

## **UK Compliance with Decision V/9n of the Meeting of the Parties**

### **Statement to the Aarhus Convention Compliance Committee, 9<sup>th</sup> March 2016**

My name is Gita Parihar, Head of Legal at Friends of the Earth. I am speaking today on behalf of the Royal Society for the Protection of Birds and Friends of the Earth groups in England and Wales, Northern Ireland and Scotland. We welcome the opportunity to make this statement on the UK's implementation of Decision V/9n to emphasise the concerns detailed in our written submissions to the Compliance Committee dated 17<sup>th</sup> December 2015.

As you know, the Governments of the UK introduced bespoke provisions for environmental cases in 2013. Whilst imperfect, the new rules offer many claimants access to environmental justice for the first time in years.

#### **England and Wales**

Since then, the Ministry of Justice has embarked on an unprecedented series of reforms to the process of Judicial Review in England and Wales. This has culminated in the Government of England and Wales consulting on specific proposals for the costs rules underpinning environmental cases in 2015. The proposals include:

- Confining eligibility for costs protection to a member of the public, thus apparently excluding community groups and even environmental NGOs, from costs protection;
- Making costs protection contingent on obtaining permission to apply for Judicial Review;
- Replacing the current fixed adverse costs caps of 5k (individuals) and 10k (all other cases) with higher caps (potentially doubled);
- Enabling the defendant and the court to challenge the level of the cap at any point in the proceedings;
- Requiring claimants to first submit a schedule of their financial resources and identifying third party financial support for JR in all cases and potentially exposing third parties to costs orders;
- Awarding separate costs caps in multiple-claimant cases, thereby exposing them to cumulative costs awards; and
- Applying some of the above proposals to the procedure for obtaining interim relief.

If enacted, these proposals would compound recent changes to JR introduced under the Criminal Justice and Courts Act 2015, including the doubling of the Administrative Court fee in England and Wales, exposing interveners to potential costs orders and removing the right to an oral hearing in cases deemed "totally without merit".

There is no evidential basis for the current proposals. In fact, statistics obtained from the MoJ in August 2015 confirm that while environmental cases represent less than 1% of the total number of

JRs lodged annually, they demonstrate high success rates. Environmental cases play an essential role in upholding the rule of law, protecting the environment and improving the quality of life.

The cumulative effect of these proposals will be to deter all but the very rich from pursuing environmental cases. Those cases that are progressed are likely to result in considerable delay as costly and time consuming satellite litigation around the issue of costs detracts parties from the substantive issues. The proposals therefore take the UK in the opposite direction of travel to compliance with Decision V/9n.

We have submitted lengthy and considered responses to the current proposals. Most recently, the CEOs of 28 members of Wildlife and Countryside Link wrote to the Secretary of State Michael Gove MP pointing out the extreme difficulties they would present for charities and environmental litigation. We await the Government's response.

### **Northern Ireland**

Similar proposals (see points 1, 4, 5, 6 and 7) to the above have been consulted upon in Northern Ireland, despite the fact that information obtained from the Department of Justice in February 2016 confirms there were only 11 Aarhus claims and no applications for interim relief in the two and a half year period between 1st April 2013 and 31st December 2015. As these cases demonstrate similarly high success rates to those in England and Wales, there is again no argument to suggest there has been a proliferation of meritless environmental litigation that must be stemmed. However, High Court legal action remains, as a whole, prohibitively expensive for most individuals, communities and NGOs. Claimants still have to be prepared to pay for their own legal costs if they are unsuccessful and barriers to civil legal aid in Northern Ireland mean that it is rarely available for claimants in environmental cases. Additionally, the reciprocal cap continues to prevent successful applicants from recovering the full costs of legal and expert fees in environmental cases.

### **Scotland**

Recent amendments to the Protective Expenses Order (PEO) regime include extending the scope of the Rules to cover cases falling under Article 9(1) and 9(3) of the Convention and modifying the categories of persons eligible for a PEO to include Members of the Public and Members of the Public Concerned. While it is too early to evaluate the impact of these changes, it is hoped that community groups will now be able to benefit from costs protection. However, legal action remains, as a whole, prohibitively expensive for most individuals, communities and NGOs. Barriers to legal aid in Scotland mean that very few awards are granted in environmental cases. Certain court fees have doubled in recent years and litigants own legal costs remain very high in complex JR cases.

### **Conclusion**

To conclude, while the new costs regimes in the UK offered hope to claimants, recent restrictions on JR and the current proposals for environmental cases will make environmental litigation impossible for the vast majority of people. Claimants would be in a worse position than before the introduction of the new costs rules as previously the granting of a Protective Costs Orders guaranteed certainty as to costs exposure. The new regime would introduce a climate of fear and uncertainty amongst claimants with obvious implications for environmental protection, access to justice and the rules of law.