

**2013 No. 81**

EUROPEAN COMMUNITIES

COURTS

**The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013**

*Made*

*25th March 2013*

*Coming into operation*

*15th April 2013*

The Department of Justice, being a Northern Ireland department designated for the purposes of section 2(2) of the European Communities Act 1972<sup>(1)</sup> in relation to the environment<sup>(2)</sup>, makes the following Regulations in exercise of the powers under section 2(2) of the European Communities Act 1972.

**Citation and commencement**

1.—(1) These Regulations may be cited as the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 and shall come into operation on 15th April 2013.

(2) These Regulations only apply to proceedings commenced on or after 15th April 2013.

**Interpretation**

2.—(1) In these Regulations—

“the Aarhus Convention” means the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environment Matters done at Aarhus on 25 June 1998;

“an Aarhus Convention case” means an application

(a)

for judicial review under section 18 of the Judicature (Northern Ireland) Act 1978<sup>(3)</sup> of a decision, act or omission all or part of which is subject to the provisions of the Aarhus Convention; or

(b)

for review under the provisions of any statutory provision to the High Court of a decision, act or omission all or part of which is subject to the provisions of the Aarhus Convention;

“court” means the High Court;

“free of charge” means otherwise than for or in expectation of fee, gain or reward;

“indemnity basis” has the meaning assigned to it by rules of court;

“legal representative” means a person exercising a right of audience or conducting litigation in an Aarhus Convention case.

(2) The Interpretation Act (Northern Ireland) 1954<sup>(4)</sup> shall apply to these Regulations as it applies to an Act of the Northern Ireland Assembly.

### Costs in Aarhus Convention cases

3. (1) These Regulations shall not apply where the applicant—

(a) has not stated in the application that it is an Aarhus Convention case; or

(b) has stated in the application that the applicant does not wish these Regulations to apply.

(2) Subject to paragraph (4), in an Aarhus Convention case, the court shall order that any costs recoverable from an applicant shall not exceed £5,000 where the applicant is an individual and £10,000 where the applicant is a legal person or an individual applying in the name of a legal entity or unincorporated association.

(3) In an Aarhus Convention case, the court shall order that the costs recoverable from a respondent shall not exceed £35,000 subject to regulation 4(3).

(4) Where the applicant is or was represented by a legal representative and this representation is or was provided free of charge, in whole or in part, even if the applicant is or was also represented by a legal representative not acting free of charge, the court shall order the respondent to make a payment to the Northern Ireland Lawyers Pro Bono Unit (registered charity number XR35688) in respect of such part of the recoverable costs as the court considers just.

(5) The amount payable under paragraph (4) shall not exceed the amount which an applicant would have recovered under paragraph (2) had the representation of the applicant not been provided free of charge.

(6) Where the court makes an order under paragraph (4) the applicant shall send a copy of the order to the Northern Ireland Pro Bono Unit within 7 days of receipt of the order.

(7) Upon any appeal of a decision in an Aarhus Convention case, the court hearing the appeal may make an order that the recoverable costs of the appeal will be limited to the extent which the court specifies having regard to—

(a) the means of both parties;

(b) all the circumstances of the case; and

(c) the need to facilitate access to justice.

(8) The court hearing the appeal shall have the same powers as those of the High Court under paragraph (4).

(9) The amounts specified in paragraphs (2) and (3) do not include value added tax.

### Challenging whether the case is an Aarhus Convention case

4.—(1) If the applicant has stated in the application that it is an Aarhus Convention case, regulation 3 applies unless—

(a) the respondent has:

(i) stated that the case is not an Aarhus Convention case; and

(ii) set out the respondent's grounds for arguing that the case is not an Aarhus Convention case; and

(b) the court is satisfied that the case is not an Aarhus Convention case.

(2) Where the respondent argues that the case is not an Aarhus Convention case, the court shall determine that issue at the earliest opportunity.

(3) In any proceedings, including any appeal, in relation to the question whether the case is an Aarhus Convention case—

(a) if the court is satisfied that the case is not an Aarhus Convention case, it shall normally make no order for costs in relation to those proceedings;

(b) if the court is satisfied that the case is an Aarhus Convention case, it shall normally order the respondent to pay the applicant's costs of those proceedings on the indemnity basis, and those costs shall be payable notwithstanding that this would increase the costs payable by the respondent beyond those specified in regulation 3.

(4) An appeal of a decision on whether the case is an Aarhus Convention case shall lie to the Court of Appeal and the notice of appeal shall be served within 21 days from the date the decision was filed.

### **Injunctions**

5. If in an Aarhus Convention case the court is satisfied that an injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court shall, in considering both whether to require an undertaking by the applicant to pay any damages which the respondent or any other person may sustain as a result and the terms of any such undertaking—

(a) have particular regard to the need for the terms of the order overall not to be such as would make continuing with the case prohibitively expensive for the applicant; and

(b) make such directions as are necessary to ensure that the case is heard at the earliest opportunity.

Sealed with the Official Seal of the Department of Justice on 25th March 2013



*David Ford*  
Minister of Justice

**2017 No. 27**

**EUROPEAN COMMUNITIES**

**COURTS**

**The Costs Protection (Aarhus Convention) (Amendment)  
Regulations (Northern Ireland) 2017**

*Made* - - - - - *23rd January 2017*

*Coming into operation* - - - - - *14th February 2017*

The Department of Justice, in exercise of the powers conferred by section 2(2) of the European Communities Act 1972(a) (being a Department designated for the purposes of that section in relation to the environment(b)), makes the following Regulations.

**Citation and commencement**

1. These Regulations may be cited as the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017 and shall come into operation on 14th February 2017.

**Application and transitional provision**

2.—(1) These Regulations apply to proceedings commenced on or after 14th February 2017.

(2) The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013(c) as they applied immediately before these Regulations came into operation continue to apply to proceedings commenced prior to 14th February 2017.

**Amendment of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013**

3.—(1) The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 are amended as follows.

(2) In regulation 2—

(a) in the definition of “an Aarhus Convention case”—

(i) after “application”, insert “by a member of the public (as defined by Article 2 of the Aarhus Convention)”;

(ii) in paragraph (b), for “High Court” substitute “court”; and

(iii) at the end, insert “and “applicant” shall be construed accordingly;” and

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(a) 1972 c.68, section 2 was amended by section 27(1)(a) and (b) of the Legislative and Regulatory Reform Act 2006 (c.51) and by section 3(3) of and Part I of the Schedule to the European Union (Amendment) Act 2008 (c.7).

(b) S.I. 2008/30.

(c) S.R. 2013 No.81.

(b) in the definition of “court”, after “High Court” insert “unless otherwise specified”.

(3) For regulation 3(2) to (9), substitute—

“(2) Subject to paragraphs (3) and (7), in an Aarhus Convention case, the court shall order that any costs recoverable from an applicant shall not exceed £5,000 where the applicant is an individual and £10,000 where the applicant is a legal person or an individual applying in the name of a legal entity or unincorporated association.

(3) The court may decrease the amount specified in paragraph (2) if it is satisfied that not doing so would make the costs of the proceedings prohibitively expensive for the applicant.

(4) Subject to paragraph (5) and regulation 4(3), in an Aarhus Convention case, the court shall order that the costs recoverable from a respondent shall not exceed £35,000.

(5) The court may increase the amount specified in paragraph (4) if it is satisfied that not doing so would make the costs of the proceedings prohibitively expensive for the applicant.

(6) The court may exercise its powers under paragraphs (3) and (5) on an application brought by an applicant.

(7) Where the applicant is or was represented by a legal representative and this representation is or was provided free of charge, in whole or in part, even if the applicant is or was also represented by a legal representative not acting free of charge, the court shall order the respondent to make a payment in respect of such part of the recoverable costs as it considers just to the Law Society of Northern Ireland, the Bar of Northern Ireland or both, as the court considers appropriate, to support the provision of free legal services.

(8) The amount payable under paragraph (7) shall not exceed the amount which an applicant would have recovered under paragraph (4) or an order made under paragraph (5) had the representation of the applicant not been provided free of charge.

(9) Where the court makes an order under paragraph (7) the applicant shall send a copy of the order to the Law Society of Northern Ireland and, or the Bar of Northern Ireland as is appropriate within 7 days of receipt of the order.

(10) The amounts specified in paragraphs (2) and (4) do not include value added tax.”.

(4) After regulation 3, insert the following new regulation—

#### **“Costs in appeals**

**3A.**—(1) Upon any appeal of a decision in an Aarhus Convention case, the court shall, subject to paragraph (2), order that the costs in respect of the appeal recoverable from an applicant or a respondent shall not exceed the amounts specified in regulation 3(2) and (4).

(2) The court shall have the same powers as those of the original court under regulation 3(3), (5) and (7).

(3) Nothing in this regulation shall affect the power of the court to make an order as to the costs of the proceedings in the original court but those costs shall not exceed the amounts specified in regulation 3(2), (4) or in any order of that court made under regulation 3(3) or (5).

(4) In this regulation—

(a) “applicant” means the applicant in the original court;

(b) “respondent” means the respondent in the original court; and

(c) “the court” means the Court of Appeal.”.

(5) In regulation 4(3)(b), for “regulation 3” substitute “regulation 3(4) or in any order made under regulation 3(5)”.

(6) After regulation 5, insert the following new regulation—

**“Determination of prohibitive expense**

**6.** Proceedings are to be considered prohibitively expensive for the purpose of these Regulations if, having regard to any court fee an applicant is liable to pay, their likely costs either—

- (a) exceed the financial means of the applicant; or
- (b) are objectively unreasonable having regard to—
  - (i) the situation of the parties;
  - (ii) whether the applicant has a reasonable prospect of success;
  - (iii) the importance of what is at stake for the applicant;
  - (iv) the importance of what is at stake for the environment;
  - (v) the complexity of the relevant law and procedure; and
  - (vi) whether the case is frivolous.”.

Sealed with the Official Seal of the Department of Justice on 23rd January 2017



*Claire Sugden*  
Minister of Justice

## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations amend the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 (the 2013 Regulations) which provide costs protection for judicial reviews and statutory reviews to the High Court of a decision, act or omission all or part of which is subject to the provisions of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters. The Public Participation Directive (Directive 2003/35/EC on public participation in respect of the drawing up of certain plans and programmes relating to the environment) implemented the Convention requirement that the review procedures for certain environmental decisions must not be prohibitively expensive.

Regulation 2 sets out the proceedings to which the amended Regulations apply and makes transitional provision. Regulation 3 makes substantive amendments to the 2013 Regulations. The amendments provide that the limit (or cap) on the amount of costs that can be recovered from the applicant in a Convention case can be lowered to avoid prohibitive expense to the applicant. They allow the limit on the amount of costs that can be recovered from the respondent in these cases to be increased to prevent prohibitive expense to the applicant. The amendments introduce a limit on the costs that can be recovered in the relevant appeal cases and allow it to be varied on the same basis as applies in the first instance proceedings. They set out factors that the court must consider when deciding whether or not to vary the caps or require an undertaking in an application for an interim injunction. They also clarify the types of applicant entitled to costs protection or to avail of the safeguards afforded by the 2013 Regulations for interim injunctions.

A copy of the Regulatory Impact Assessment which has been conducted in respect of these Regulations forms part of the Department of Justice's summary of responses to the relevant public consultation and is available on the Department of Justice website (<https://www.justice-ni.gov.uk/publications/costs-protection-environmental-cases-summary-responses>).

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