5,000 although consultees' views have also been sought on the amount), be applied to all proceedings including those on appeal?**
**Q.13 – if not, should an additional application be possible to set a PCO for a appeal? Should the limit be set by the court or should a presumptive limit apply? Please give reasons.**
**Q.14 – should the position differ according to whether it is the applicant or respondent (at first instance) who is appealing? If so, in what way?**

53. Given the aim to ensure that environmental litigation is not prohibitively expensive, it would be inappropriate for the level of the PCO to be increased if there is one (or even two) appeal(s). The limit represents the level above which litigating would be prohibitively expensive for a citizen or an organisation on an objective basis and while applicants may be able to raise some additional resources as a result of fundraising activities, it is unlikely that the position with regard to prohibitive expense will change significantly within 12 months. In the interests of certainty, and to comply with the requirements of EU law, it should not be possible for respondents to apply to increase the level of the limit in relation to a subsequent appeal.

54. CAJE maintains that this should be the case regardless of who is bringing the appeal, in order to ensure equality of arms between applicants and respondents and to avoid complicated scenarios where, for example, one party wins at first instance and the other in the Court of Appeal and/or the Supreme Court.

55. However, it should be noted that if the regime retains a cross-cap (aimed to represent a reasonable level for the applicant's costs), the cross-cap would need to increase accordingly to cover the work involved in the appeal(s). Of course, this level of complexity would be unnecessary if there was simply no explicit cross-cap (as suggested above).

**Injunctive Relief**

**Q.15 Are you aware of specific examples of environmental judicial reviews where an interim injunction was requested? Where requested, was this subject to a cross-undertaking in damages? Please give any details of cases and their outcomes.**

**Q.16 Are you aware of specific examples of judicial reviews where a applicant has been deterred from applying for either an interim injunction pr a judicial review due to the potential requirement to give a**

**cross-undertaking in damages? Please give details of any examples and their outcomes.**

**Q.17 Do you agree that the factors to be taken into account by the courts in deciding whether to issue an interim injunction in environmental judicial review proceedings without a cross-undertaking in damages should be clarified? Please give reasons for your answer.**

56. CAJE welcomes the fact that the consultation paper addresses the question of interim relief. The availability of injunctive relief is expressly required by Article 9(4) of the Aarhus Convention and is clearly pivotal given the findings of the Compliance Committee in case C33, in which it was found that the requirement for cross-undertakings in damages renders interim relief prohibitively expensive (paragraph 133). The question of injunctive relief was also expressly included in the Reasoned Opinion issued to the UK on 18th March 2010.

57. We note that the consultation paper in England and Wales failed to address this issue and, specifically, to make recommendations in light of the findings of a previous consultation on cross-undertakings in damages in environmental judicial review claims issued in November 2010 (to which CAJE responded).

58. CAJE welcomes the recognition in this consultation paper that the lack of clear guidelines means that the parties may find it difficult to anticipate when they would be successful in obtaining an interim injunction without a cross-undertaking in damages[22]. Similarly, that the lack of clarity could have a 'chilling effect', which may deter potential interim injunction applications in appropriate cases or even deter applicants from pursuing an environmental judicial review altogether due to that risk[23].

59. We note that the Department of Justice has no data on the numbers of environmental judicial review applications in which an interim injunction was sought, or on the number of such applications where a cross-undertaking in damages was required[24]. CAJE is aware of such cases in England and Wales, however, unfortunately we have no recent information on this issue relevant to Northern Ireland. That is not to say that such cases do not exist – a point we made in response to the Ministry of Justice consultation paper in 2011 was that many individuals and NGOs rarely regard interim relief as an option and so applications are extremely limited (we amplify this point below).

60. However, we wish at the outset to make some general remarks about the suitability of cross-undertakings in damages in environmental cases. The fact that the Aarhus Convention includes injunctive relief within Article 9(4), and that the Commission's Reasoned Opinion and the findings of the Compliance Committee make specific reference to interim relief[25], is symptomatic of the inherent public interest nature of environmental claims and underlines why we believe they merit special consideration.

61. Paragraph 4.21 of the consultation paper confirms that the purpose of cross-undertakings in damages is to ensure that a developer can be fairly

---

22 Consultation paper, paragraph 4.28
23 Consultation paper, paragraph 4.30
24 Consultation paper, paragraph 4.25
25 See http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/312&format=HTM

compensated for any financial loss suffered as a result of putting the proposal on hold if the applicant subsequently loses the case.

62. However, as we illustrate later, the applicant's failure to obtain interim relief can result in significant, irreversible environmental damage – damage that has subsequently been declared unlawful. In environmental cases, the applicant rarely has any personal financial interest in the outcome of the case and does not stand to profit from the granting of injunctive relief – it is society as a whole that stands to benefit if an area of land or a natural resource (for example) is protected in the short-term and the claim is ultimately successful.

63. In our view, it is therefore inappropriate to maintain a system that seeks to put a commercial developer on the same footing as an environmental applicant – the motivation and rationale behind those taking and defending environmental claims is most usually diametrically opposed. It is clearly important to have sufficient checks and balances in the system to protect commercial organizations from undue delay or financial loss, but there are ways of doing that by, for example, ensuring that a claim in which interim relief is sought is heard urgently. And when we say urgently - we mean literally within a few weeks. In our experience these cases can be high profile but they are rare and accommodating them at short notice should not put the judicial system under undue pressure.

**The case for change**

64. In recent years, there have been two very high-profile environmental cases in which an injunction has been applied for, but in which the applicant has been unable to give cross-undertakings in damages. These cases are *R v Secretary of State for the Environment ex parte the Royal Society for the Protection of Birds*[26] (the "Lappel Bank" case) and *R v Inspectorate of Pollution & Anor, ex parte Greenpeace Ltd*[27] (the "Sellafield" case).

65. In the Lappel Bank case, the House of Lords refused to grant interim relief to the RSPB as it was unable to give cross-undertakings in damages in relation to the large commercial loss which may have resulted from any delay in the development of the port. In the twelve months that elapsed between the RSPB's application for interim relief and the ruling of the ECJ, the area of mudflat known as Lappel bank (which formed part of the Medway Estuary and Marshes potential Special Protection Area) was irreversibly destroyed.

66. Similarly, in the Sellafield case, Greenpeace was unable to give BNFL cross-undertakings in damages in the order of £3.5 million (£250,000 per day for 14 days) to delay the operation of the THORP nuclear plant for a fortnight until the substantive hearing took place. As such, the plant continued to operate.

67. On the basis of the Ministry of Justice consultation paper, the Environmental Law Foundation canvassed lawyers providing *pro bono* support through its Advice and Referral Service about interim relief. The overriding concern from lawyers advising individuals and community groups was that the prohibitive costs involved in judicial review are what stop many people from pursuing cases. Thus, the issue of cross-undertakings rarely arises because most citizens and residents' groups are prevented from even reaching that stage. However, more specifically, one advisor stated that based on discussions held with local

---

26 [1997] Env. L.R. 431

27 (1994) 1 WLR 570

action groups over the last ten years, the cost of cross-undertakings would almost always deter local action groups. It was stated that: "*I have over the last ten years had several cases for environmental NGOs (including large groups such as Greenpeace) where no interim relief has been sought because of the potential difficulty of being required to give a cross-undertaking. That is particularly the case where the potential for losses is large and commercial third parties are involved (e.g. the nuclear industry, fishing and forestry operations).*"

**Factors to be considered by the court**

68. CAJE welcomes the proposal to dispense with the requirement for cross-undertakings in damages in certain circumstances. However, we foresee significant problems with the requirements included within the present wording of paragraph 4.33, including:

**(a) "A final judgment in the matter would be impossible to enforce because the factual basis of the proceedings will have been eroded"**

69. In our view this sets the bar too high. This would only really catch cases where the damage done would be entirely irreversible (e.g. the outright destruction of a protected area, for example) and not those cases where the damage could (but would be unlikely in practice) to be reversed by the court if the case succeeded. Thus, for example, if the challenge is to a landfill consent then, in theory, waste placed without leave in a landfill during the litigation could later be removed but the court is likely to be reluctant to order that and it is questionable whether it would cross the "impossibility" threshold.

**(a) "Significant environmental damage would be caused"**

70. This may also be problematic, as it invites argument about whether "significant" is a filter to remove cases where there would be no real harm if the injunction was not granted, or whether a high level of harm would be needed if the *status quo* is to be preserved by an injunction. It is notable that, in the context of equality law, the similar adjective "substantial" has been taken to mean "more than minor or trivial". If "significant" has a similar meaning here, that may be fine. But if significant in fact connotes a high level of damage then, in practice, injunctions will rarely arise and the formulation will not give effect to the public interest inherent in compliance with international obligations. If "significant" here is, alternatively, taken to mean the same as "significant" in the EIA screening test (as in "projects likely to have significant effects on the environment") then that also raises the spectre of extensive satellite litigation in cases where the applicant alleges that (for example) a proposed development should have been subject to EIA but the decision-maker has said not. That could well then draw the court into deciding, as part of the application for an injunction and no doubt with extra evidence/cost (and also caught up no doubt with arguments about PCOs and costs) on the impact of development (which environmental JR has traditionally left to the decision-maker). An application for an injunction could thus become a merits challenge by default. As such, CAJE believes that the threshold should be set low ("more than minor or trivial" or similar) to preserve the status quo while there is a speedy consideration of the substantive JR, rather than at some level which distorts the JR process and pushes up costs.

71. In general, the difficulties associated with relying on criteria that involve judicial discretion (or include terms that are not appropriately defined) are highlighted in a recent report on remedies published on behalf of the UNECE Task Force on Access to Justice[28]. For the reasons cited in (b) and (c) above, our general view would be that it is necessary to define any conditions or criteria attached to the removal of cross-undertakings in damages as clearly and precisely as possible;

**(a) "The applicant would probably and reasonably discontinue proceedings or the application for an interim injunction if a cross-undertaking in damages was required and would not be acting unreasonably in so doing"**

72. The issue here is how will the court decide whether a applicant is acting reasonably in withdrawing the proceedings or the application for interim relief? Would the court simply accept the applicant's statement to that effect? If not, the court is inevitably drawn into a detailed means assessment as to what a applicant can afford in each particular case, which could lead to significant uncertainty and unhelpful satellite litigation.

73. CAJE continues to support the approach advocated in the Sullivan reports[29]. We believe it provides a clear and transparent approach to a problem for which (in the light of previous events) it is understandable little empirical data exists.

74. However, we would stress two points. Firstly, that any criteria or conditions attached to the granting of interim relief should be defined as clearly and precisely as possible in order to reduce uncertainty. Secondly, that in view of the small number of cases in which interim relief is likely to be sought (being, as it is, a sub-section of environmental cases) "promptly" means just that. The Epstein report cites the example of Lithuania, in which cases must be decided in the first instance within two months and be completed in all instances within six months (see page 82). We agree that it may be helpful to consider setting an explicit deadline in this respect and that such a deadline should not extend beyond several weeks.

**Omissions**
**VAT**

75. The figures included in the consultation paper do not appear to include VAT. If they do not, the figure for the cross-cap should be inflated by 20%. The PCO figure should not be inflated in the same way as it reflects the total amount which is not prohibitive, whereas the cross-cap represents a reasonable figure for the applicant's costs, plus VAT.

**Q.2 – Would the proposed codification of PCOs enable you to bring a judicial review in a case within the scope of the Aarhus Convention if you wished to challenge a decision in the future? Please explain your reasons.**

76. No. The vast majority of citizens and civil society groups would be unwilling to embark on environmental judicial review with a potential costs liability of

---

[28] See Epstein, Y. (2011) "*Article 9.4 of the Aarhus Convention and the requirement for adequate and effective remedies, including injunctive relief*" Available at http://www.unece.org/env/pp/a.to.j.htm

[29] See Sullivan I (paragraph 82) and Sullivan II (paragraphs 41-43)

£35,000. Even if applicant lawyers were willing to work for free, those same groups would, in most case, still be dissuaded by a £5,000 adverse costs liability. This is compounded by the fact that respondents may be able to increase the £5,000 limit significantly on the basis of information in the public domain, thus resulting in continuing unhelpful and costly satellite litigation.

77. Similarly, wealthier environmental NGOs (which may have considered bringing a small number of additional cases) would be dissuaded by the fact that respondents could access their published accounts and argue that a much higher limit should be imposed. Most environmental NGOs have relatively limited "free funds" – most funding is restricted and finding resources to fund legal challenges at short notice is difficult. This is compounded by the fact that pursuing judicial reviews (as with any type of litigation) is enormously time-consuming and is rarely contemplated unless the issue is an organisational priority.

78. Finally, paragraph 4.9 of the consultation paper raises a further complicating factor, in stating that '*local residents may sometimes form a limited liability [company] as a vehicle for litigation'*. In this regard, it should be noted that many, if not most of the larger environmental NGOs in the UK, are set up as companies limited by guarantee. These arrangements are not intended to be a 'vehicle for litigation' but a more suitable structure for a number of activities, including lobbying and campaigning purposes. As to its effect, some courts have dealt with the question of costs protection by saying it is provided if the applicant's status is that of a limited company, without further elaboration[30]. However, this is in fact no protection for an environmental NGO that would have to go into liquidation if an adverse costs order exceeded its assets.

**Conclusion**

79. To conclude, the worst-case scenario possible under these proposals is that presumptive limits (as to the limit and a cross-cap) will apply and respondents can challenge means on publicly available information. If this is what the Department of Justice adopts, it will do little, or nothing, to improve access to environmental justice for individuals and civil society groups in Northern Ireland. It will therefore only be a matter of time before further Communications are submitted to the Aarhus Convention Compliance Committee and/or the European Commission – thus wasting additional time and public funding debating prohibitive expense all over again.

80. If the UK is intent on pursuing a codification of the PCO regime, CAJE would propose that the limit is reduced from £5,000 to between £2,000-3,000 and that any cross-cap is eliminated, thus enabling applicant lawyers to recover their costs in successful cases at normal commercial rates on assessment. These figures should not be subject to challenge and confirmation that a case falls within the scope of the Convention should be made at the earliest opportunity. Proposals in relation to injunctions should be encompassed within the question of prohibitive expense in accordance with the criteria set out in Sullivan I and II.

---

30 In *R (Stop Bristol Airport Expansion Ltd) v North Somerset Council,* the court held that the claimant already had costs protection through its status as a limited liability company