Joint Links Statement: Access to Justice in the UK[1]
June 2015

This Joint Links statement sets out our views on Access to Justice in the UK.

Joint Links collectively represents voluntary organisations with more than 8 million members across the UK. It comprises the combined memberships of Wildlife and Countryside Link, Scottish Environment LINK, Wales Environment Link and the Northern Ireland Environment Link. Each is a coalition of environmental voluntary organisations, united by common interest in the conservation and restoration of nature and the promotion of sustainable development across the terrestrial, freshwater and marine environments.

The organisations below welcome the opportunity to provide the 8th Meeting of the Task Force on Access to Justice with a statement about the UK's compliance with Article 9 of the Aarhus Convention. This position statement identifies inconsistencies between the devolved administrations of the UK and outlines concerns regarding issues of cost, time limits and the scope of Judicial Review. These problems undermine the UK's ability to comply with the Convention. We therefore urge the UK Government and devolved administrations to effect sufficient changes to bring the UK into compliance.

This statement will be presented to the Task Force on Access to Justice by Carol Day (Solicitor and Legal Consultant at RSPB and Vice Chair of Wildlife and Countryside Link's Legal Strategy Group) on behalf of the following organisations:

- Wildlife and Countryside Link:
  - Buglife – the Invertebrate Conservation Trust
  - ClientEarth
  - Friends of the Earth England, Wales and Northern Ireland
  - Greenpeace
  - John Muir Trust
  - Open Spaces Society
  - Plantlife
  - Salmon and Trout Association
  - Ramblers
  - RSPB
  - WWF-UK
- Northern Ireland Environment Link
- Scottish Environment Link
- Wales Environment Link

1. Costs

In 2013, the devolved administrations of the UK introduced bespoke costs rules in response to the Decision of the Meeting of the Parties in Communications C23, C27 and C33[2] and

[1] For more information on the issues raised in this statement, please see: http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/frObserver_CAJE_V9n_Annex_1_22.01.15.pdf

[2] See http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html and http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-

judgments of the Court of Justice of the European Union (CJEU) in *Commission v UK*[3] and *Edwards*[4] on legal review mechanisms and prohibitive expense[5].

While the new rules were a welcome step forward, our experience is that legal costs remain prohibitively expensive in all jurisdictions of the UK. Moreover, the UK's ability to comply with Article 9 of the Aarhus Convention continues to be frustrated by a number of issues, including:

- **The effect of the caps and the cross-cap** - legal action remains prohibitively expensive for many individuals and community groups. This is because losing parties must pay the court fee (which has doubled in the last year), their own legal costs (which routinely amount to £25,000 and often more) plus a cap of either £5,000 or £10,000. Ironically, cases can also be "too expensive to win" as successful 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 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 court should have the discretion to reduce the £5,000 and £10,000 caps on cause shown and that the cross cap of £35,000 should be removed on the basis that it is unfair and contrary to the Aarhus Convention.

- **Who is eligible for costs protection?** - There is confusion and inconsistency as to which figure applies to community groups. These can often be very small and poorly funded but (because they comprise more than one individual) attract the £10,000 cap in England, Wales and Northern Ireland and are not eligible for automatic costs protection at all under the regime in Scotland[6].

- **What is eligible for costs protection?** – Costs protection under the new rules in Scotland is limited to judicial and statutory review cases falling within the scope of the EC Public Participation Directive. Petitioners in broader "Aarhus cases" must apply for a Protective Expenses Order (PEO) under common law. Thus, it is not certain that a PEO will be granted – indeed only a handful of such orders have been granted in Scotland at common law. In England and Wales, the new rules do not encompass statutory reviews (reviews to the High Court under the provisions of any statutory provision of a decision subject to the Aarhus Convention), unlike the regimes in Scotland and Northern Ireland. In this respect, we draw attention to the Court of Appeal case of *Venn*[7], in which Lord Justice Sullivan observed: "*In the light of my conclusion on Article 9(3), and the decisions of the Aarhus Compliance Committee and the CJEU in Commission v UK … it is now clear that the costs protection regime introduced by CPR 45.41 is not Aarhus compliant insofar as it is confined to applications for judicial review, and excludes statutory appeals and applications. A costs regime for environmental cases falling within Aarhus under which costs protection depends not on the nature of the environmental decision or the*

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convention/envpptfwg/envppcc/envppccimplementation/fifth-meeting-of-the-parties-2014/united-kingdom-decision-v9n.html

3 Case C-530/11

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

5 See Civil Procedure Rule 45.51 in England and Wales, Chapter 58A (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) of the Court of Session Rules in Scotland and the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013

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

7 *Venn v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539, paragraph 34

legal principles upon which it may be challenged, but upon the identity of the decision-taker, is systemically flawed in terms of Aarhus compliance".

- **Appeals** - the CJEU has confirmed that the assessment as to what is prohibitively expensive applies to all stages of a case. There is presently confusion as to whether, on appeal(s), the original £5,000 and £10,000 caps encompass subsequent proceedings, the same cap is imposed again (i.e. effectively doubling or tripling the adverse costs cap depending on the number of appeals) or whether a completely new assessment is required. As both the CJEU and the Aarhus Convention Compliance Committee stress the importance of advance certainty for claimants, we believe the caps imposed at first instance should cover any subsequent appeal(s) as what is prohibitively expensive (particularly for an individual) at first instance will be equally so at later stages of a case.

- **Court fees** – the fees for JR in England and Wales have recently doubled to £840 if permission is granted and, in 2013, the Government in England introduced a new fee for oral renewal of a permission hearing of £350. As of 2011, the fee for applying to permission to appeal to the Supreme Court is £1,000 with a further £4,820 payable for filing a statement of relevant facts and issues, making the court fee alone nearly £6,000.

- **Public funding** – legal aid for environmental Judicial Reviews is theoretically available in England and Wales. However, availability is usually contingent on the community making a significant financial contribution. 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. When deciding whether to grant legal aid in Scotland, the Scottish Legal Aid Board (SLAB) considers whether "other persons" may have a joint interest with the applicant[8]. 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 qualify. 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. The removal of Regulation 15 is considered essential for compliance with Article 9(4) of the Aarhus Convention. Finally, public funding is not available for NGOs in any part of the UK.

- **Other measures** – the Government in England has recently passed the Criminal Justice and Courts Act 2015. Part four of the Act includes a number of controversial provisions that will undermine the UK's ability to comply with Article 9 of the Aarhus Convention, including:

- Section 84 of the Act gives the High Court the power to refuse an application for JR where it considers that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred and *requires* the court to do so if the defendant requests it. The court already has a discretion to refuse permission where the outcome for the applicant would have been *no* different – however, lowering the threshold in this way will undoubtedly prohibit some challenges from proceeding;

- Section 85 of the Act requires JR applicants to provide information about the financing of the case so that the court[9] can consider whether to order costs to be paid by potential

8 See http://www.legislation.gov.uk/ssi/2002/494/regulation/15/made

9 Under section 86 of the Act 2015

funders identified in that information. This is likely to deter people from being willing to fund JR and 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);

- Section 87 of the Act requires the High Court and Court of Appeal 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 in certain circumstances. This will undoubtedly deter individuals and NGOs from intervening in cases in respect of which they may have been able to provide valuable assistance to the court; and

- Section 90 of the Act gives the Lord Chancellor the power to make regulations providing that sections 88 and 89 of the Act (concerning costs capping) do not apply to environmental cases. This provides the Lord Chancellor with the opportunity to define what is meant by an "environmental case". Such cases are currently given a wide interpretation for the purposes of the application of the Aarhus costs rules, in line with the definition of such cases in *Venn*[10]. To move away from this definition would undermine the UK's compliance with the Convention.

We call upon the devolved administrations to collate and publish information on the effectiveness of the new costs regimes, and the impact of the measures outlined above, in order to assess compliance with Article 9(4) of the Aarhus Convention and Decision V/9n of the Meeting of the Parties to the Aarhus Convention, and to make necessary changes accordingly.

2. Time limits

Following *Uniplex*[11], the reference to "promptly" no longer applies in relation to JRs relating to decisions under planning legislation in England and Wales. As of 1st July 2013, applications for a JR in relation to planning matters must be brought within six weeks of the contested decision.

We believe the six week time limit 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.

In Northern Ireland, the time limit for judicial reviews is "promptly and in any event within three months". The Court has discretion to extend time. However, 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 "promptly".

The introduction of a three month time limit for lodging JR proceedings 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

10 *Venn v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539, at §11

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

legal aid, will exacerbate this difficulty[12]. Secondly, there is a different legal history and culture in Scotland, which means that local communities less readily identify legal action as a solution.

We believe the reduced time limits for lodging cases undermines the UK's ability to comply with the requirement for legal review mechanisms to be "fair" under Article 9(4) of the Aarhus Convention. We call on the Governments of the UK to establish a fair and consistent position on time limits.

3. Scope of JR

Article 9(2) of the Convention requires the UK to provide the public with access to legal review procedures to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 of the Convention (essentially projects subject to Environmental Impact Assessment (EIA) and Integrated Pollution Prevention and Control (IPPC)). The extent to which JR provides a mechanism to review substantive legality is unclear. In Communication C33, the Aarhus Compliance Committee was not convinced the UK meets the necessary standard of review[13]. Unfortunately, recent UK cases (e.g. *Sustainable Shetland v Scottish Ministers*[14] *and Evans*) in the Supreme Court have also failed to clarify the position.

4. Conclusion

While we welcome the introduction of bespoke costs rules for environmental cases, the process of Judicial Review has been under a sustained attack in recent years. While many of the measures introduced have not targeted environmental cases, such cases have been a casualty of them and the cumulative effect has been to substantively undermine any improvements in access to justice.

The UK would appear to have made no attempt to evaluate the impact of the new costs regimes (and recent measures which impact on them) on the ability to comply with its duties under Article 9 of the Aarhus Convention. We urge the Governments of the UK to do so as a matter of some urgency and to effect any further changes as necessary to bring the UK into compliance in a consistent manner.

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

13 See paragraphs 123-127 of the ACCC's findings here: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece_mp.pp_c.1_2010_6_add.3_eng.pdf

14 [2015] UKSC 21. Judgment available here: https://www.supremecourt.uk/decided-cases/docs/UKSC_2014_0137_Judgment.pdf