COALITION FOR ACCESS TO JUSTICE FOR THE ENVIRONMENT

Costs Protection for Litigants in Environmental Judicial Review Claims:
Outline proposals for a costs capping scheme for cases
which fall within the Aarhus Convention

Summary of points made by CAJE

- Aarhus claims are inherently in the public interest. The claimant 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 claimant. Aarhus cases merit special consideration.

- The scope of the proposals should be extended beyond judicial review to include environmental s.288 (and other statutory) challenges. As the Convention also encompasses private law environmental cases the government must make separate provision for them.

- A cap of £5,000 on the claimant'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' individuals on an objective basis.

- Neither the £5,000 cap, 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 claimant 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-permission. There should be no costs in favour of third parties and an absolute limit (lower than or equal to the proposed cap) on what the defendant can recover under *Mount Cook*.

- The level of the cap 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 claimant's costs), this would need to increase accordingly to cover the work involved in the appeal(s).

- Consistent with *Bolton*, 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. The two must be viewed together when considering compliance with the Aarhus Convention.

Introduction

1. This response is made on behalf of the Coalition for Access to Justice for the Environment (**CAJE**). CAJE includes a number of leading environmental NGOs in the UK including Friends of the Earth, WWF-UK, Greenpeace, the Royal Society for the Protection of Birds, Capacity Global and the Environmental Law Foundation. We are 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 this consultation paper and the government's commitment to address the EU infraction proceedings and the findings of the Aarhus Convention Compliance Committee in Communications C23, C27 and C33. In particular, we commend the decision to issue this consultation paper in advance of the Court of Justice of the European Union's consideration of a number of questions concerning costs in *Edwards*[1], which we understand will take place in 2012. We hope the government will continue to move swiftly to ensure full compliance with the Convention and EU law at the earliest opportunity.

4. We address the majority of the issues raised in the questionnaire in the course of our response. However, with reference to question 1, we would refer the Ministry of Justice to a paper presented at the recent CAJE event '*Aarhus and Access Rights: the New Landscape'* in October 2011 (attached as Annex I), 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. 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].

5. CAJE members have also continued to conduct research on this topic in recent years. We refer the MoJ to a report by the Environmental Law Foundation in association with BRASS, which refers to a number of potential cases that were halted by cost considerations. This research identified 210 potential JR cases between 2005 and

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1 *R (on the application of Edwards and Another (Appellant)) v The Environment Agency and Others (Respondent)*

2 Annex I, pages 17-18

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].

6. Similarly, our members continue to report cases in which claimants are served with high costs estimates at an early stage in the legal proceedings. Whether such estimates are designed to dissuade claimants 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.

7. CAJE's final introductory comment is that we make these observations on the basis that the government 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 claimant 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

8. Before commenting on the detail of the consultation paper and the questions raised within it, we wish to make a general remark about the special nature of environmental claims. Aarhus cases are inherently in the public interest. The claimant 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.

9. Accordingly, it is inappropriate to maintain a system that seeks to put a commercial developer on the same footing as an environmental claimant. The Aarhus Convention requires contracting Parties to distinguish between normal commercial and policy considerations and those of environmental interest. Put simply, Aarhus claims require a wholly different approach.

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

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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

4 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

11. 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[7] and defendants can challenge means on publicly available information), they will do little, or nothing, to improve access to environmental justice in England and Wales. The problems arise from two fundamental (and linked) flaws in the basic premises on which the proposals are made.

12. Firstly, the indication that the purpose of an Aarhus costs rule is 'to limit the overall cost of judicial review cases falling under the Aarhus Convention' is incorrect[8]. Its purpose is to ensure that litigating Aarhus cases is not prohibitively expensive for the claimant, as required by Article 9(4) of the Convention. Secondly, the suggestion (in the same paragraph) that the granting of a cap and a cross cap should be linked in some way, is incorrect. The caps have unrelated 'purposes' (indeed we would argue that a cross cap has no foundation in the Convention) and must be considered separately. We discuss these issues in more detail below.

Detailed comments on the consultation paper

Scope

13. The proposal to apply the provisions of the scheme to all environmental judicial reviews is a welcome improvement on previous proposals (which applied only to cases covered by the EC Public Participation Directive (essentially EIA and IPPC)). However, in order to fully comply with the requirements of the Convention the proposals must apply to all environmental judicial reviews, s.288 TCPA (and other statutory) challenges.

14. In the environmental field, whether the challenge is made by way of a statutory appeal or by way of judicial review is sometimes a matter of historical happenstance – many environmental challenges can be made by way of statutory appeal. In the Aarhus context this is likely to be particularly important in the planning context.

15. We consider it beneficial to avoid two entirely different rules within the same court and for reasons of logical consistency – the reasons for our proposals (below) in judicial review apply with equal force in the context of statutory appeals.

16. However, we are aware that the absence of a permission filter in statutory appeals increases the possibility of an increased number of (unmeritorious) cases being brought under any new regime. As such, we recommend giving consideration to the possibility of introducing a permission filter to statutory appeals. In this eventuality, the safeguards in terms of timing and costs outlined below should apply.

17. Although the consultation paper does not address private law cases, it is clear the government 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. One possibility would be to examine the possibility of encompassing such claims within the form of a QuOCS regime proposed for personal injury cases.

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7 Consultation paper § 28

8 Consultation paper § 29

Making an Application

18. CAJE welcomes the proposal that applications for a PCO need not be supported by grounds and evidence unless an order other than the 'default order' is sought. The paper attached as Annex I 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[9]. Thus, the proposal to streamline the process and remove the requirement to produce grounds and evidence is welcome.

19. In terms of timing, the consultation paper suggests that a PCO will only be granted when permission 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-permission**, i.e. no costs in favour of interested parties and an absolute limit (lower than or equal to the proposed cap) on what the defendant can recover under *Mount Cook*.

20. CAJE would also point out that the procedure in respect of rolled-up hearings, in which permission and the substantive issues are addressed concurrently, needs to be addressed. In such cases, the claimants will have flagged the case as an Aarhus case when lodging the application and the judge should then confirm the case is an Aarhus case at the earliest opportunity. For more detailed submissions on the issue of rolled-up hearings, CAJE would refer the MoJ to the separate response submitted by Friends of the Earth.

The level of the cap

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

21. The paper states that the PCO will limit the liability of the claimant to pay the defendant's costs to £5,000 and the liability of the defendant to pay the claimant's costs to £30,000.

22. The consultation paper provides no explicit rationale for the £5,000 cap. However, reference is made to the case of *Garner*[10], in which the Court of Appeal awarded a PCO at £5,000[11]. It is also suggested later in the paper that this sum would not present an insuperable barrier to proceeding[12], i.e. that a figure of £5,000 is not 'prohibitively expensive' for most claimants.

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

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

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

12 Consultation paper §35

23. However, we would argue that this sum is still too high. It is certainly not consistent with the objective approach proposed in 'Sullivan I'[13] and 'Sullivan II' of focusing on the 'ordinary person' (i.e. just above legal aid means eligibility).

24. 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. 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**

25. 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).

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

27. 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 claimants would seek to challenge the cap, thus resulting in vastly disproportionate sums on satellite litigation for the sake of two or three thousand pounds.

28. 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[14]. A further example of the disproportionate time spent dealing with costs has been forwarded to us by Jamie Beagent (Solicitor, Leigh, Day & Co) and can be found attached as Annex II.

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

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[13] 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

[14] Gita Parihar (Head of the Rights & Justice Centre at Friends of the Earth), pers. comm..

30. With the cap 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).

31. This issue was addressed in the Sullivan Reports. 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[15]. 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**

32. These figures confirm that environmental cases comprise a very small proportion of the total number of cases; around 20 cases per year of a total of 1.8 million[16]. The figures above 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.

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

34. 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 (on the basis of recent discussion within the Legal Strategy Group of Wildlife Link, which includes groups such as Buglife, the Whale & Dolphin Conservation Society and The Wildlife Trusts) 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 capped.

35. We would also point out that both the Sullivan reports and Lord Justice Jackson, in his year-long review of civil litigation costs, concluded that the permission

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

16 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 on 8th December 2011

requirement is a sufficient filter to weed out unmeritorious cases[17]. However, it is important that the Administrative Court is adequately resourced (including through the deployment of specialist judges to deal with environmental cases) to ensure that sufficient consideration is given to permission 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?

36. Paragraph 36 of the consultation 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 *claimants'* 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 permission filter, claimants 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 claimant's position – as discussed below.

37. 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 36 of the paper, as discussed above) that it would appear to represent a pre-estimate of the claimant's costs. We would agree this is a reasonable approximation - providing the case is not unduly complex.

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

39. This problem has recently been compounded by the proposed abolition of the recoverability of success fees on Conditional Fee Agreements (as proposed by the Legal Aid, Sentencing & Punishment of Offenders (LASPO) Bill, currently before Parliament). This will have the consequence of effectively removing Conditional Fee Agreement (CFA) funding as an option for Aarhus claimants - only the wealthiest of claimants would be able to afford to pay their lawyers' success fees when a case is won and it would simply not be commercially viable for lawyers to act on a no win, no fee basis without being able to spread their risk.

40. Thus, in unsuccessful cases, either claimants must pay their lawyers' costs (thus facing a total liability of £35,000 - which is clearly prohibitively expensive) or claimant lawyers must work for free, which is wrong in principle, not consistent with the Convention or a sustainable long-term answer to access to environmental justice.

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[17] See Jackson Review, §4.1 (iii), Chapter 30

41. 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 claimant 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 claimants' total costs liability.

42. 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, claimants will find it difficult to obtain legal representation because claimant 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[18]', 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) the proposal in the LASPO Bill to abolish the recoverability of success fees and (b) that only the wealthiest claimants 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 claimant lawyers to act on a no win no fee basis and 'spread their risk'. Again, the corollary of this that claimants 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.

43. For these reasons, we believe that it is unhelpful to have an explicit cross-cap. We have discussed this issue with other claimant lawyers in the environmental sphere and we believe that a better alternative would be for claimant 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.

44. We consider that the only circumstances in which the cap should not apply are when the claimant 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.

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

45. Where a claimant 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 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 permission filter) but also that such cases are conducted responsibly. Even in those Tribunals where the general rule is that each party has to bear its own costs, the Tribunal[19] invariably has power to order costs against a party that has behaved unreasonably. However, the threshold of unreasonable behaviour is a high one.

46. However, it would be important to ensure that a defendant 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 claimant of his intention to do so and the basis of his proposed claim. Such a requirement could properly be included in a revised practice direction.

Certainty and challenges to the cross-cap

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

Q. 5 – if so, do you think defendants should only be entitled to apply to remove the cap or should it also be possible for defendants to make applications to raise the cap? 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 cap ought to be reviewed at the same time?

47. 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[20]. It discusses whether clarity can best be achieved by setting either an automatic presumptive limit or an absolute cap on claimant's exposure to the defendant's costs[21].

48. In particular, the paper provides for the possibility for the defendant to challenge the £5,000 cap 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.

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

20 Consultation paper §21

21 Consultation paper §26

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

50. 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 defendant's ability to argue for an increased cap 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.

51. 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). In one current case, a local planning authority in Devon is challenging the level of the PCO obtained by the claimants 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 the new regime. For charities and public limited companies, it would also encompass published accounts. While it may appear that large sums of money are available, 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 legal challenges at short notice is difficult.

52. If the codified PCO regime maintains provision for defendants to challenge means on public information, claimants 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.

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

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

55. 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[22]. 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.

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

Interested parties

56. The paper says nothing about the position of Interested Parties. Consistent with *Bolton* 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 defendant drops out but the interested party carries on in which case they should take the place of the defendant in relation to the £5,000 and £30,000 (or whatever they are). An alternative approach would be to state that the £5,000 (or whatever figure) represents the claimant'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 default cap 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 claimant or defendat (at first instance) who is appealing? If so, in what way?

57. 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 cap represents the level above which litigating would be prohibitively expensive for a citizen or an organisation on an objective basis and while claimants 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 defendants to apply to increase the level of the cap in relation to a subsequent appeal.

58. We illustrate this point by reference to Friends of the Earth's current case against the Department for Energy and Climate Change (DECC) in relation to proposed changes to the Feed In Tariff scheme. While Friends of the Earth won the first instance proceedings, it continued to be at risk of costs in the appeal to the Court of Appeal (and to the Supreme Court, should the appeal proceed further). The claimant was subsequently able to agree a cap on its costs with DECC. However, this cap is of the level of £15,000 (three times the cap proposed by the Government in its consultation paper) and far from a level to which it would be able to commit itself in every case. This underscores the need for certainty as to costs of a fixed amount at the outset.

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

60. However, it should be noted that if the regime retains a cross-cap (aimed to represent a reasonable level for the claimant'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).

Omissions

Injunctive Relief

61. The paper omits key issues covered by the EU infraction proceedings and the findings of the Aarhus Convention Compliance Committee in Communication C33, including the need to ensure that injunctive relief is not prohibitively expensive. If it is impossible to expedite the proceedings so as to avoid the need for an injunction, in Aarhus cases no cross-undertaking in damages can be imposed as it would make it prohibitively expensive to bring the case. Thus, we emphasise that the costs issues and the *requirement* to provide a cross-undertaking in damages (as effected by an amendment to the Civil Procedure Rules in February 2010[23]) must be viewed together when considering prohibitive expense and compliance with the Aarhus Convention.

62. CAJE notes the current consultation paper issued by the Department of the Justice in Northern Ireland[24] does address the question of interim relief in the following terms:

> "1.11 We also ask questions about cross-undertakings in damages when an interim injunction is sought and the enforcement of these cross-undertakings. The following summarises the main proposals on cross-undertakings:
>
> - The rules are to apply to judicial review cases falling under the Aarhus Convention, including those matters covered by the Public Participation Directive. The rules are to apply in relation to all applicants in the same way, regardless of whether the applicant is a natural or legal person;
>
> - If the application meets the other criteria for granting an interim injunction, the court will grant an interim injunction without a cross-undertaking for damages where, if an injunction were not granted:
>
> - a final judgment in the matter would be impossible to enforce because the factual basis of the proceedings will have been eroded;
> - significant environmental damage would be caused; and
> - the applicant would be likely to discontinue proceedings or the application for an interim injunction if a cross-undertaking in

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23 See Practice Direction 25A – Interim Injunctions, paragraph 5.1 available at: www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part25a.htm

24 See paragraphs 3.7 and 4.18-4.33 of the Consultation paper available at: http://www.dojni.gov.uk/index/public-consultations/current-consultations/cost-protection-consultation-pdf-07.12.11.pdf

damages was required and would not be acting unreasonably in so doing."

63. With the exception of the final requirement (that the applicant would be likely to continue proceedings if a cross-undertaking was required), the recommendations almost exactly mirror the recommendations made in relation to injunctions in Sullivan I[25]. The fact that the Northern Ireland consultation paper not only addresses injunctive relief, but seeks to address the issue in such positive terms, is in somewhat stark contrast to the apparent failure of the MoJ consultation paper to recognise that cross-undertakings in damages are important in the context of 'prohibitive expense'. We urge the MoJ to consider the Department of Justice's proposals.

VAT

64. 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 claimant'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.

65. Unfortunately not. The vast majority of citizens and civil society groups would be unwilling to embark on environmental judicial review with a potential costs liability of £35,000. Even if claimant 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 defendants may be able to increase the £5,000 cap significantly on the basis of information in the public domain, thus resulting in continuing unhelpful and costly satellite litigation.

66. Similarly, wealthier environmental NGOs (which may have considered bringing a small number of additional cases) would be dissuaded by the fact that defendants could access their published accounts and argue that a much higher cap 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.

67. Finally, paragraph 32 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 claimant's status is that of a limited company, without further

[25] Sullivan I, see paragraphs 73-83

elaboration[26]. 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

68. To conclude, the worst-case scenario possible under these proposals is that presumptive limits (as to the cap and a cross cap) will apply and defendants can challenge means on publicly available information. If this is what the government adopts, it will do little, or nothing, to improve access to environmental justice for individuals and civil society groups in England and Wales. 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.

69. If the government is intent on pursuing a codification of the PCO regime, CAJE would propose the government reduces the cap from £5,000 to between £2,000-3,000 and eliminates any cross cap, thus enabling claimant 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 (currently being consulted on in Northern Ireland) should be encompassed within the question of prohibitive expense.

This response is endorsed by the following members of CAJE:

Carol Day, Solicitor, WWF-UK
Rosie Sutherland, Legal Adviser, RSPB
Tom Brenan, Legal & Policy Officer, Environmental Law Foundation
Gita Parihar, Head of the Rights & Justice Centre, Friends of the Earth
Maria Adebowale, Director, Capacity Global
Kate Harrison, Solicitor, Greenpeace

[26] See Court Order from *R (Stop Bristol Airport Expansion Ltd) v North Somerset Council* dated 22nd June 2011, paragraph 3(a), which holds the claimant already has costs protection through its status as a limited liability company (attached as Annex III)