



Ministry
of Justice

Costs Protection in Environmental Claims

Proposals to revise the costs capping scheme for eligible environmental challenges

To:

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RESPONSE TO CONSULTATION QUESTIONS

Q1. Do you agree with the revised definition proposed for an ‘Aarhus Convention claim’. If not how do you think it should be defined? Please give your reasons.

I agree that an ‘Aarhus Convention claim’ should be extended to statutory reviews in addition to Judicial Review.

However, I also feel that the definition should also be extended to private law challenges that deal with the environment such as nuisance claims.

In that context, I consider that specific reference should also be made to article 2.3(a)-(c) of the Aarhus Convention relating to the definition of environmental claims, so that the matter is fully clarified in accordance with the treaty obligations in the convention.

Q2. Do you agree with the proposed changes to the wording of the rules and Practice Directions regarding eligibility for costs protection? If not, please give your reasons.

For the most part yes. There should be complete flexibility to take the Claimant’s means into account, in accordance with the Edwards rulings and the EU Commission v. UK case.

Q3. Should claimants only be granted costs protection under the Environmental Costs Protection Regime once permission to apply for judicial review or statutory review (where relevant) has been given? If not, then please give your reasons.

I consider that all claimants who wish to bring Aarhus related Judicial Reviews concerning environmental matters would be seriously prejudiced by any proposals that such costs protection would only apply after the grant of permission.

I consider that this will render possible costs of applying for permission for Judicial Review possibly “prohibitively expensive” in such cases, as it is only as a result of such applications being made that it is possible to determine whether the case has any merit or not.

I consider also that were such proposals to be implemented, this would be in breach of article 9.4 of the Aarhus Convention, as it would render the costs of applying for permission for Judicial Review “prohibitively expensive” and act as a deterrent to members of the public being able to mount environmental challenges.

Q4. Do you agree with the proposal to introduce a ‘hybrid’ approach to govern the level of the costs caps? If not, please give your reasons.

I consider that the level of cost protection should be initially set at a far lower figure than £5,000, but that there should be full flexibility regarding the recourses of the Claimant.

I also consider that Claimants who are in receipt of benefits should have automatic exemption from costs.

Q5. Do you agree that the criteria set out at proposed rule 45.44(4) at Annex A properly reflect the principles from the *Edwards* cases? If not, please give your reasons.

I don’t agree that the inclusion of criteria “vi” regarding a “frivolous” claim is relevant to the principles of the *Edwards* case.

There is no mention of considering cases to be “frivolous” in *Edwards* at all, and it is only after cases have been fully heard and tested that a final view can be arrived at regarding their merits.

Q6. Do you agree that it is appropriate for the courts to apply the *Edwards* principles (proposed rule 45.44 at Annex A) to decide whether to vary costs caps? If not, please give your reasons.

I fully agree that there should be flexibility, but that this shouldn’t be exceptional. The *Edwards* rulings make no mention of “exceptional” as criteria.

I also would contend that there should be no costs awarded against a Claimant who fails to have any costs limit varied.

Q7. Should all claimants be required to file at court and serve on the defendant a schedule of their financial resources at the commencement of proceedings? If not, please give your reasons.

I don’t agree with this proposal. It is a serious invasion of personal privacy and “data”. It raises issues under article 8(1) of the ECHR as incorporated under schedule 1 of the Human Rights Act 1998, as well as breaches of the requirements for “fairness” under the Data Protection Principles of the Data Protection Act 1998.

Any financial information should only be required to be provided if an application is made to vary any costs limit, and then should be entirely confidential and not disclosed to the Defendant.

Alternatively, the Defendant should be required to undertake to retain the information in confidence and there should be prohibitions against publication or supplying of any data to third parties.

If necessary, the Freedom of Information Commissioner should also be consulted as to his views regarding any Data Protection issues arising from such disclosure.

The Information Commissioner has held that a person's financial circumstance and details constitute "personal data" in the context of supplying details of whether or not a party to proceedings has been granted legal aid.

Q8. Do you agree with the proposed approach to the application of costs caps in claims involving multiple claimants or defendants? If not please give your reasons.

I think it would be an impossible task to have to split up liabilities for payment of costs in these types of cases. There should be an overall cap set.

Q9. At what level should the default costs caps be set? Please give your reasons.

I consider that the default costs cap should be set at £500, which is sufficient to cover persons of moderate means and any persons in receipt of benefits.

Q10. What are your views on the introduction of a range of default costs caps in the future?

If the default figure of £500 isn't acceptable, the range of default costs caps should include a default cap of nil for persons in receipt of benefits.

Q11. Do you agree that where a defendant unsuccessfully challenges whether a claim is an Aarhus Convention claim, costs of that challenge should normally be ordered on the standard basis? If not please give your reasons.

No. There should be no costs awarded at that stage, as very often Aarhus cases may be borderline, and to expose claimants to the possible liabilities of costs on the standard basis might act as a disincentive to bring cases regarding the environment.

Q12. Do you think the Environmental Costs Protection Regime should make specific provision for how the courts should normally deal with the costs of applications to vary costs caps? If so, what approach should the rules take?

I don't consider that any costs should be awarded against a Claimant applying for costs variation.

If such costs were to be awarded, this might again act as a deterrent to a claimant with limited means who was unsuccessful before the court.

I also consider that any proposals should not include power to increase any default costs cap.

Any such proposals for awarding costs against a claimant who applied to vary the default costs cap, would also in my view, render such proceedings "prohibitively expensive" in breach of article 9.4 of the Aarhus Convention, even relating to satellite litigation in connection with the main claim.

Q13. Do you have any comments on the proposed revisions to Practice Direction 25A?

I don't believe that costs protection should be increased above the default level under any circumstances.

Such circumstances would have to be clearly set out in the rules if this were to be contemplated. Nor should the default costs protection be removed under any circumstances.

Also, if it were proposed to take into account any support from third parties, the rules should clearly state under what circumstances this would take place.

It certainly shouldn't cover cases where only provisional support was promised and which turned out not to be forthcoming.

Q14. Are there other types of challenge to which the Environmental Costs Protection Regime should be extended and if so what are they and why?

I feel that the definition should also be extended to private law challenges that deal with the environment such as nuisance claims.

The costs protection should in fact apply to any proceedings brought by members of the public as defined in article 2.4 and 5 of the Aarhus Convention regarding any case that involves the environment as defined in article 2.3(a)-(c).

Q15. From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals to revise the Environmental Costs Protection Regime?

I consider that all claimants who wish to bring Aarhus related Judicial Reviews concerning environmental matters would be seriously prejudiced by any proposals that such costs protection would only apply after the grant of permission.

I consider that this will render possible costs of applying for permission for Judicial Review possibly "prohibitively expensive" in such cases, as it is only as a result of such applications being made that it is possible to determine whether the case has any merit or not.

About you

Please use this section to tell us about yourself

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If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.
