giving nature a home

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17th December 2015

Dear Ms Marshall,

Re: Decision V/9n concerning compliance by the UK with its obligations under the Aarhus Convention

We are grateful for the opportunity to provide comments on the UK's second progress report on the above. We hope this response will inform the Compliance Committee's ongoing discussions on Decision V/9n.

As the UK Report sets out the relevant sections of Decision V/9n we do not repeat them here.

Article 9(4) Aarhus Convention and "Prohibitively Expensive"

England and Wales

The UK's Second Report confirms: "*new rules providing for cost protection for claimants in cases under the Aarhus Convention were adopted throughout the UK in April 2013, but that judgments given in a number of cases*[1] *prompted the Ministry of Justice and the devolved administrations to review the rules adopted in 2013*".

This response summarises the implications of reviews conducted in England/Wales and Northern Ireland. However, we would initially point out that this is a somewhat disingenuous portrayal of the timeline. The Aarhus costs rules were introduced in order to comply with the findings of the Aarhus Convention Compliance Committee ("the Compliance Committee" or the "ACCC") in 2010, the European Commission's referral of the case to the Court of Justice of the European Union (CJEU) on prohibitive expense in April 2011 and in light of Advocate General Kokott's Opinion in *Edwards* in October 2012. The new costs rules were therefore introduced in full knowledge of the likely approach of the CJEU to the issue of prohibitive expense and, in particular, the requirement to consider both the objective and subjective circumstances of a case.

[1] The cases include *Commission v UK* (Case C-530/11), *Edwards v Environment Agency* (Case C-260/11) and the UK Supreme Court judgment in *R (Edwards) v Environment Agency* (No. 2) [2013] UKSC 78

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We also believe the summary of the proposals included within the consultation on costs protection in environmental claims[2] is inaccurate. It states: "*the government proposals seek to make sure the UK complies with its EU obligations*". They clearly do not. We attach Wildlife & Countryside Link's response to the consultation in England and Wales (supported by 18 members of Link) and a legal Opinion provided by Nathalie Lieven QC and Andrew Parkinson from Landmark Chambers. The Link response and Opinion detail how the Government's proposals do not respect the CJEU's findings with regard to prohibitive expense in the cases of *Commission v UK* and *Edwards*.

The summary of the proposals also makes no reference to the impact of the proposals on UK compliance with the Aarhus Convention. That may be because they take the UK in the opposite direction of travel to compliance with Articles 3(4), 9(4) and 9(5) of the Convention and the implementation of Decision V/9n. Link's consultation response and the opinion also detail the manner in which the proposals undermine the UK's compliance with the Convention. However, to summarise:

Definition of an Aarhus Convention Claim

The UK states that it proposes to "*Extend the types of case for which costs protection is available beyond JRs to include statutory reviews and certain statutory appeals which engage the relevant EU Directives… It will continue to be for the court to decide whether a case falls within the definition, if disputed by the defendant*".

While Link welcomes the proposal to extend costs protection to certain types of statutory review, information provided by the MOJ in 2015[3] suggests that only a small percentage of statutory reviews cases would be eligible for costs protection under the new regime. If the proposals are to be both effective and Aarhus-compliant, then statutory reviews concerning all matters within the scope of Articles 9(2) and 9(3) of the Aarhus Convention should be encompassed - as is currently the case in Northern Ireland[4].

Secondly, any claimant is currently eligible to benefit from costs protection when bringing an environmental claim. The amendments to the Civil Procedure Rules in Annex A of the consultation paper confine eligibility for costs protection to a member of the public, thus excluding key audiences, including environmental NGOs, from costs protection.

Making costs protection contingent on obtaining permission to apply for Judicial Review

Costs protection currently applies from the point at which a claimant files a claim in the High Court. However, the Government is proposing that costs protection be made contingent on a claimant obtaining permission to proceed with an application for JR (and certain statutory reviews as the Government in England and Wales has recently introduced a permission stage in statutory reviews). This will remove advance certainty as to costs exposure and could expose the claimant to costs awards beyond their means – thus preventing the UK from complying with the judgments of the CJEU in *Commission v UK*[5] and *Edwards* and the findings of the Compliance Committee in C77.

The removal of fixed adverse costs caps

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[2] See https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/supporting_documents/costprotectioninenvironmentalclaimsonsultationpaper.pdf

[3] See the answer to question 1 and Annex B of Link's response to the consultation

[4] See The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, s.2(1)(b) available at: http://www.legislation.gov.uk/nisr/2013/81/regulation/2/made

[5] Case C-530/11 *Commission v UK,* paragraphs 34 and 56

The Government is consulting on proposals to amend the current fixed costs cap approach to costs protection, thus enabling courts to vary the level of costs caps in individual cases. It is proposed that costs would be set at a default level (doubling the current levels of £5,000 for an individual and £10,000 in all other cases to £10,000 and £20,000 respectively), but that, at any time thereafter, any party (including the Court of its own motion) could apply to vary their own or another party's costs cap. The proposals to allow defendants to challenge the level of the cap on a claimant's adverse costs liability will conflict with the requirement for certainty with regard to costs exposure. Proposals to increase the caps to £10,000 and £20,000 have no evidential basis and do not satisfy the requirement for costs to be "objectively reasonable". We would emphasise that the figures for adverse costs liability do not represent the claimant's total costs liability – the claimant must also pay the court fee (just under £1,000) and their own legal costs, which routinely total at least £25,000. The total costs exposure of £31,000 – £36,000 is already prohibitively expensive for many claimants, particularly individuals.

Requirement to provide a schedule of financial resources

Proposals obliging claimants to submit a schedule of financial resources identifying third party financial support for JR are unjustified and unworkable. It is also of concern that such information, which may contain the names and addresses of children and vulnerable people, could be made publicly available.

Multiple costs awards for more than one claimant

The £5,000 and £10,000 caps on adverse costs liability currently apply no matter how many individuals or groups bring a case to court. The Government is proposing that in cases brought by more than one individual or group, separate costs caps will apply to each of them, therefore making the total costs liability much higher.

Challenging Aarhus Convention claims

It is currently onerous for defendants to challenge the status of a claim as an environmental (Aarhus) claim because an unsuccessful challenge attracts an award of costs on an indemnity basis. The proposals seek to introduce the imposition of costs on a standard basis following an unsuccessful challenge to the status of a claim. This will encourage defendants to challenge claims, thus prompting costly and time-consuming satellite litigation.

Interim relief (injunctions)

The Government's proposals include requiring applications for an injunction to be made by a member of the public, the introduction of a subjective element to decisions on cross-undertakings in damages and a requirement for the court to have regard to the combined financial resources of multiple claimants when making decisions about cross-undertakings in damages. There is no basis for the process of obtaining relief to be made more difficult than it currently is. Information obtained from the MOJ in November 2015 confirms there were only 12 applications for interim injunctive relief in Aarhus claims between April 2013 and May 2015. Moreover, although Practice Direction 25A does not currently require the court to require the claimant to give a cross-undertaking in damages in Aarhus Convention claims, the data shows that claimants are still being required to provide such an undertaking in between 50-83% of cases in which relief is sought. Finally, the proportion of cases in which a cross-undertaking in damages was provided by the claimant also appears to be low, suggesting that claimants were not generally able or willing to provide such an undertaking. These proposals will make it even harder for claimants to access relief also and therefore take the UK further into non-compliance with EU law and the Aarhus Convention.

Other issues

The UK's Second Progress Report fails to include recent legislative developments that have adversely impacted on the UK's compliance with the Aarhus Convention. These measures have largely been promulgated under the **Criminal Justice and Courts Act 2015**. The Government has subsequently either effected, or consulted on giving effect to, provisions of Part 4 of the Act relating to Judicial Review[6], including:

- **Section 84 Likelihood of substantially different outcome for the applicant** –As of 13th April 2015, section 84(2) of the Act requires the court to refuse permission for a JR to proceed (or a remedy) where it considers that it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained about had not occurred, unless the court considers it appropriate to grant permission or a remedy for reasons of exceptional public interest and certifies that this is the case;

- **Sections 85 and 86 Provision and use of information about financial resources –** the Government consulted on proposals to give effect to s. 85 of the Act in July 2015. The consultation closed on 15th September 2015 (two days before the consultation on environmental JRs commenced) and the Government refused to meet any stakeholders to discuss the proposals. The proposals would require JR applicants to provide the court with information about the financing of the application so that the court can consider whether to order costs to be paid by potential funders identified in that information. Link's response to the consultation (attached) explains how the practical application of these proposals will create profound difficulties for the nature of charity funding, by both threatening the general funding available to charities and reducing the ability and willingness of charities to apply for JR. Link also pointed out that the proposed measures will undermine the UK's compliance with the access to justice pillar of the Aarhus Convention; and

- **Section 87 Interveners and costs** – As of 13th April 2015, section 87 of the Act amends the costs position of those who apply for permission to intervene in a JR in the High Court or Court of Appeal. The courts can now make costs orders against or in favour of interveners under their general discretion in relation to costs. Section 87 establishes two presumptions that the court must follow unless there are exceptional circumstances:

  - Interveners should bear their own costs and a party to the JR cannot be required to pay an intervener's costs unless exceptional circumstances make this appropriate;

  - Where a party applies to the court, asking the court to order an intervener to pay that party's costs arising from the intervention, unless there are exceptional circumstances the court must make such an order if one or more of four conditions are met. The conditions are that: (a) the intervener has acted, in substance as the sole or principal applicant, defendant, appellant or respondent; (b) the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court; (c) a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings; and (d) the intervener has behaved unreasonably.

Scotland[7]

[6] See http://www.legislation.gov.uk/ukpga/2015/2/part/4/enacted

[7] Information on Scotland provided by Mary Church (Friends of the Earth Scotland) and Friends of the Earth Scotland's legal adviser

The Protective Expenses Order (PEO) regime in Scotland caps adverse costs liability for certain parties to £5,000. Currently, the rules only apply to individuals and NGOs promoting environmental protection - community groups and similar bodies are not eligible - and are limited to judicial and statutory review cases falling within the scope of the EC Public Participation Directive (PPD). However, as the UK Report notes, the Scottish Government proposes to extend the scope of the Rules to cover cases falling under Article 9(1) and 9(3) of the Convention. The Scottish Government also proposes to modify the categories of persons eligible for a PEO[8]. The relevant statutory instrument has only just been published. We note it comes into force on 11th January 2016. We make comment on the scope of the new rules insofar as we are able within the timescales below. We have yet to see any details of these proposals. However, any move to extend persons eligible must, in our view, include community groups to be Aarhus compliant.

Generally however, and whilst it is too early to formally evaluate the success of the new PEO regime in Scotland, our view is that legal action remains, as a whole, prohibitively expensive for most individuals, communities and NGOs. Litigants still have to raise their own legal costs which for a complex JR, accounting for lawyers and court fees, can add up to tens of thousands of pounds. This view is reinforced by experience in Northern Ireland (see below). Data collection on PEOs is poor[9]. The Scottish Government is aware of 9 cases involving – but not awarding – PEOs. A former Report from Defra to the Committee cited five petitioners who had applied for a PEO, three of whom were refused[10].

In particular, barriers to legal aid in Scotland mean that very few awards are granted in environmental cases[11], and the system effectively prohibits aid for public interest cases (which most Aarhus challenges are). When deciding whether to grant legal aid under Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002[12], the Scottish Legal Aid Board (SLAB) looks at whether 'other persons' might have a joint interest with the applicant. If so, SLAB is prohibited from granting legal aid if it would be reasonable for those other persons to help fund the case. Moreover, the test states that the applicant must be

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8 http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-meeting-papers/scjc-28-september-2015/draft-minutes-28-september-2015.pdf?sfvrsn=2

9 http://www.scottish.parliament.uk/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S4W-27845&ResultsPerPage=10

10 PEO applications made by Newton Mearns Residents Flood Prevention Group, Friends of Loch Etive and the John Muir Trust were all refused. Note also that while Sustainable Scotland was granted a PEO, this was before the new rules came into effect – they may no longer be eligible

11 In correspondence with the Scottish Parliament's Public Petitions Committee (regarding FoE's petition on Aarhus compliance), SLAB indicated that in a three-year period (2008-2011) only two environmental cases where Regulation 15 was considered had been granted legal aid (http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/40063.aspx). In the same period, three cases had been refused Legal Aid citing Regulation 15, and all were environmental cases. Correspondence with SLAB in April 2012 confirmed that two of the three cases refused were later granted on appeal, and by that point a further award of Legal Aid had been granted in a case where Regulation 15 was relevant, amounting to a total of 5 cases granted over a 4 year period. We consider that it is likely most of these cases had a strong private interest. To the best of our knowledge, only one of these grants was in a public interest matter, and this was when the case was on appeal, at which point SLAB somewhat arbitrarily decided that Regulation 15 did not apply to the appeal proceedings. It is not clear on what basis this decision was made, but it may be cited as an example of legal aid being available for public interest cases

12 See http://www.legislation.gov.uk/ssi/2002/494/regulation/15/made

"seriously prejudiced in his or her own right" without legal aid in order to qualify[13]. Furthermore, unlike in England and Wales, community groups are not able to apply for legal aid under the Scottish regime.

These criteria strongly imply that a private interest is not only necessary to qualify for legal aid, but that a wider public interest will effectively disqualify the applicant. A recent Freedom of Information request confirmed that in the last 5 years the Scottish Government had not had any discussions with SLAB on the impact of Regulation 15 in environmental cases. We consider the removal of Regulation 15 essential for compliance with Article 9(4) of the Aarhus Convention and the PPD.

These long-term difficulties were exacerbated in 2013 by the introduction of a cap on the expenses of a JR to be covered by legal aid (including Counsel's fees, solicitors' fees and outlays) of £7,000. This is an entirely unrealistic figure to run a complex environmental JR. While applications can be made to increase the figure, the cap is likely to reduce the number of solicitors willing to act in this area as they run the risk of incurring liability for counsel's fees and outlays which are not covered by the cap. Due to the low levels of payment for legal aid compared with market rates, and the complexities of judicial review cases, individuals can struggle to find a lawyer willing to represent them on this basis.

Data collection on awards of Legal Aid in Environmental cases is poor. A letter from the Scottish Legal Aid Board to the Scottish Parliament's Equal Opportunities Committee in June 2015 contains a breakdown of numbers of Legal Aid applications and awards in environmental cases[14]. However this data is problematic in terms of getting a full picture of awards in Aarhus cases. For example how 'an environmental aspect' is defined has a significant bearing on these statistics.

On total costs for taking an Aarhus judicial or statutory review, the Scottish Government is effectively unable to provide figures for Petitioners costs where Legal Aid is not awarded[15]. It is hard to see how the current measures to ensure access to justice in these cases can be justified without a clear understanding of the costs petitioners are actually faced with.

As indicated above, the new rules were only published at the beginning of December 2015[16], and only came to our attention in the last few days. There would appear to have been no consultation on the proposed changes.

Firstly, there are a number of points in the new rules which we welcome. The ability to apply for a PEO has been extended to appeals to the Court of Session arising from decisions of the Scottish Information Commissioner on Environmental Information requests, and relevant proceedings which include a challenge to an act or omission on the grounds that it contravenes the law relating to the environment. The scope of the ability to apply for Protective Expenses Orders is now more closely aligned with the Convention itself.

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13 For a more detailed dissection see Frances McCartney, 'Public interest and legal aid' Scots Law Times, Issue 32: 15-10-2010

14 http://www.scottish.parliament.uk/S4_EqualOpportunitiesCommittee/General%20Documents/Letter_to_Margaret_McCulloch_MSP_-_4_6_15_%28pdf%29.pdf

15 http://www.scottish.parliament.uk/S4_EqualOpportunitiesCommittee/General%20Documents/Letter_from_Mr_Wheelhouse_Petition_1372_%282%29.pdf

16 The rules can be found here: http://www.legislation.gov.uk/ssi/2015/408/made?view=plain

We also warmly welcome the expansion of categories of persons eligible to apply for Protective Expense orders to include Members of the Public, and Members of the Public Concerned, mirroring the language used in the Convention itself. One of the most worrying flaws of the previous rules was that they appeared to explicitly exclude community groups from applying for a PEO, and indeed to date no community group has successfully applied for a PEO under the rules. The definitions of Members of the Public and Members of the Public Concerned in the Aarhus Implementation Guide are broad and certainty include community groups, however we will continue to monitor decisions of the Court of Session to ensure they reflect this scope.

However, we note that because the rules apply only to cases taken in the Court of Session, applications for PEOs cannot be made in cases regarding noise nuisance or other environmental nuisances in the Sheriff Court. The rules provide that applications for PEOs must be made quickly after the case is raised; this is often impracticable given the level of detail expected in a PEO application, particularly in relation to financial information, and the short time period for raising challenges (sometimes as short as 6 weeks after the decision was made). One of the criteria for determining whether a PEO is made is consideration by the court as to whether an application has 'no real prospect of success'. This means that within the application for a PEO, in addition to detailed financial information, an applicant has to be ready to argue the substantive issues. All of that has to be done quickly after the case is raised. These pressures of time, particularly if individuals are attempting to raise funds, are likely to mean that few solicitors are willing to take on such cases given the risks if the solicitors are unable to carry out intensive work at relatively short notice.

Northern Ireland

Background and preliminary points:

- The 2013 Regulations only address High Court and Court of Appeal cases. Access to environmental justice in many cases could be rendered more affordable by permitting applicants to challenge decisions in less expensive tribunals. The obvious example is that of objections to grants of planning permission (the most common environmental law challenge). Those may not be brought by way of appeal to the Planning Appeals Commission. Objectors only remedy is to apply to the High Court for JR. In contrast, the developer can appeal a refusal of planning permission, or the imposition of conditions, to the Planning Appeals Commission – a less expensive forum and one where parties can participate in less formal ways – e.g. by written submissions, if they choose.

- Legal aid is rarely available to assist with funding environmental cases in the High Court, as the Legal Services Agency will apply the "group interest" rule and refuse assistance.

- In the High Court the normal rule is that the successful party has its costs paid by the losing party. The issue facing applicants is that if they lose they will have to pay two sets of legal costs. If a case will involve costs of £30,000 for each side then, without costs protection, the loser can expect to pay £60,000. With costs protection under the 2013 Regulations, a losing applicant will have to pay £30,000 plus £5,000 or £10,000 depending on its status - that is a total of £35,000 or £40,000 plus VAT (20%). As the risk of losing and bearing costs liabilities is the biggest disincentive to bring proceedings it can be seen that the 2013 Regulations ameliorate, but do not address, the entire problem.

- In Northern Ireland, under the costs indemnity rule, the unsuccessful party cannot be ordered to pay more than the successful party would have had to pay to its own lawyers had it lost. Thus, the

unsuccessful party benefits from any costs concessions the lawyers for the successful party have agreed to, as a means of assisting their client to bring the case. "No win, no fee" and conditional or contingency fee arrangements are unlawful in Northern Ireland.

The 2013 Regulations

The 2013 Costs Protection Rules have had an immediate and beneficial impact in Northern Ireland since their introduction. There have been a number of Orders awarded with the consent of the public authority under challenge. In these cases, a PCO has been made at an early stage in proceedings. This has assisted in setting these cases up, achieving a reasonable degree of financial certainty at an early stage and allowing the applicants to focus on the environmental challenge itself.

The cap on liability for the respondent public authority's costs is £5,000 plus VAT for individual applicants or £10,000 plus VAT, if the applicant is a company or association.

The financial means of the applicant are not subject to declaration or scrutiny.

However, the main concern with the 2013 Regulations is that they also impose an automatic cross cap of £35,000 plus VAT - meaning that the successful applicant cannot recover more than this from an unsuccessful respondent public authority. This will not matter for "routine" public law environmental challenges where the applicant's costs do not exceed £35,000 plus VAT and may be acceptable where the applicant's costs do not significantly exceed the £35,000 limit. However, cases can be expected to (and do) exceed this limit and the more major the case, the greater the difficulty will be. As mentioned in detail in our response to the UK's first progress report on Decision V/9n, we are aware of one case in which the successful applicants had to pay £18,000 plus VAT of their own costs – i.e. the excess over £35,000.00 plus VAT. In another major case, the excess would have been nearer £100,000 and simply could not have been brought (this was as pre 2013 case where there was no cross cap).

The cross cap has an arbitrary and unfair impact in larger cases and fails the test of objectivity set in the *Edwards* case. It is submitted that the public authority should be required to apply for, and justify, a cross cap and the level of same, if it believes one should be imposed. The CJEU, in case C-530/11, declined to rule on this issue but only through a lack of evidence on the impact of the cross cap. In Northern Ireland it is certain that the applicant will have to fund the shortfall (see para 60 of the Judgment), as conditional fee arrangements are unlawful.

In Case C-503/11, Advocate General Kokott mentions caps on the respondent public authority's costs in terms of equality of arms[17]. However, most respondent public authorities are incomparably better funded than applicants and, in particular, community groups. Legal challenges may involve Government sponsored or funded projects where one arm of government is regulating or adjudicating on the proposals of another – and where the ability to challenge the process judicially is therefore all the more important. In State infrastructure cases the environmental states can be very high and these are cases where the costs are more likely to exceed £35,000 on each side.

In truth, even with the costs protection regimes (2013 and before) in place, costs can be considered prohibitively expensive in the sense that those brought by individuals or communities are still likely to have to be heavily subsided by the lawyers representing the applicants - or not brought at all. That said, without costs protection it would simply have been impossible to bring several of the major environmental cases on behalf of sections of the public.

Review of 2013 Regulations

[17] See paragraph 72 of the Opinion

A consultation on a review of the 2013 Regulations was launched by the Department of Justice (DoJ) in Northern Ireland on 25th November 2015[18]. It will run for eight weeks until 20th January 2016[19]. The proposals are of concern because:

- The DoJ proposes to require applicants to file sworn evidence of their financial means and any support received from any third party. This will undoubtedly have a major chilling effect on applicants (the NI contributor has first-hand experience of just how reticent clients are to do this). Where a group of residents, who by definition live in a community, are applicants, they will not wish their neighbours to have that degree of insight into their personal financial affairs, let alone the public authority and, as these are open Court proceedings, also the public. In no other civil proceedings before the Courts do litigants have to declare their financial resources to the Court and to the other side - save in those unusual cases where there are real and objective concerns that the other party will be unable to pay costs if they lose. Accordingly, applicants in environmental cases will now be treated markedly less favourably under a regime that is supposed to enable access to justice. There is also no doubt that public authorities were alive to the concerns individual applicants have about such disclosure when financial disclosure could be required before the 2013 Regulations came in.

  Third party donations to "fighting funds" are not uncommon. The proposed change will dissuade publicly spirited donors and charities (who support such cases) from providing support. Disclosure here could only be justified if the third party donor is the principal funder. These measures will undoubtedly have the effect of deterring access to environmental justice.

- The costs caps will apply by default but it is proposed that these can be varied on application or by the Court at any time, so long as that does not make the costs prohibitively expensive for a party. It is provided that variation to the advantage of the applicant (e.g. increasing the public authority's liability for the applicant's costs) shall only be made of the costs liability would otherwise be prohibitively expressive and the case is exceptional on that basis. Taken with mandatory disclosure of financial means it is foreseeable that this will end up being used to put pressure on applicants. It cannot be right that such variations can be "at any time." This proposal severely undermines the need for predictability for applicants at the outset of the case.

- It is proposed that the cap will be cumulative for each party. Note that this will rarely apply to the public authority respondents as there is usually only one such respondent. There will often be multiple objectors or applicants. It is irrational to say that the cap for four neighbours acting together is to be £20,000 plus VAT, where it would have been £10,000 had they formed an association. The outcomes here will be arbitrary and unfair and may lead to artificial practices in the framing of challenges.

- One proposal is to define those able to benefit from costs protection as "members of the public," rather than leaving it to the general law as whether the applicant has a sufficient interest in the outcome. If by this the DoJ accepts that "members of the public" includes "one or more natural legal persons, their associations, organisations or groups" (the Aarhus Convention definition of "public")

[18] The consultation is available here: https://www.dojni.gov.uk/consultations/consultation-proposals-revise-costs-capping-scheme-certain-environmental-challenges

[19] We are disappointed to note that the consultation is not scheduled to run for twelve weeks – as was the case with the English/Welsh consultation. Following the launch of the NI consultation, RSPB Northern Ireland requested data (including the number of cases benefitting from costs protection) under the 2013 Regulations under the Environmental Information Regulations 2004. The DoJ has requested an extension to the period for supplying same information until 2nd February 2016. RSPB NI has requested an extension to the deadline for consultation responses to enable it to receive and analyse the data and thus provide an informed response to the consultation paper. At this time, we do not know whether this request has been granted

then the new Regulations should say so explicitly so as to avoid confusion and achieve certainty, as a matter of Northern Ireland domestic law. It needs to be clear that this includes environmental NGOs, charities and not for profit entities as well as individuals.

Injunctions

- The consultation paper introduces a subjective test along with a multifactorial objective test where "the importance of what is at stake for the environment" appears as the fifth consideration. Taken together these will tend to make the outcome of an application sufficiently uncertain so that, as is often the case now, no-one will be able to afford the costs risks involved. Where there are commercial interests at stake (and for State infrastructure schemes that will be increased construction costs if there is delay) it is hard to conceive of circumstances where members of the public could ever afford to compensate the developer for its loss. It would at least be more acceptable if the starting position was a presumption against a cross undertaking as to damages where the principle purpose of the injunction is the protection of the environment pending resolution of the issue by the Courts.

Time Limits

England and Wales

The UK's Second Report confirms that the requirement for proceedings to be issued "promptly" no longer applies to JRs relating to decisions under planning legislation. In July 2013, rule 54.4 was amended to reduce the time limits for planning JRs to six weeks, thus aligning them with those for statutory planning appeals. The time limit for bringing a JR of a procurement decision was shortened to thirty days at the same time.

As pointed in our response to the UK's First Report, our experience is that the six week time limit in England and Wales is preventing individuals and groups from challenging planning decisions. The effect of this time limit is that compliance with the Pre-Action Protocol (PAP) within the timeframe is often impossible (as shown by the fact that there is no longer an obligation to comply with it). As such, claimants will often be required to file a claim without knowing the basis on which the claim will be defended, and therefore the strength of their claim. The reality is that if a community group is not already formed, comprehensively organised, sufficiently funded, fully engaged in the process leading up to the relevant decision and already in touch with lawyers - then it is unlikely to be able to mount a legal challenge.

The thirty day time limit is exceptionally challenging. In one case concerning the legality of the 20km Norwich Northern Distributor Road (NNDR), the claimant was unable to comply with the PAP procedure because of the thirty day time limit for lodging proceedings. The defendant immediately conceded that it had acted unlawfully and the decision to approve the road scheme was quashed by the High Court. However, the defendant then challenged the quantum of costs submitted by the claimant on the basis that it had not complied with the PAP. In our view, it would be far preferable to extend the deadline so that the PAP procedure could be fully complied with and preventing claimants from having to issue proceedings, which may otherwise not have been progressed, pre-emptively.

For the now rare cases in which public funding may be available, the problem above is compounded as claimants are in the difficult position of having to lodge proceedings pre-emptively in order to meet the statutory limit without knowing whether their application for public funding will be agreed.

We had hoped to be in a position to gather more information for the Compliance Committee on this issue during 2015. However, our resources have been directed towards the sheer volume of legislative and policy proposals on JR emanating from the MOJ in recent months.

Northern Ireland

We refer to comments made above regarding the difficulties experienced by claimants in relation to the six-week deadline for lodging JR in decisions made under the planning acts.

Conclusion

After a decade of domestic and international scrutiny, the Governments of the UK introduced bespoke provisions for environmental cases to comply with EU and international law in 2013. These new rules offer many claimants access to environmental justice for the first time in years.

Since then, the Ministry of Justice has embarked on an unprecedented series of reforms to the process of Judicial Review in England and Wales, culminating in specific proposals for the costs rules underpinning environmental cases in England/Wales and Northern Ireland in Autumn 2015. The cumulative effect of these proposals will make it extremely difficult for claimants to bring environmental cases and return the UK to a situation in which costly and time consuming satellite litigation around the issue of costs deters potential claimants from embarking on JR. These proposals therefore take the UK in the opposite direction of travel to compliance with the EC Public Participation Directive and Articles 9(4) and (5) of the Aarhus Convention. Environmental NGOs have submitted lengthy and considered responses to the proposals in England/Wales and we now await the Government's formal response.

Finally, we wish to thank the Committee for providing us with an opportunity to respond to the UK's second Progress Report and hope these observations will help to inform the Committee's discussion on this issue.

Yours sincerely,

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