



Environment Links UK Statement: Access to Justice in the UK

June 2016

Introduction

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

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.

The organisations below welcome the opportunity to provide the 9th Meeting of the Task Force on Access to Justice with a statement about the UK Government's compliance with Article 9 of the Aarhus Convention.

Recent reforms to Judicial Review (JR) in England and Wales have compromised the UK's ability to comply with the access to justice provisions of the Convention. During the last year, the Ministry of Justice in England and Wales and the Department of Justice in Northern Ireland have consulted on significant changes to the bespoke costs rules for environmental cases introduced in 2013 to comply with the rulings of the Court of Justice of the European Union¹ (CJEU) and the findings of the Aarhus Convention Compliance Committee² (ACCC) on "prohibitive expense". Link has submitted detailed and lengthy responses to these consultations, demonstrating how the proposals conflict with the provisions of the EC Public Participation Directive (PPD) and Article 9 of the Aarhus Convention³. The Scottish Government has effected positive changes to the JR regime in respect of costs and standing and is currently inviting views on the benefits of establishing an environmental court or tribunal.

The UK is obliged to provide access to environmental justice as a result of binding commitments under EU and international law. While the UK Government does not recognise that the right to a healthy environment in Article 1 of the Aarhus Convention gives right to substantive rights in the UK, it has nevertheless ratified the Convention. In recognising that the framework of the 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 expanded - not constrained - as current restrictions aim to do.

¹ See Case C-530/11 *Commission v UK, Edwards v Environment Agency* (Case C-260/11) and *R (Edwards) v Environment Agency (No. 2)* [2013] UKSC 78)

² See Communications C23, C27 and C33

³ See Wildlife & Countryside Link's response here: <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>

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

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

- Buglife – The Invertebrate Conservation Trust
- Campaign for National Parks
- ClientEarth
- Friends of the Earth UK
- Open Spaces Society
- The Ramblers
- RSPB
- Salmon and Trout Conservation
- The Wildlife Trusts
- Wildfowl and Wetlands Trust
- WWF-UK

Costs

England and Wales

Part 4 of the Criminal Justice and Courts Act (CJCA) 2015 contains provisions to protect JR from “misuse”. Sections 85 and 86 of the Act oblige the judiciary to consider making costs order against third parties to JR proceedings. In July 2015, the Ministry of Justice sought views on the following proposals in relation to all Judicial Reviews⁴:

- to require a declaration of funding sources on an application for permission for JR;
- to require details of third party funding (or likely funding) where the funding is above a threshold of £1,500;
- to require a claimant charity or non-governmental organisation that is corporate body to provide the names and addresses of its members; and
- to require a more detailed picture of the applicant's financial circumstances on application for a costs capping order.

The proposals appear to have been developed in the absence of any narrative, evidence or empirical data to suggest that JR is being “misused” or to show how these proposals will increase transparency and access to justice.

Wildlife and Countryside Link's response⁵ explained how the practical application of these proposals will create profound difficulties for the nature of charity funding, by both threatening the general funding available to charities and reducing the ability and willingness of charities to apply for JR. The potential exposure of charity donors and funders to legal cost orders arising from indirect funding that a charity subsequently decides to use to fund a JR offends the basic principles of justice. In relation to environmental cases, the

⁴ See <https://consult.justice.gov.uk/digital-communications/reform-of-judicial-review-proposals-for-the-provis>

⁵ See <http://www.wcl.org.uk/docs/Link%20Response%20to%20MoJ%20consultation%20on%20Reform%20of%20JR%20Final.pdf>

proposed measures will reduce access to environmental justice in a manner wholly in opposition to the principles enshrined in the Convention.

In September 2015, the MoJ consulted on proposed changes to the Civil Procedures Rules in respect of costs in environmental cases⁶. These environmental costs rules were introduced in 2013 and offered many claimants access to justice for the first time in years. The proposals include:

- (1) Confining eligibility for costs protection to a member of the public, thus apparently excluding community groups and even environmental NGOs, from costs protection;
- (2) Making costs protection contingent on obtaining permission to apply for JR;
- (3) Replacing the current fixed adverse costs caps of 5k (individuals) and 10k (all other cases) with higher caps (potentially doubled);
- (4) Enabling the defendant and the court to challenge the level of the cap at any point in the proceedings, thus re-introducing uncertainty for the claimant;
- (5) Requiring claimants to first submit a schedule of their financial resources and identifying third party financial support for JR in all cases and potentially exposing third parties to costs orders;
- (6) Awarding separate costs caps in multiple-claimant cases, thereby exposing them to cumulative costs awards; and
- (7) Applying some of the above proposals to the procedure for obtaining interim relief.

If enacted, these proposals would compound other changes to JR (some also introduced under the CJA 2015), including the doubling of the Administrative Court fee in England and Wales to just under £1,000, exposing 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 the current proposals. 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 deter all but the very rich from pursuing environmental cases. Those cases that are progressed are likely to result in considerable delay as costly and time consuming satellite litigation around the issue of costs detracts parties from the substantive issues. The proposals therefore take the UK Government in the opposite direction of travel to compliance with Decision V/9n.

We have submitted lengthy and considered responses to the current proposals. Most recently, the CEOs of 28 members of Wildlife and Countryside Link wrote to the Secretary of State Michael Gove MP pointing out the extreme difficulties they would present for charities and environmental litigation. We await the Government’s response.

Northern Ireland

⁶ See <https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims>

Similar proposals (see points 1, 4, 5, 6 and 7) to the above have been consulted upon in Northern Ireland⁷, despite the fact that information obtained from the Department of Justice (DoJ) in February 2016 confirms there were only 11 Aarhus claims and no applications for interim relief in the two and a half year period between 1st April 2013 and 31st December 2015. As these cases demonstrate similarly high success rates to those in England and Wales, there is again no argument to suggest there has been a proliferation of meritless environmental litigation that must be stemmed. Northern Ireland Environment Link (NIEL) responded to the consultation in February 2016. The DoJ's formal response is awaited.

In the interim, NIEL would point out that High Court legal action remains, as a whole, prohibitively expensive for most individuals, communities and NGOs. Claimants still have to be prepared to pay for their own legal costs if they are unsuccessful and barriers to civil legal aid in Northern Ireland mean that it is rarely available for claimants in environmental cases. Additionally, the reciprocal cap continues to prevent successful applicants from recovering the full costs of legal and expert fees in environmental cases.

Scotland

Link welcomes recent amendments to the Protective Expenses Order (PEO) regime 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. We also welcome the current consultation inviting views on further improvements to access to environmental justice in Scotland, including the possible establishment of a specialist environmental court or tribunal⁸.

However, in the interim we would also reinforce the fact that legal action remains, as a whole, prohibitively expensive for most individuals, communities and NGOs. Barriers to legal aid mean that very few awards are granted in environmental cases. Certain court fees have doubled in recent years and litigants own legal costs remain very high in complex JR cases.

Intensity of 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 is the usual test for JR of administrative action⁹. However, this is an extremely difficult threshold to reach, particularly when the decision-maker has discretion to balance 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*¹⁰, *Evans*¹¹,

⁷ See <https://www.dojni.gov.uk/consultations/consultation-proposals-revise-costs-capping-scheme-certain-environmental-challenges>

⁸ See <https://consult.scotland.gov.uk/courts-judicial-appointments-policy-unit/environmental-justice>

⁹ or where proportionality is explicitly required

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

¹¹ *Evans –v- Secretary of State for Communities and Local Government* [2013] EWCA Civ 115

*Foster*¹², *Smyth v Secretary of State for Communities and Local Government*¹³ and *Viking*¹⁴). The corollary of this limitation is that those challenges that do proceed rely almost wholly on procedural grounds, which can render JR a somewhat blunt instrument.

In C33, the ACCC questioned whether JR in 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”, the drafters surely did not envisage a system of review focused almost exclusively on procedural irregularities. Link believes that substantive review must mean something quantifiable and effective and that, on that basis, JR in the UK does not comply.

Timescales

Challenges with respect to costs 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. 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

To conclude, while the introduction of new costs regimes in the UK in 2013 initially offered hope to claimants, recent restrictions on JR and the current proposals for environmental cases will make environmental litigation impossible for the vast majority of people. Claimants would be in a worse position than before the introduction of the new costs rules as previously the granting of a Protective Costs Orders guaranteed certainty as to costs exposure. The new regime would introduce a climate of fear and uncertainty amongst claimants with obvious implications for environmental protection, access to justice and the rule of law.

Environment Links UK

June 2016

¹² *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)

¹³ [2015] EWCA Civ 174, [79]–[80]

¹⁴ *Sustainable Scotland v The Scottish Ministers* [2014] CSIH 60 – see: <http://www.scotcourts.gov.uk/search-judgments/judgment?id=cdc395a6-8980-69d2-b500-ff000d74aa7>