Task Force on Access to Justice

Fourteenth meeting, Geneva, 27-28 April 2022

Agenda item 3: Stocktaking of recent and upcoming developments (Thursday, 28 April, 11 a.m.–1 p.m)

Introduction

Good morning Chair and colleagues - and thank you for the opportunity to deliver a brief update on recent and upcoming developments on access to justice in the UK. I make this statement on behalf of the Royal Society for the Protection of Birds, but I am grateful to colleagues in Friends of the Earth, Friends of the Earth Scotland, the Environmental Rights Centre for Scotland and colleagues in private practice in Northern Ireland for information provided. I would like to briefly touch on three issues: (i) outstanding concerns regarding costs; (ii) the intensity of judicial review in the UK; (iii) and a current Bill before the English Parliament.

Prohibitive expense

The UK is currently preparing an Action Plan to implement the recommendations of Decision VII/8S of MOP-7 regarding prohibitively expensive. We have written to the Government setting out the issues we hope the Plan will address in order to meet the recommendations of the Decision. We believe compliance with the recommendations require changes to the legislative and policy framework. Our UK-wide concerns focus on the following issues:

- The current Environmental Costs protection Regime sets default adverse costs limits for unsuccessful claimants in Judicial Review proceedings of £5,000 for individuals and £10,000 in all other cases. There is also a reciprocal cap limiting the costs that successful claimants can recover to £35,000. However, some private law environmental claims are excluded from the Regime and the position regarding unincorporated community groups is unclear. we believe it is necessary to include all environmental claims within the scope of the regime and to clarify that community groups benefit from the cap applying to individuals.

- The Compliance Committee also expressed concern about the lack of cases in which the default costs caps have been varied downwards and that the relatively high proportion of cases in which defendants sought an increase in the costs cap may create a deterrent effect. We believe the Northern Ireland approach, in which default caps can only be varied downwards and the reciprocal cap can only be varied upwards, represents a significant improvement on the regime operating in other administrations of the UK but we recommend the Ministry of Justice undertakes a consultation on that issue.

- The position regarding costs protection on appeal is unclear. We believe there is merit in introducing a rule confirming the default cap expressly covers the adverse costs of all proceedings.

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- The current position on cross-undertakings for damages fails to meet the requirement in the Convention for a clear, transparent and consistent framework. Our initial view is that where a default cap is already in place or will be set there should be no further requirement for a cross undertaking in damages in order to secure injunctive relief.

- In **England and Wales**, there are other well documented concerns around the operation of the costs regime, but there have been two recent unhelpful court judgments. Firstly, in *Bertoncini*[1], the High Court held that an Interested Party to the proceedings has standing to apply for a variation of the default cap. Secondly, in *CPRE v Kent*, the Supreme Court confirmed that where permission for judicial review is refused, a claimant may now be liable to pay the costs of more than one defendant and/or Interested Party. The effect of these judgments is that interested parties are emboldened to submit excessive estimates of costs at an early stage in the proceedings and to apply for the cap to be varied upwards to accommodate excessive costs estimates.

- In **Scotland**, the Protected Expenses Order still fails to recognise that the actual costs incurred by unsuccessful petitioners are not limited to the £5,000 default cap, but also include their own legal costs, thus making the process prohibitively expensive in practice. There is a need to review and overhaul the costs regime in its entirety. Secondly, problems persist regarding legal aid, which is drastically limited in Aarhus cases. We have urged the Government to ensure the Action Plan includes confirmation that amendments will be made to the relevant regulations to ensure civil society organisations are eligible for financial support.

- In **Northern Ireland**, problems also persist around own legal costs, as has been demonstrated by an increase in the number of litigants in person. As in Scotland, financial assistance from public funds is rarely available to fund environmental legal challenges even where the applicant would otherwise qualify for such assistance.

Intensity of review

In 2017 the RSPB and others submitted a Communication to the Compliance Committee arguing that the standard of review applied in the UK fails to provide a review of procedural and substantive legality in accordance with Article 9(2) and (3) of the Convention. We welcome the recent findings of the Committee in Communication ACCC/C/2013/90 regarding standard of review in Northern Ireland and hope that the Committee will be in a position to publish draft Findings in relation to Communication ACCC/C/2017/156 in the near future.

Judicial Review and Courts Bill

Finally, we wish to highlight concerns about a Bill currently progressing through the English Parliament with profound implications for the operation of remedies. Clause 1 of the Judicial Review and Courts Bill sought to introduce two new remedies: Suspended Quashing Orders (which would allow unlawful decisions to stand until quashed by court order at a future date) and Prospective Quashing Orders (which would allow the past reliance on an unlawful decision to be deemed valid). We have raised concerns throughout the Bill's passage that the imposition of these new remedies could undermine the UK's compliance with the requirement in of Article 9(4) of the Convention to provide adequate and effective remedies. The Bill has

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1 *R (Bertoncini) v London Borough of Hammersmith and Fulham and Kendall Massey* CO/3213/2019 [2020] EWHC

met strong opposition in the House of Lords because of the worrying implications for the rule of law. The Bill returns to the House of Commons on Tuesday 26 April 2022.

Many thanks for listening. If anyone would like further information, I can make available a copy of our submission to the UK on the forthcoming Action Plan and various briefings on the Judicial Review and Courts Bill.

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