

COALITION FOR ACCESS TO JUSTICE FOR THE ENVIRONMENT

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22nd January 2015

Dear Ms Toop,

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

As members of CAJE, we are grateful for the opportunity to provide comments on the UK's first progress report. We hope that this response, along with CAJE's letter dated 11th December 2014, will help to inform the Compliance Committee's discussion on Decision V/9n at its next meeting on 23-27 March 2015. As the UK Report sets out the relevant sections of Decision V/9i we do not repeat them here.

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

England and Wales

The Report confirms that the UK has undertaken a cross-government exercise to review the costs regime for cases under the Aarhus Convention following the CJEU's judgment in *Commission v United Kingdom* (Case C-530/11) and other case law¹. We understand that consideration was given to whether the regime should make provision for cases brought by way of statutory review and the scope to amend the current costs caps of £5,000 for individuals and £10,000 for organisations.

We highlighted our support for the new costs rules in England and Wales to include statutory review cases within the scope of the Aarhus Convention in our letter to Lord Dyson (copied to the Secretariat) dated 11th December 2014. As such cases already benefit from costs protection in Scotland and Northern Ireland, amending the Civil Procedure Rules (CPR) for such cases would ensure a unified UK position.

We understand the Civil Procedure Rules Committee (CPRC) was due to discuss amendments to the CPR in light of the findings of the Government's review in January 2015. As outlined in our letter to Lord Dyson, our view is that the Courts should have the power to reduce (but

¹ *Edwards v Environment Agency* (Case C-260/11) and *R (Edwards) v Environment Agency* (No. 2) [2013] UKSC 78)



not increase) the adverse caps of £5,000 and £10,000 on cause shown (as is currently the case in Scotland). We do not know whether the CPRC has been asked to effect amendments to increase or decrease the caps on adverse cost liability at this point. We have been unable to obtain the terms of reference for the cross-government review² or, indeed, any information (statistical or otherwise) relating to the effectiveness of the Aarhus costs regime following its introduction in 2013³. As such, we cannot provide the Committee with a formal view as to the effectiveness of the new costs rules.

Scotland⁴

The UK Reports that the Scottish Government is in the process of modernising and enhancing the efficiency of the civil justice system through a number of reforms, including the Courts Reform (Scotland) Act 2014 and the Government's response to the Taylor Review in June 2014⁵. The Report maintains that PEOs are available at common law in both judicial review cases and statutory appeals, as well as being codified in Chapter 58A of the Rules of the Court of Session and notes that the recommendations of the Taylor Review will “*go a long way to changing the unpredictability of costs in civil litigation*”. The Report acknowledges that these changes will not affect the ‘loser pays’ principle, unless the petitioner has a Protective Expense Order (PEO).

The PEO regime in Scotland caps adverse costs liability for certain parties to £5,000. The Report maintains: “*case law demonstrates that groups are taking advantage of the availability of PEOs both at common law and under statute*” and provides a number of cases by way of illustration⁶. However, as the Report acknowledges, the rules only apply to individuals and NGOs promoting environmental protection - community groups and similar bodies are not eligible⁷. Whilst all five petitioners cited in the Report applied for a PEO, three of them were refused⁸. It should be noted that the rules for PEOs - the Chapter 58 A rules referred to above - did not apply in the case of *The Newton Mearns Residents Flood Prevention Group for Cheviot Drive*⁹ and this application was considered by the Inner House on appeal at common law only.

² FoI request submitted 3rd December 2014 and refused on 30th December 2014 under sections 35(1) (a) and (b) and 42 of the FOIA 2000

³ The MoJ has refused to provide information on, *inter alia*, the number of cases benefitting from costs protection in England and Wales under CPR 45.41 on the basis that: (i) the information requested is not environmental information under the EIRs; and (ii) the cost of providing it exceeds the limit (£600) under FOIA 2000. The matter is going before the Information Rights Tribunal on 26th March 2015 (*Day v Information Commissioner* (EA/2014/0287))

⁴ Information on Scotland provided by Mary Church (Friends of the Earth Scotland) and Friends of the Earth Scotland's legal adviser

⁵ See <http://www.scotland.gov.uk/Resource/0045/00451822.pdf>

⁶ *Newton Mearns Residents Flood Prevention Group v East Renfrewshire Council* [2013] CSIH 70; *Carroll v Scottish Borders Council* [2014] CSOH 30; *Sustainable Shetland v Scottish Ministers* [2014] CSIH 60; *Friends of Loch Etive, petitioner* [2014] CSOH 116; *John Muir Trust, petitioner* [2014] CSOH 172A

⁷ SSI 2013 No. 81 **58A.3.** (4)(e) <http://www.legislation.gov.uk/ssi/2013/81/made>

⁸ 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.

⁹ [2013] CSIH 70



The Committee is also asked to note that the availability of PEOs under the new rules is limited to judicial and statutory review cases falling within the scope of the EC Public Participation Directive¹⁰ (PPD). Petitioners in broader “Aarhus cases” must apply for a PEO under common law. Thus, it is not certain that a PEO will be granted, and only a handful of such PEOs have been granted in Scotland at common law. The difficulty is that the *Corner House* principles set an extremely high test to obtain such an order. Furthermore, those that have been granted have had extremely high limits. In *McGinty v Scottish Ministers*¹¹ a limit of £30,000 was set. Whilst this was an environmental case, it was dealt with at common law. In *Walton v Scottish Ministers*¹², again dealt with at common law but with reference to the particular issues arising in environmental cases, the limit was set at £40,000.

Contrary to the UK Report, the remit of the Taylor Review did not extend to examining the obligations of the Scottish Government regarding expenses and funding of environmental litigation under the PPD or the Aarhus Convention¹³. However, the Review strongly implied that EU law consider Aarhus cases to be defined by the PPD.¹⁴ While the Review recommended that PEOs be available in all public interest cases (therefore covering many Aarhus cases outside the scope of the PPD) it held that the decision to grant a PEO (and at what level) were matters for judicial discretion - not specific rules of court.¹⁵

While 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).

In particular, barriers to legal aid in Scotland mean that very few awards are granted in environmental cases¹⁶, and the system effectively prohibits aid for public interest cases

¹⁰ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

¹¹ [2010] CSOH 5

¹² [2011] CSOH 10

¹³ Confirmed in email correspondence with Kay McCorquodale, Secretary to the Taylor Review, 15 March 2013

¹⁴ See <http://www.scotland.gov.uk/About/Review/taylor-review/Report> Taylor Review of Expenses and Funding of Civil Litigation in Scotland, Chapter 5, Paragraph 29

¹⁵ See <http://www.scotland.gov.uk/About/Review/taylor-review/Report> Taylor Review of Expenses and Funding of Civil Litigation in Scotland, Chapter 5, Paragraph 33

¹⁶ In correspondence with the Scottish Parliament’s Public Petitions Committee (regarding FoES 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



(which most Aarhus challenges are). When deciding whether to grant legal aid under Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002¹⁷, 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 “*seriously prejudiced in his or her own right*” without legal aid in order to qualify¹⁸. 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.

Northern Ireland¹⁹

As stated above, our view is that the Courts should have the power to reduce (but not increase) the adverse caps of £5,000 and £10,000 on cause shown. One practitioner reports that a PCO of £10,000 was too high for one of his clients who could not afford to pay his own legal costs and potentially suffer adverse costs of £10,000 (plus VAT). The claimant then tried to continue the case as a litigant in person but was unable to do so and the case could not continue.

The same practitioner also highlighted the detrimental effect of the cross-cap of £35,000²⁰. In straightforward JRs the cross cap may not be problematic - but this is not the case in complex environmental cases involving issues of public importance cases. This issue is illustrated by the following two cases.

on what basis this decision was made, but it may be cited as an example of legal aid being available for public interest cases.

¹⁷ See <http://www.legislation.gov.uk/ssi/2002/494/regulation/15/made>

¹⁸ For a more detailed dissection see Frances McCartney, ‘Public interest and legal aid’ Scots Law Times, Issue 32: 15-10-2010

¹⁹ Information from Northern Ireland provided by Roger Watts, C & J Black Solicitors, 13 Linenhall Street, Belfast, BT2 8AA

²⁰ provided under Regulation 3(3) of The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013



The first case concerned a proposed 50 mile dual carriageway scheme at a cost of £800m²¹. The road affected 250 farmers, over 100 of whom supported the case. A PCO was obtained, but only after a difficult and fully contested hearing, under the pre-regulation law. The Order granted by the High Court was that the objectors would have to pay £20,000 if they lost but there was no cross cap in the event that they won. In the event, the claimants were successful and therefore their full costs were recovered. The case ran for 6 days in the High Court, was highly technical and very challenging. Their costs came out at between £100k + £150k for the costs of a solicitor, senior and junior counsel, a roads consultant, an environmental consultant and an agricultural consultant. Some of the consultants, counsel and the solicitor proceeded on the basis of concessionary fees (the “true” costs would have been nearer £250,000). The claimants’ position would have deteriorated under the 2013 Regulations because, whilst their liability to adverse costs would have been reduced to £10,000, had they lost (they were an unincorporated association) they would have recovered only £35,000 leaving them with a shortfall of close to £100k (or over £200k against the “true costs.”). There is little doubt this case would not have been brought had the claimants faced this kind of shortfall, win or lose.

The second case was conducted after the Regulations came into force. It concerned the construction of a sports stadium at a value of approximately £81m. The grouping opposing the development consisted of roughly 200 nearby households. The case was again taken on the basis of concessionary fees by both the solicitor and senior counsel (managing without junior counsel reduced costs). Unpredictably, the case ran for 13 days making it, probably, the longest judicial review in Northern Ireland legal history. The residents were successful. They will recover £35,000 plus VAT leaving them approximately £18,000 out of pocket. Had the stadium case been charged at commercial rates the “true” costs would have exceeded £100,000 and the shortfall would have been, beyond argument, prohibitively expensive.

While these cases might be seen as atypical (as they were at the top end in terms of scale and complexity), it is difficult to see how, under current administrative review procedures, the costs for many environmental JRs can be kept below £35,000 by the time solicitor, counsel and all necessary consultants are paid. Environmental challenges are often complex, multifaceted and accompanied by voluminous documentation.

Additionally, it is reported that:

- Legal aid is invariably denied in Northern Ireland when a group of objectors have a similar interest in objecting to a scheme in development. Accordingly, financial assistance from public funds is rarely available for potential applicants in environmental legal challenges;
- The indemnity costs rule applies with full force in Northern Ireland. If successful, objectors can only recover the costs they agreed to pay their own legal team. If these were reduced or are concessionary then that is all that can be recovered from the unsuccessful public authority²²; and

²¹ This case occurred before the 2013 Regulations came into force

²² The 2013 Regulations do provide that where lawyers are providing representation free of charge in whole or part then the Court shall order that such part of the recoverable costs shall be paid to the Northern Ireland Lawyers *Pro Bono* Unit as it thinks just. The reference to ‘recoverable costs’ may be a reference to the £35,000 in regulation 3(2). This provision may assist the *Pro Bono* Unit but will not assist in cases where legal representation is not provided *pro-bono*



- Contingent and no-win no fee arrangements are unlawful in Northern Ireland.

Echoing the Scottish experience, the 2013 Regulations in Northern Ireland only address part of the problem. Applicants still need to proceed on the basis that if they lose their case they will have to pay their own lawyers and other advisers. It is the cumulative effect of this issue, taken with concerns about also paying the other side's costs if they lose (which the 2013 Regulations do attempt to address), which continues, in many cases, to make environmental legal challenges prohibitively expensive in Northern Ireland.

Finally, also of importance in Northern Ireland (and more generally) is that individuals, objectors and environmental NGOs often find that the only legal route open to them to challenge public and private development projects is by way of JR or statutory appeal/review – all of which involve an application to the High Court. No administrative or JR procedures exist which would provide applicants with a simpler, less formal and less expensive forum for the resolution of their complaints. Notably such a forum does exist in the context of planning applications (the Planning Appeals Commission). Developers who are dissatisfied with the outcome of their applications for planning permission can appeal to the PAC. There is no reciprocal right of access to the PAC for objectors to planning applications.

Conclusion on costs

Our experience across the UK demonstrates that legal costs remain very high and, in many cases, prohibitively expensive for individuals and community groups. This is largely because losing parties have to pay the court fee (which has doubled in the last year), their own legal costs (which routinely amount to £25,000 and often rather more) plus a cap of either £5,000 or £10,000 – and winning parties are often unable to recover their full costs in more complex environmental cases because of the cross-cap of £35,000. As such, claimants in England and Wales and Scotland are routinely facing costs of £31-36k on losing a case (often more in Scotland) and may suffer significant financial losses when winning complex cases.

We believe the figures of £5,000 and £10,000 are too high and that the cross cap of £35,000 is unfair and contrary to the letter and spirit of the Aarhus Convention. There is no basis for such a measure in the Aarhus Convention – prohibitive expense applies to the claimant (not the defendant public body) and, as such, it should be removed. There is also UK-wide confusion about which figure applies to community groups – which can often be very small and poorly funded – but which (because they comprise more than one individual) attract the £10,000 in England and Wales and Northern Ireland and are not eligible for automatic costs protection at all under the regime in Scotland.

We recommend that in order to ascertain what difference (if any) the new costs rules are making to access to environmental justice, the UK is requested to collate and publish information concerning the new costs regimes in the context of its compliance with Article 9(4) of the Aarhus Convention and Decision V/9n.

Time Limits

England and Wales

The Report notes that following *Uniplex*²³, the reference to “promptly” no longer applies in relation to judicial reviews relating to decisions under planning legislation in England and Wales. Changes to Civil Procedure Rule 54.4 introduced in July 2013 harmonised the time

²³ (UK) Ltd v NHS Business Service Authority [2010] 2 CMLR and Case C-206/08



limits for planning judicial reviews with those for statutory planning appeals (six weeks) and do not include a “promptly” requirement.

As yet, we have no empirical evidence that claimants are unable to bring cases because of the new six week deadline in planning cases. However, our experience thus far is that the shortened deadline is problematic, particularly in cases in which legal aid is sought. Such 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. Even in cases in which legal aid is not sought, it is a considerable challenge for individuals and groups to form an organisational structure, find a solicitor (who must then instruct counsel), fundraise for a JR should they be advised they have a case and lodge proceedings within six weeks of the contested decision.

Scotland

While the implementation of aspects of the Scottish Civil Courts Review through the Courts Reform (Scotland) Act²⁴ are to be welcomed, it is of great concern to see the introduction of a three-month time limit for judicial review cases identified as an “*improvement for access to justice in environmental matters*”.

We acknowledge that there is a three month time limit for (non-planning) JR cases in England and Wales. However, the introduction of such a limit in Scotland (where no time limit previously existed) will cause particular problems. Firstly, it is already difficult for potential petitioners to find a solicitor willing to act on a *pro bono*, reduced fee or legally aided basis and the introduction of a reduced time limit, combined with challenges around legal aid (described above), will exacerbate this difficulty²⁵. Secondly, there is a different legal history and culture in Scotland, which means that local communities less readily identify legal action as a solution.

While we are broadly supportive of the introduction of a leave to proceed stage for judicial review, we note that there is a risk that, combined with a three month time limit, it could actually hinder access to justice as petitioners struggle to access funds and lawyers to marshal the necessary legal arguments to satisfy the Court in order to gain leave to proceed.

Northern Ireland

The time limit for judicial reviews is “promptly and in any event within three months.” The Court has a discretion to extend time. Increasingly the Courts are ruling domestic law environmental law challenges out of time where they are brought within, but towards the end of, the (outer) time limit of three months on the basis that they have not been brought

²⁴ Section 89 of the Courts Reform (Scotland) Act 2014 inserts new sections 27A to 27D into the Court of Session Act 1988. Section 27A provides a three month time limit for bringing an application for judicial review. There is no additional requirement that a judicial review be lodged “promptly” and the court may override this time limit if the court considers it equitable to do so. Section 27B introduces a requirement for permission to proceed. This is intended to filter out unarguable cases. The applicant must have; (1) “sufficient interest” in the subject matter; and (2) a real prospect of success. The permission stage may be decided on paper, which may be cheaper than an oral hearing. Oral hearings are allowed if permission is refused. There is also provision for an appeal from an Oral Hearing.

²⁵ See, for example, *Bova and Christie v The Highland Council and others* [2013] CSIH 41 <http://www.scotcourts.gov.uk/opinions/2013CSIH41.html>



“promptly.” The Courts, following *Uniplex* (cited above), regard EU Law environmental challenges differently – subject simply to a three month time limit.

However, be it three months or some lesser period, the problem encountered is that JR is a ‘front loaded’ process where the applicant has to file on day one all relevant documentation and full sworn factual statements with the statement of the grounds of challenge and relief sought. This is because applicants have to show at the outset that they have an arguable case in order to get the leave of the High Court to proceed. Marshalling all the relevant evidence at the outset of the case in documentary format is daunting in cases involving complex and voluminous paperwork (e.g. transcripts of Public Inquiries, Inspectors’ Reports and Environmental Statements) and where input from different consultants is required. This becomes particularly difficult where community groups have to negotiate fee arrangements with their lawyers and make decisions on affordability at the same time. The Courts have shown some recognition that community groups are not as well organised as commercial organisations, when applying this time limit.

Statutory references and appeals typically have a six week time limit for proceedings to be instituted. This can be a severe hurdle to surmount, mitigated only by the fact that full papers do not usually have to be filed on day one (as leave of the High Court to proceed is not required under these procedures). However, a full statement of the grounds relied on must be filed on day one and this can be extremely burdensome as shown, for example, in the Northern Ireland roads case cited above, when the Minister’s decision being challenged and the Public Inquiry Report on which that decision was based were both made public on the same day. Where statutory processes have taken many months or years and legal challenge is only provided for at the end of the process there seems little justification for such a tight time limit.

Conclusion on time limits

We are firmly of the view that the six week time limit in England and Wales is far too short to allow individuals and groups to challenge planning decisions. 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. We also recognise the difficulties associated with the introduction of a three month time limit in Scotland when previously no time limit existed.

Given that the UK does not have a unified position on time limits, we would ask the Government to give further consideration to this issue. It may be that a UK-wide time limit is appropriate, but at this stage it is unclear what that might be. Equally, there may be an argument for the UK to put in place some procedures for fairly extending time for NGOs and groups where they have to organise themselves in advance of bringing a collective action. We therefore invite the Compliance Committee to ask the UK to undertake research to evaluate the impact of these amendments on the ground, with a view to establishing a UK-wide position in the future.

Matters not covered by the Report

Finally, we would point out that the Report fails to mention the implications of current proposals for the UK’s compliance with Article 9(4) Aarhus Convention. This includes proposals contained in Part 4 of the Criminal Justice and Courts Bill (CJCB) to:



- 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. We are concerned that this will deter people from being willing to fund JR – and thus prevent applicants from being able to bring cases. We believe that it conflicts with EU law, in that individuals and/or NGOs (who may not even be party to the proceedings) will be exposed to uncertainty as to whether they face any financial liability as a result of the claimant losing the case (and, if so, to what extent); and
- Enable the High Court and Court of Appeal (subject to exceptional circumstances) to order an intervener to pay any costs that the court considers have been incurred by a party to the proceedings as a result of the intervener’s involvement. We believe the assumption that those seeking to intervene in a case may have to pay additional costs conflicts with the aims of the access to justice pillar of the Aarhus Convention, which aims to provide procedures and remedies to members of the public so they can have the rights enshrined in the Convention enforced by law.

While these proposals are not yet law they are being robustly promulgated by the Government in England and Wales and, if passed, they will have implications for the UK’s compliance with Article 9(4) of the Convention.

Conclusion

Contrary to the UK Report, access to environmental justice in Scotland and Northern Ireland remains barely affordable or unaffordable to non-commercial clients, certainly in cases with any real degree of complexity (and environmental cases rarely seem to be simple) unless legal teams and consultants are prepared to seriously subsidise them. The challenges in England and Wales are somewhat different. The shortened deadline and inability to reduce the figures for the adverse caps and increase the cross-caps cause persistent problems and current proposals to further undermine the system of JR will exacerbate these difficulties. Unless the UK situation improves, there is a significant likelihood that the issue of prohibitive expense will again be raised with both the Compliance Committee and the European Commission.

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

This submission is supported by the following members of CAJE:

Carol Day (Solicitor and Legal Consultant, RSPB)

Gita Parihar (Solicitor and Head of the Rights and Justice Centre, Friends of the Earth)

Mary Church (Head of Campaigns, Friends of the Earth Scotland)

Debbie Tripley (Solicitor, WWF-UK)

