

Environment Links UK Statement: Access to Justice in the UK

Summary

Environment Links UK (formerly 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.

We welcome the opportunity to provide the 10th Meeting of the Task Force on Access to Justice with a written statement about the UK's compliance with Article 9 of the Aarhus Convention.

In recognising that the framework of the Aarhus Convention provides for an effective system of procedural rights, the UK Government must ensure the scope for access to justice for the environment is appropriately provided. However, ongoing reforms to Judicial Review (JR) in England and Wales continue to take the UK in the opposite direction of travel from compliance with the access to justice provisions of the Convention. In particular, in November 2016, the Ministry of Justice in England and Wales confirmed that it will be proceeding with significant changes to the costs rules for environmental cases. Some of the more detrimental changes were laid before Parliament on the afternoon 3rd February 2017 in Section VII of the Civil Procedure (Amendment) Rules 2017¹ (the Amendment Rules), and are due to come into effect on the 28th February 2017 (see later).

These proposals do not comply with the rulings of the Court of Justice of the European Union in *Commission v UK* and *Edwards*² (CJEU) or the findings of the Aarhus Convention Compliance Committee³ (ACCC) on "prohibitive expense", as demonstrated in Wildlife & Countryside Link's response to the public consultation⁴.

The Department of Justice in Northern Ireland has made a number of positive amendments to their costs regime for environmental cases following a similar consultation exercise in 2015. The Scottish Government has also effected positive changes to the JR regime in respect of costs and standing. It also invited views on further improvement to access to justice and the possible benefits of establishing an environmental court or tribunal in early 2016.

The outcome of the EU Referendum in June 2016 has created a climate of uncertainty around the future of the EU environmental acquis in the UK. There are also deep concerns about access to justice and the enforcement deficit arising from the loss of the Court of Justice of the European Union (CJEU) and the EU complaints mechanism.

This statement is supported by Wales Environment Link, Scottish Environment Link, Northern Ireland Environment Link and members of Wildlife and Countryside Link.

¹ See http://www.legislation.gov.uk/ukxi/2017/95/pdfs/ukxi_20170095_en.pdf

² See Case C-530/11 *Commission v UK* and *Edwards v Environment Agency* (Case C-260/11) and R (Edwards) v Environment Agency (No. 2) [2013] UKSC 78)

³ See Communications C23, C27 and C33

⁴ See <http://www.wcl.org.uk/legal.asp> and Northern Ireland Environment Link's response here: <http://www.nienvironmentlink.org/cmsfiles/NIEL-response-DoJ-Costs-Protection-consultation.pdf>

Costs - England and Wales

In September 2015, the Ministry of Justice (MoJ) consulted the public on changes to the Civil Procedures Rules in respect of costs in environmental cases⁵ introduced in 2013. In November 2016, the MoJ announced that it would be proceeding with the majority of the changes, despite overwhelming opposition to them⁶. The Civil Procedure (Amendment) Rules 2017 were laid in Parliament on 3rd February 2017. They following changes come into effect on 28th February 2017:

- The Court may, of its own volition or at the request of the Defendant, vary either party's cost cap at any time during the proceedings. The Government assumes that it would be exceptional for the Claimant's cap on adverse costs to decrease. An increase in the cap will be on the basis that the proceedings are not Prohibitively Expensive for the Claimant. However, it is possible that the Claimant will already be exposed to considerable costs if it decides to withdraw on the basis of a new cap part-way through the proceedings. The effect of this will be to deter many Claimants from embarking on litigation in the first place;
- The Court must, when assessing whether the proceedings would be Prohibitively Expensive for the Claimant to take into account some (but not all) the factors set out by the CJEU in the case of *Edwards*;
- The Rules provide for separate cost caps to apply for each Claimant if there is more than one;
- The Claimant is required to disclose personal financial information to the court when making an application for JR (including disclosing any third party support provided) without knowing whether the information will be considered and discussed in open court or in private; and
- The Rules makes specific provision requiring an appellate court to apply the same principles on what is or is not prohibitively expensive when determining a cost cap for the Claimant.

These proposals compound other changes to JR introduced under the Criminal Justice and Courts Act 2015, including the doubling of the Administrative Court fee in England and Wales to just under £1,000, exposing JR interveners to potential costs orders and removing the right to an oral hearing in cases deemed "totally without merit".

There is no evidential basis for any of these changes. In fact, statistics obtained from the MoJ in August 2015 confirm that while environmental cases represent less than 1% of the total number of JRs lodged annually, they demonstrate high success rates. Environmental cases play an essential role in upholding the rule of law, protecting the environment and improving the quality of life.

The cumulative effect of these proposals will be to, once again, deter all but the very rich from pursuing environmental cases. If anything, claimants will be in a worse position than before the introduction of the new costs rules as previously the granting of a Protective Costs Orders at an early stage of the proceedings guaranteed certainty as to costs exposure. Cases

⁵ See <https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims>

⁶ See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/569588/costs-protection-in-environmental-claims-govt-response.pdf

that are progressed are likely to suffer considerable delay as costly and time consuming satellite litigation around the issue of costs in itself detracts from the substantive issues.

The proposals take the UK Government in the opposite direction of travel to compliance with Decision V/9n of the Meeting of the Parties to the Aarhus Convention concerning the UK and the prohibitively expensive costs of legal action⁷. A number of Link members have sought legal advice on the lawfulness of the proposals and are considering their next steps.

Northern Ireland

The Department of Justice (DoJ) in Northern Ireland consulted on a number of similar proposals to the MoJ in 2015/2016⁸, provoking a modest but strong reaction⁹. The DoJ published its response in September 2016¹⁰, acknowledging a “... *widespread opposition amongst respondents to the proposals made and a general consensus that they were a retrograde step in terms of the protection offered to environmental litigant*”.

The outcome was that most of the damaging proposals, including the mandatory disclosure of financial details and the possibility for the respondents to apply for the caps to be varied, were withdrawn. Other welcome measures that may improve access to environmental justice were proposed, including the fact that applicants will be able to apply to the courts for their caps to be reduced, and the respondent’s cap to be increased – if the default limits would make the proceedings prohibitively expensive. This will allow applicants to apply to have their liability reduced below the default limits, and increase applicant’s ability to recover their own costs from respondents.

Scotland

Link welcomed amendments to the Protective Expenses Order (PEO) regime in 2016 including extending the scope of the Rules to cover cases falling under Article 9(1) and 9(3) of the Convention and modifying the categories of persons eligible for a PEO to include Members of the Public and Members of the Public Concerned. While it is too early to evaluate the impact of these changes, it is hoped that community groups will now be able to benefit from costs protection.

Despite the above improvements, we would reiterate that legal action remains, as a whole, prohibitively expensive for most individuals, communities and NGOs in Scotland. Barriers to legal aid mean that very few awards are granted in environmental cases. Certain court fees have doubled in recent years - for example, hearing fees for the Court’s time are now £500 per half an hour per party - and litigants own legal costs remain high in complex JR cases. Very few PEOs have been granted under the new rules.

Link responded to the March 2016 consultation inviting views on developments in environmental justice in Scotland, and submitted that the establishment of a specialist

⁷ See <https://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppcc/envppccimplementation/fifth-meeting-of-the-parties-2014/united-kingdom-decision-v9n.html>

⁸ See <https://www.dojni.gov.uk/consultations/consultation-proposals-revise-costs-capping-scheme-certain-environmental-challenges>

⁹ Northern Ireland Environment Link’s response can be found here: <http://www.nienvironmentlink.org/cmsfiles/NIEL-response-DoJ-Costs-Protection-consultation.pdf>

¹⁰ See <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/costs-protection-in-environment-cases-responses.pdf>

environmental court or tribunal should be considered to help improve access to justice¹¹. The Government have yet to publish analysis and next steps following the consultation.

Intensity of Judicial Review

Article 9(2) of the Aarhus Convention requires contracting Parties 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.

In the absence of illegality or procedural impropriety, *Wednesbury* unreasonableness (or irrationality) is the usual test for JR of administrative action¹². However, demonstrating that a decision is *Wednesbury* unreasonable is an extremely difficult threshold to reach, particularly when the decision-maker has discretion to balance a number of competing considerations. Thus, in the majority of planning cases, the court's view is that it is entirely for the decision maker to attribute to the relevant considerations such weight as it thinks fit (see, for example, *R (on the application of Jones v Mansfield District Council*¹³, *Evans*¹⁴, *Foster*¹⁵, *Smyth v Secretary of State for Communities and Local Government*¹⁶, *Viking*¹⁷ and *Dilner*¹⁸). The corollary of this limitation is that those challenges that proceed rely almost wholly on procedural grounds, which can render JR a time-consuming, expensive and somewhat blunt instrument as the decision-maker can simply rectify any procedural flaws when forced through legal action to revisit the decision. These limitations apply equally to the process of Statutory Review. For example, in a case concerning the extension of Lydd Airport¹⁹, the High Court concluded that a planning inspector had not acted unlawfully in concluding that he had sufficient evidence about the impact of bird control measures to decide that an Appropriate Assessment was not required. While the Claimant submitted clear evidence to show that disturbance to feeding would not be solved by the return of birds to feed at night, the Court held this evidence was insufficient to conclude that the Inspector's decision was irrational.

In Communication C33, the Aarhus Convention Compliance Committee (ACCC) questioned whether the UK provides the necessary standard of review to comply with Article 9(2) of the Convention. While the Convention does not define "substantive legality", its creators surely did not envisage a system of review focused almost exclusively on procedural irregularities. Varying standards of review are applied in EU Member States. The CJEU applies a more exacting standard of review known as the proportionality principle, which is also applied in UK human rights cases. A move away from *Wednesday* unreasonableness towards proportionality seems inevitable in the UK, although whether that would demonstrate full compliance with Article 9(2) of the Aarhus Convention in practice remains to be seen.

Timescales

¹¹ See <https://consult.scotland.gov.uk/courts-judicial-appointments-policy-unit/environmental-justice>

¹² or where proportionality is explicitly required

¹³ 10 [2003] EWCA Civ 1408, paragraphs 60-61

¹⁴ *Evans v Secretary of State for Communities and Local Government* [2013] EWCA Civ 115

¹⁵ *R (on the application of (1) Derek Foster (2) Tom Langton (claimants) v Forest of Dean District Council (Defendant) & (1) Homes & Communities Agency (2) Natural England (Interested Parties)* [2015] EWHC 2648 (Admin)

¹⁶ [2015] EWCA Civ 174, [79]–[80]

¹⁷ *Sustainable Scotland v The Scottish Ministers* [2014] CSIH 60

¹⁸ *R (on the application of Dilner) v Sheffield City Council* [2016] EWHC 945 (Admin)

¹⁹ *Royal Society for the Protection of Birds (2) Lydd Airport Action Group v (1) Secretary of State for Communities and Local Government (2) Secretary of State for Transport (3) London Ashford Airport Ltd (4) Shepway District Council* [2014] EWHC 1523 (Admin)

Challenges with respect to the prohibitively high cost of legal action are compounded by the reduced time limit for applying for a JR of decisions made under the Planning Acts in England and Wales to six weeks. 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. These difficulties are evidenced by the acceptance that the shortened time-limit is unlikely to allow sufficient time to fulfil the Pre-Action Protocol and exacerbated by the fact that an application for JR must often be made before a community group is awarded public funding to progress a case.

The reduction of the time limit to three months in Scotland (where no time limit originally existed) is also problematic as potential petitioners struggle to find solicitors to represent them on a *pro bono* or reduced fee basis.

Conclusion

While the introduction of new costs rules for environmental cases in 2013 was a welcome improvement, ongoing restrictions to the process of JR generally and actual and proposed changes to the costs regime for environmental cases in England and Wales will, once again, make environmental litigation impossible for many people. We fear the new regime will introduce a climate of uncertainty amongst claimants with obvious implications for environmental protection, access to justice and the rule of law.

The implications of the UK's departure from the EU are as yet unknown. However, it seems increasingly likely that EU Directives on Access to Information and Public Participation may no longer apply in the UK post-Brexit. In the absence of EU supremacy, the extent to which the UK courts will apply the jurisprudence of the CJEU (whether enshrined in existing UK case-law or not) is uncertain. We will also lose the European Commission's complaint procedure, which offers a free and easily accessible way for civil society to raise breaches of EU law. In such uncharted territory, we call upon the relevant UNECE institutions, including the Task Force on Access to Justice and the Aarhus Convention Compliance Committee, to ensure the UK upholds its responsibilities under the Convention as far as possible.

Environment Links UK
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