Communication to the Aarhus Convention Compliance Committee

Secretary to the Aarhus Convention Compliance Committee

UN Economic Commission for Europe

Environment Division

Palais des Nations

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Switzerland

Section I: Correspondent

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Section II: Party Concerned:

United Kingdom

Section III: Length of Communication

Less than 10 pages

Section IV: The Facts

The Decision

In 2008 a property developer sought to obtain planning permission to build an estate of 18 houses in open countryside outside of Ashover, Derbyshire. Permission to carry out this development was refused. The developer then reapplied for planning permission to develop 26 houses in 2014 and again in 2015. These applications were both refused. An appeal was made against the most recent decision and an Inspector was appointed by the Secretary of State for Communities and Local Government to hear the evidence and make a recommendation to the Secretary of State. After hearing all evidence over a four-day period and visiting the site the Inspector recommended that the appeal be dismissed and planning permission be refused. The Secretary of State disagreed with his Inspector's recommendation, allowed the appeal, and granted planning permission.

Challenging the Decision

Objectors to the development sought a legal opinion on challenging the Secretary of State's decision. It was the opinion of counsel that challenging the Secretary of State's decision would be extremely costly and could fail. The costs protection regime for "Aarhus claims" would not be available for challenges to decisions of the Secretary of State even though the only difference rendering it inapplicable was the identity of the decision-maker. As a result of the uncertainty as to costs no member of the public had the appetite to challenge the decision.

We have been made aware that amendments were made to Part 45 Section VII of England and Wales' Civil Procedure Rules ("CPR") ("The 2017 Amendments") on 28th February 2017. These mean that any claimant or a third party supporter of a claim now risks public disclosure of their financial means.

Legal Background

Part 45 of the CPR contains costs protection for "Aarhus claims" by way of fixed costs caps limiting the liability of the unsuccessful claimant to £5,000 or £10,000, and that of the unsuccessful defendant to £35,000. Prior to the 2017 Amendments it was open to the defendant to dispute that the claim was an Aarhus claim, but once identified as an Aarhus claim there was no scope for variation of the amounts of the costs caps. As noted above in relation to the former Aarhus rules, the new Aarhus rules only apply to claims made under a certain procedure (such as judicial review or section 289 of the Town and Country Planning Act 1990 ("the 1990 Act")). The Aarhus regime still does not apply to claims brought against decisions of the Secretary of State under section 288 of the 1990 Act, even though the legal principles that the court would apply would be the same as any judicial review claim and the only effective difference between a judicial review and a section 288 claim is the identity of the decision-maker.

In R (Garner) v Elmbridge Borough Council [2010] EWCA Civ 1006 the Court of Appeal considered the principles governing what are known as "protective costs orders" ("PCO") in environmental cases brought in the public interest. What Lord Justice Sullivan said on the disclosure of financial means is relevant:

> "51. [the Claimant] said that he was unwilling to undergo a means test in a public forum. Applicants for public funding from the Legal Services Commission have to disclose details of their means to the Legal Services Commission, but they do so in a private process; they do not have to disclose details of their means and personal affairs, for example who has an interest in the house in which they are living, how much it is worth et cetera, to the opposing parties or to the court, in documents which are publicly available and which will be discussed, unless the judge orders otherwise, in an open forum. The possibility that the judge might, as an exercise of judicial discretion, order that the public should be excluded while such details were considered would not provide the requisite degree of assurance that an individual's private financial affairs would not be exposed to public gaze if he dared to challenge an environmental decision.
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> 52. The more intrusive the investigation into the means of those who seek PCOs and the more detail that is required of them, the more likely it is that there will be a chilling effect on the willingness of ordinary members of the public (who need the protection that a PCO would afford) to challenge the lawfulness of environmental decisions."

The Aarhus costs regime was thereafter established in the CPR. When the UK government determined to change the Aarhus costs regime it consulted on the proposed changes. The potential "chilling effect" was cited in consultation responses. The government's response was:

> "38. Turning to respondents' concerns over the complexity of the process, privacy issues and the potential chilling effect of disclosing financial information, it is not

and has never been the intention that the level of detail that claimants will be required to provide should be unnecessarily burdensome. Information will only be required which the government anticipates will allow the court and the defendant to determine whether a costs cap variation might be appropriate. As to concerns about privacy, the government notes that hearings can be in private if they involve confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality."

The full text of the new Rule 8(5) in the CPR is as follows:

"Scope and interpretation

45.41.—(1) This section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.

(2) In this Section —

(a) "Aarhus Convention claim" means a claim brought by one or more members of the public —

(i) by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1) or 9(2) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 ("the Aarhus Convention"); or

(ii) by judicial review which challenges the legality of any such decision, act or omission and which is within the scope of Article 9(3) of the Aarhus Convention;

(b) references to a member or members of the public are to be construed in accordance with the Aarhus Convention.

(3) This Section does not apply to appeals other than appeals brought under section 289(1) of the Town and Country Planning Act 1990 or section 65(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, which are for the purposes of this Section to be treated as reviews under statute.

…

Opting out, and other cases where rules 45.43 to 45.45 do not apply to a claimant

45.42.—(1) Subject to paragraph (2), rules 45.43 to 45.45 apply where a claimant who is a member of the public has —

(a) stated in the claim form that the claim is an Aarhus Convention claim; and

(b) filed and served with the claim form a schedule of the claimant's financial resources which takes into account any financial support which any person has provided or is likely to provide to the claimant and which is verified by a statement of truth.

(2) Subject to paragraph (3), rules 45.43 to 45.45 do not apply where the claimant has stated in the claim form that although the claim is an Aarhus Convention claim, the claimant does not wish those rules to apply.

(3) If there is more than one claimant, rules 45.43 to 45.45 do not apply in relation to the costs payable by or to any claimant who has not acted as set out in paragraph (1), or who has acted as set out in paragraph (2), or who is not a member of the public.

Limit on costs recoverable from a party in an Aarhus Convention claim

45.43.—(1) Subject to rules 45.42 and 45.45, a claimant or defendant in an Aarhus Convention claim may not be ordered to pay costs exceeding the amounts in paragraph (2) or (3) or as varied in accordance with rule 45.44.
(2) For a claimant the amount is—
(a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;
(b) £10,000 in all other cases.
(3) For a defendant the amount is £35,000.
(4) In an Aarhus Convention claim with multiple claimants or multiple defendants, the amounts in paragraphs (2) and (3) (subject to any direction of the court under rule 45.44) apply in relation to each such claimant or defendant individually and may not be exceeded, irrespective of the number of receiving parties.

Varying the limit on costs recoverable from a party in an Aarhus Convention claim
45.44.—(1) The court may vary the amounts in rule 45.43 or may remove altogether the limits on the maximum costs liability of any party in an Aarhus Convention claim.
(2) The court may vary such an amount or remove such a limit only if satisfied that—
(a) to do so would not make the costs of the proceedings prohibitively expensive for the claimant; and
(b) in the case of a variation which would reduce a claimant's maximum costs liability or increase that of a defendant, without the variation the costs of the proceedings would be prohibitively expensive for the claimant.
(3) Proceedings are to be considered prohibitively expensive for the purpose of this rule if their likely costs (including any court fees which are payable by the claimant) either—
(a) exceed the financial resources of the claimant; or
(b) are objectively unreasonable having regard to
(i) the situation of the parties;
(ii) whether the claimant has a reasonable prospect of success;
(iii) the importance of what is at stake for the claimant;
(iv) the importance of what is at stake for the environment;
(v) the complexity of the relevant law and procedure; and
(vi) whether the claim is frivolous.
(4) When the court considers the financial resources of the claimant for the purposes of this rule, it must have regard to any financial support which any person has provided or is likely to provide to the claimant.
(Rule 39.2(3)(c) makes provision for a hearing (or any part of it) to be in private if it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality.)

Challenging whether the claim is an Aarhus Convention claim
45.45.—(1) Where a claimant has complied with rule 45.42(1), and subject to rule 45.42(2) and (3), rule 45.43 will apply unless—
(a) the defendant has in the acknowledgment of service—
(i) denied that the claim is an Aarhus Convention claim; and
(ii) set out the defendant's grounds for such denial; and
(b) the court has determined that the claim is not an Aarhus Convention claim.
(2) Where the defendant denies that the claim is an Aarhus Convention claim, the court must determine that issue at the earliest opportunity.
(3) In any proceedings to determine whether the claim is an Aarhus Convention

claim—

(a) if the court holds that the claim is not an Aarhus Convention claim, it will normally make no order for costs in relation to those proceedings;
(b) if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant to pay the claimant's costs of those proceedings to be assessed on the standard basis, and that order may be enforced even if this would increase the costs payable by the defendant beyond the amount stated in rule 45.43(3) or any variation of that amount."

The new Aarhus regime was subject to challenge in R (on the application of Royal Society for the Protection of Birds) v Secretary of State for Justice [2017] EWHC 2309 (Admin). The claimants brought their judicial review on the following three grounds: (1) the provisions of the rules which enable a variation of the costs limits at any point in the litigation are in breach of the requirements of EU law; (2) it was unlawful for the 2017 Amendments to fail to provide for private hearings when a claimant or a third party supporter's financial details may be discussed and examined at such a hearing; and (3) a declaration was warranted that in the light of the CJEU jurisprudence the claimant's own costs of bringing the litigation should necessarily be included within the assessment of the financial resources of the claimant for the purposes of evaluating whether or not costs protection should be afforded and whether or not the proceedings are "prohibitively expensive".

This challenge failed before Mr Justice Dove but not without some commentary from the learned judge on the failings of the new Aarhus regime. The full text of the decision is attached. The key paragraph for the purposes of this complaint is as follows:

"57. To summarise my conclusions on Ground 2, I am satisfied that if a dispute in relation to the appropriate level of costs caps were to proceed to a hearing (as opposed to being dealt with on the papers at a time when the claimant's financial information would remain confidential) then the rules should provide for that hearing to be in private in the first instance. That is not simply for the same reasons that other analogous hearings identified in Practice Direction 39A are to be listed in the first instance in private to preserve confidentiality, but also because I am satisfied that the chilling effect which the prospect of the public disclosure of the financial information of the claimant and/or his or her financial supporters would have on the propensity to bring meritorious environmental claims would be in breach of the requirements to ensure wide access to justice set out in the CJEU jurisprudence set out above (for example in the Opinion of the Advocate General and the judgment of the Court in Edwards and set out above in paragraph 26). The reasons for the first hearing of a dispute in relation to the quantum of the costs cap to be heard in private apply equally whether the financial resources in question are those of an individual claimant or of a third party supporter. Given the breadth of the way in which the 2017 Amendments (in particular CPR 44.42(1)(b) and 44.44(4)) are drafted, it is clear that it is the intention that a defendant should be able to argue that the nature and extent of the sources of third party funding available to a claimant to support the litigation justify a variation in the costs cap. The suggestion by the defendant that the form of financial information required could be in the form provided by Practice Direction CPR 46PD.10 does not obviate this. Thus, in my judgment Practice Direction CPR 39PD paragraph 1.5 requires amendment to include the first hearing in relation disputes over the variation of cost caps in ACR cases. Whilst not strictly before the court, in the light of the arguments which have

been raised in this case it would be clearly beneficial for specific definition to be provided as to the nature and content of the financial information required by CPR 45.42(1)(b)."

Section V: Provision of the Convention alleged to be in non-compliance

Article 9(3). The new civil procedure rules do not ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Section VI: Nature of alleged non-compliance

There are two grounds of non-compliance. Firstly, the UK's non-compliance with Article 9(3) arises from the failure to extend the Aarhus costs regime to section 288 challenges. Members of the public seeking to protect the environment for its own sake will not be able to challenge acts and omissions by private persons and public authorities without the certainty of knowing what adverse costs risks they face should they lose. There is no reason why section 288 challenges should be treated any differently to judicial review challenges as the substance of the decision can be precisely the same in each case. The only difference is the identity of the decision-maker. There can be no argument that the fact that s.288 challenges are made under statute as the new Aarhus costs regime applies to section 289 challenges (45.41(3)).

Secondly, the UK is non-compliant with Article 9(3) due to the "chilling effect" that the disclosure of private financial information will have. Claimants will be dissuaded from bringing a case knowing that their private financial situation could be aired in public. Even if claimants (and third party supporters) choose to accept the potential that their private finances could be made public and bring a claim, they could well be dissuaded by the considerable uncertainty as to how the new rules could be applied. There is no guidance on when a court will consider that publicity of private financial information would be damaging, or even at what level financial information becomes sufficiently confidential for the question of a private hearing even to arise. Further, it is only in exceptional circumstances that legal proceedings are conducted in private due to the overwhelming public interest in legal proceedings being transparent and open to the public and so a claimant must have very good reasons to require a hearing in private. Hearings concerning these new issues will add to the cost of litigating environmental claims, further dissuading potential claimants.

Section VII: Use of domestic remedies

We have turned to Counsel for an opinion regarding the resolution of the issue but for the reasons set out above we have no effective domestic remedy.

Section VIII: Use of other international procedures

No other international procedures have been invoked.

Section IX: Confidentiality

Not requested

Section X: Enclosures

We enclose a copy of the Approved judgement in R (on the application of Royal Society for the Protection of Birds) v Secretary of State for Justice [2017] EWHC 2309 (Admin).

AD Hardwick (a signed copy of this submission has been sent by post as instructed)

20 December 2017