Wildlife and Countryside LINK

Friends of the Earth

Aarhus Convention Secretariat
United Nations Economic Commission for Europe
Palais des Nations
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By Email Only: aarhus.compliance@un.org

2 February 2024

Dear Aarhus Convention Secretariat,

Re: Update on costs protection in private environmental law cases

We write in relation to a recent UK Supreme court judgment, *Wolverhampton City Council and others (Respondents) v London Gypsies and Travellers and others (Appellant*) [2023] UKSC 47, in which Friends of the Earth intervened. The judgment can be found here.

We wish to draw this case to the ACCC's attention, in the context of the ongoing obstacles to access to justice in private environmental law proceedings in this country, and the ACCC's Findings of non-compliance on this matter issued in 2015 (and which continue to remain unaddressed by the UK). We respectfully consider that the ACCC may find this judgment relevant to its ongoing monitoring of the UK's efforts to bring itself into compliance with Decision V1/8k in relation to Communications ACCC/C/2013/85 and 86, and in the context of the UK's First Progress Report.

Background

The *Wolverhampton* appeal concerned the use of so-called 'persons unknown' injunctions[1] targeting Gypsy and Traveller communities,[2] as well as environmental protestors. Friends of the Earth opposes the use of these injunctions, given (amongst other matters), concerns over issues of procedural fairness. They are frequently sought on a without notice basis, and consequently are often granted without the court hearing any submissions from a defendant. They have in recent years been increasingly used by private companies in relation to community-led resistance to fracking and other fossil fuel extraction, as well as to projects such as the controversial HS2 railway (the Northern section of which, running from the West

[1]Where the defendants are unknown and unidentifiable, instead of named defendants as is usual in legal proceedings.

[2] A number of public authorities had taken out 'borough-wide' injunctions designed to prevent Gypsy and Traveller communities from stopping on vast sections of public land. This had been done in the context of a lack of sufficient, allocated stopping sites for these communities.

Midlands to Manchester, has recently been scrapped by the UK Government). They have often been granted on a wide-ranging basis, and have enabled private entities to obtain, in effect, their own, bespoke public order offences, creating a parallel system to criminal law. Once issued, these injunctions can be very difficult to challenge (for example, by anyone who considers that their terms are unclear or their prohibitions too broad), owing to the lack of costs protection that has been deemed available under the court rules (see further below).

It is notable that the danger posed by these injunctions has been recognised by Michael Forst, the UN Special Rapporteur on Environmental Defenders under the Aarhus Convention, following his recent visit to the UK. His statement dated 23 January 2024 expressed concern over the crackdown on peaceful protest in the UK, and included that he was "*deeply troubled by the use of civil injunctions to ban protest in certain areas*".

Costs Protection in Private Environmental Law Proceedings

In *Wolverhampton*, the Supreme Court held that there was no jurisdictional issue to the court granting persons unknown injunctions, including in relation to environmental protestors. However, it did impose stringent conditions limiting their use in the Gypsy and Traveller context, a development which Friends of the Earth welcomes. We wish, however, to draw to the ACCC's attention that there is an unfortunate lack of clear guidance in the judgment on the availability of costs protection in proceedings of this kind. For citizens who may wish to challenge an injunction relating to environmental protest, the *Wolverhampton* judgment leaves them with uncertainty over their cost exposure.

Friends of the Earth made detailed submissions in this appeal on the prohibitively expensive nature of this type of case for many citizens, based on its own experience. It referred to the fact that it was priced out of court, when, in 2019 in the High Court, it sought to vary a wide-ranging, anti-protest persons unknown injunction taken out by Cuadrilla Bowlands Limited in relation to its fracking operations in Lancashire. In that case[3], Cuadrilla threatened Friends of the Earth with £85,000 of costs in the event that its claim was unsuccessful. Friends of the Earth applied for cost protection from the High Court, seeking a cap limited to a maximum of £10,000 (the default cost cap for an Aarhus Convention claimant as per the Civil Procedure Rules; now rule 46.26). However, this was rejected by the High Court, which held that there was no in principle jurisdiction for it to make a protective cost order ("PCO").[4] The absence of any cost protection meant that Friends of the Earth was forced to withdraw from the case.

[3] This case was referenced by Environmental Links UK in its statement dated 06.03.2023 to the Fifteenth Meeting of the Task Force on Access to Justice which also raised this issue as a barrier to bringing environmental claims. The Statement can be found here.

[4] The Order of Pelling J dated 13 August 2019 ruled that:

(i) the jurisdiction to make PCOs in judicial review proceedings was "*substantively irrelevant*", as these were private law proceedings (para.3);

(ii) (ii) Civil Procedure Rule 3.19 (which contains a general cost capping power) was also "*substantively irrelevant*" (para. 3); and

(iii) (iii) s.51 of the Senior Courts Act 1981 and CPR 3.1 did not provide a general discretion to make a cost order on the terms sought by Friends of the Earth and that "*Given the current state of the authorities, if there is jurisdiction to make PCOs in cases such as this then it is a jurisdiction that must be identified and delimited by the decisions of appellate courts*" (para. 6).

In *Wolverhampton*, the Supreme Court expressed [para 233] "*considerable concern that costs of litigation of this kind are way beyond the means of most if not all Gypsies and Travellers and many interveners, as counsel for the first interveners, Friends of the Earth submitted*" and stated that it could "*see the benefit of such an order in an appropriate case to ensure that all relevant arguments are properly ventilated, and the court is equipped to give general guidance on the difficult issues to which it may give rise*". However, it declined to make a definitive ruling on whether the court has a general jurisdiction to make such an order, stating that there is a question of *"..whether the court has jurisdiction to make a protective or costs capping order. This is a matter to be considered on another day by the judge making or continuing the order"* [para 233].

Despite this lack of guidance in the judgment, we understand from the appellants that they applied for and *were* actually granted a PCO by the Supreme Court in this case. Following this judgment, then, there is an absence of clarity over whether cost protection is *generally* available in these sorts of proceedings, and if it is, the circumstances in which PCOs can be made and the factors that should be taken into account by the court. Whilst the Supreme Court's judgment in *Wolverhampton* does not rule on whether courts have jurisdiction to grant these orders, the fact is it did grant one itself in this very case. That would indicate that there *is* a jurisdiction of some kind (albeit its parameters have not been set out), in contrast to the High Court judge's finding in the Cuadrilla case (referred to above).

That being said, the *Wolverhampton* judgment still leaves citizens involved in these sorts of proceedings with a lack of certainty on the issue of cost protection. This includes those wishing to challenge injunctions that target environmental protestors. The issue of uncertainty is acute given the large sums associated with cases of this kind, as evidenced by the Cuadrilla case.

The lack of guidance and clarity on the availability of costs protection orders in these cases is a further illustration of the ongoing barriers to participating in environmental court cases in the UK. This is regrettable and undermines access to environmental justice. In our view, it is a further example of incompatibility with the Aarhus Convention, given that the requirements on access to justice under the Convention, including the need for certainty on costs, are not confined only to public environmental law cases. We would respectfully suggest that there is a need for the UK to legislate on this issue to provide the certainty on cost protection required, bearing in mind that the UK's highest court has not taken up the opportunity to address the issue on this occasion, and it may take years for another such opportunity to arise again.

Please do not hesitate to contact us should the Committee have any questions arising from this letter.

Yours faithfully,

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