Friends of the Earth Scotland Policy Briefing Paper

Tipping the Scales: Access to Environmental Justice in Scotland

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The Aarhus Convention

The Aarhus Convention is an International Treaty that recognizes every person's right to a healthy environment – as well as his or her duty to protect it. It seeks to ensure that every individual lives in an environment adequate for his or her health and well-being. This applies not only to those of us living today, but to future generations as well.

The Convention upholds the following rights (the three 'pillars') for every person:

1. the right to be informed and have access to information about the environment;
2. the right to participate in environmental decision making; and
3. the right of easy and effective access to justice if the former rights are denied or if national environmental law has been broken, in a way that is *fair, equitable, timely, and free or inexpensive.*

The last of these three enables the public to challenge general breaches of environmental law, even if they have not suffered personal harm. This is crucial in fighting decisions that lead to environmentally damaging developments where the harm is not geographically limited.

In addition, the Convention states that access to justice under any of these headings must not be "prohibitively expensive".

Scotland, as an Aarhus signatory at both UK and EU level, is legally obliged to implement all three pillars. EU directives have been put in place for the first two,[1] which have been legislated for in Scotland under the Freedom of Information (Scotland) Act 2002 and the Environmental Assessment (Scotland) Act 2005. There is no EU directive, and no specific Scottish legislation, which implements the final pillar, access to justice.

UK compliance

The Aarhus Convention Compliance Committee and the European Commission have recently found the UK (England and Wales) to be in breach of the Convention through non-compliance with pillar three.[2]

Bad news for them, but even worse for Scotland. Although of course the Scottish legal system is distinct from England and Wales, in the main areas in which the UK has been found lacking, Scotland is even further behind.

One of the key areas in which the UK falls short of compliance is that of **Prohibitive Expense**. The UK contends that provisions including legal aid, Conditional Fee Agreements (CFAs – akin to 'no win, no fee'), Protective Costs Orders (PCOs - orders limiting the costs the losing side will have to pay) and extensive judicial discretion amount to compliance; however the Compliance Committee has judged these measures insufficient,[3] and the European Commission issued a Reasoned Opinion (one step away from taking the UK to task at the European Court of Justice) noting that "the potential financial consequences of losing challenges is preventing NGOs and

[1] For Pillar 1, the Integrated Pollution Prevention and Control (IPPC) Directive and for Pillar 2 the Environmental Impact Assessment (EIA) Directive
[2] Aarhus Convention Compliance Committee Draft Findings with regard to UK Compliance, ACCC/C/2008/33 (2010)
[3] Draft Findings, ACCC/C/2008/33

individuals from bringing cases against public bodies [in the UK],” in legitimate public interest cases.[4]

Scottish compliance

On this count, Scotland falls considerably short of the rest of the UK. While the legal aid system in England and Wales allows for legal aid in public interest (including environmental) cases, the Scottish system has consistently failed to award aid in such cases. Provisions for Protective Cost Orders, whilst granted only in exceptional circumstances and under strict criteria south of the border, are considerably more advanced than in Scotland (which to date has only issued one[5]).

In addition, Scotland has more restrictive rules on legal standing – the conditions an individual or NGO must meet in order to be eligible to initiate a judicial proceeding. Aarhus is designed to ensure wide access to justice, and explicitly includes the public likely to be affected by environmental decision making[6] and non-governmental organizations promoting environmental protection.[7]

In Scotland, applicants have to demonstrate both 'title and interest' in order to take a case. In practical terms this has been interpreted as requiring a property interest: for instance, it is easy to demonstrate standing as landowner, but not as a party affected by pollution. It remains unclear under case law whether environmental and community groups have legal standing to take judicial review cases, and this uncertainty is a significant disincentive to applicants, and is not in line with the intention of Aarhus on wide access to justice.

There are a number of case studies that demonstrate these Aarhus-breaching barriers to environmental justice in Scotland.

Scottish case studies

In 2003 *William Smith v the Scottish Ministers*[8] demonstrated how costs can prove an insurmountable barrier. As a disabled local resident concerned that the construction of a new bridge over the Clyde in Glasgow would impede dredging and elevate the risk of flooding, Smith sought to challenge the permission granted for construction. Denied legal aid initially and on appeal, Smith was ordered to find caution of £10,000 within seven days as a condition for proceeding with the appeal. Moreover, being without the financial means to secure representation and unable to conduct his own appeal (being dyslexic, disabled and deaf), Smith was not granted time to attempt to secure representation. His access to justice was curtailed for what amounted to economic reasons; yet Aarhus enshrines the principle that potentially environmentally damaging projects should not be immune from scrutiny simply because attempted opponents cannot afford the challenge.

For the claimant in *Mary Buchan Forbes v Aberdeenshire Council & Trump International Golf Links*,[9] the restrictive interpretations of title and interest to sue proved a barrier, as Forbes' standing was questioned by the judge on the basis that although neighbouring the site, her dwelling stands a kilometer from the current environmentally damaging preparatory works. Forbes also failed to demonstrate “sufficient interest” because she had not followed proper procedure by objecting to the planning application in the first place. Therefore, the substance of the decision remained inscrutable because of the strict interpretation of ‘neighbour’ and the unyielding precondition that the correct bureaucratic procedure must have been followed.

In a ground breaking 2010 ruling,[10] the local community group seeking to overturn the late

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[4] European Commission IP/10/312, (2010)

[5] See the Hunterston case in Scottish case studies, below

[6] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) (1998), Art 2. Par 5

[7] Aarhus Convention, Art 9. Par 2

[8] http://www.scotcourts.gov.uk/opinions/XA119.html

[9] http://www.scotcourts.gov.uk/opinions/2010CSOH1.html

[10] http://www.scotcourts.gov.uk/opinions/2010csoh5.html

inclusion (without adequate consultation) of a coal fired power station at Hunterston in the National Planning Framework were awarded the first ever PCO in Scotland. Yet, the court capped the applicant's liability for the defendant's costs at £30,000, which, when added to the estimated costs of up to £80,000 he would face in bringing the case (having been denied legal aid), amount to a significant financial barrier to pursuing the case. The principle behind PCOs is to provide early certainty and a reasonable limit on the level of costs the applicant may be expected to pay (in line with Aarhus) yet both the extreme rarity and the very high cost cap set, mean PCOs in Scotland do not yet contribute to removing the financial barrier to environmental justice.

Learning from other countries

Methods of implementing Aarhus across Europe naturally vary greatly; however examining practical application in other states allows us to speculate how the cases considered above might have turned out in states considered to be in fuller compliance with Aarhus, thus illustrating the options for better implementation in Scotland.

Overcoming prohibitive costs

For example, the prohibitive costs faced by Smith would not have been an issue in **Portugal**, where it is enshrined in law that access to justice cannot be denied for economic reasons, and all individuals who can demonstrate that they can't afford in part or whole to meet the costs of procedures can be granted legal aid, including legal assistance in bringing the case before the court and exemption from court and attorney's fees. This extremely comprehensive system of legal aid has not led to the courts being overrun by cases; in fact, Portugal has one of the lower numbers of environmental court cases in Europe.

In **Denmark**, a system of independent administrative appeal boards, with legal and technical expertise, provides an efficient and far cheaper alternative to an expensive judicial system which can require court fees, expensive legal representation, as well as the operation of the loser pays principle. The claimant must pay a small fee (approx 65€), which is reimbursed if the appeal is won.

In **Spain,** Smith would very likely be covered by the system of legal aid which goes a considerable way to compensating for the expenses of the procedure. Moreover, the losing party pays principle applies in practice only when the loser is the administration. Only in cases of *mala fides* will the administrative court impose on a private losing party the cost incurred in the procedure by the administration. Legal aid would also likely have been granted in **Italy**, where the system of legal aid is based on the income of the parties, and an appellant like William Smith, without a large income, would have benefited from it.

In Scotland (and England and Wales) it is the 'loser pays' principle that necessitates PCOs in the first place. This principle does not however apply in all member states. Had the Hunterston case taken place in **Belgium**, for example, the losing party would only have to pay a 243€ lump sum as compensation to the winning party.

In **Spain** and the **Netherlands**, the rule is that the loser will only pay when the party who initiated the court proceedings acted with *mala fides* (in bad faith) (Spain) or made an unreasonable use of the right to initiate a lawsuit (the Netherlands). Moreover, in **Spain** the general principle is that the loser pays principle applies only when the loser is the administration.

Likewise, in **Finland**, the "loser pays" principle does not apply when actions are initiated against public authorities. These latter two systems mean that cost shifting effectively only goes one way, from big party (who is more able to incur the costs) to small, rather than small (who may be unable to incur the costs) to big. Nonetheless, the *mala fides* caveat prevents unreasonable advantage being taken of such a system.

Overcoming restrictive interpretations of standing

A case like *Forbes v Trump*, barred by a restrictive interpretation of standing would have faced far fewer obstacles in more comprehensively Aarhus complaint member states. In **Portugal**, protection of the environment by the state and the fundamental right of every citizen to a healthy

and ecologically balanced human environment, are constitutionally enshrined. This progressive legal framework would have granted Forbes standing via the legal right of actio popularis (action in the name of the collective interest; Popular Action Law protects general or diffuse interests such as the environment) to redress offences against the preservation of the environment. No property right, geographical vicinity or specific engagement in bureaucratic procedure criteria would be necessary.

Denmark's administrative appeal boards system admits appeals from various categories of organisation, as well as any party or individual with a significant interest in the outcome of the case. It may be supposed that Forbes' interest in the outcome, given the close vicinity and likely ecological harm to local and much loved environmental features, would be sufficient to grant admission to the widely accessible appeals boards. In **Ireland**, although not yet party to Aarhus, standing is drawn very widely: "any person", including NGOs (with legal personality) can resort to judicial enforcement mechanisms. Had Forbes' case arisen in Ireland, she would not have faced the obstacle of establishing a prima facie case that she faced here in Scotland.

Spain would require demonstrating a "legitimate interest", but such an interest does not have to be direct or individual nor imply holding a subjective right; indeed, "environmental interest" has been recognised as one of the legitimate interests that may grant standing. Nevertheless, that interest has to be "real, effective and actual", but it is enough to show an advantage or legal utility derived from the reparation demanded, and this advantage or benefit does not have to be economic or material but it can be moral. In Forbes' case, not having to demonstrate title, and an environmental interest, perhaps predicated on the 'moral' aim of preserving dune ecosystems, would have ensured her standing.

What can we do about it?

A 2009 review of civil justice in Scotland by the Lord Chief Justice Lord Gill recommended capping the costs of certain legal cases; ensuring competency to issue PCOs, with somewhat less restrictive criteria, in Scottish courts; and easing the rules on who could bring a case to court, ensuring that anyone with a clear interest – including communities and campaigning organisations – could initiate legal challenges.

The Jackson Review (2009) in England and Wales recognized that while in theory PCOs can provide early certainty and control the level of a claimant's cost liability, the PCO system cannot bridge the non-compliance gap, as they are restrictive and discretionary. The Review recommended that the UK could 'expand the [PCO] test and…introduce one way cost shifting for all environmental judicial review claims, leaving the permission" requirement as a sufficient mechanism to weed out weak claims'.[11] The 'permission requirement' applies to all public law cases and means that claimant must seek the court's permission to take a case, effectively ensuring that unmeritorious or poorly argued cases fall at the first hurdle. This requirement deals with the concern that cost shifting (or indeed any other measure to improve access to justice) would open the floodgates on time and money wasting cases. Here, Scotland has an opportunity to 'queue jump'; bypassing an imperfect PCO system and implementing one-way cost shifting instead.

The Sullivan Report (2008, and update report 2010) on Access to Environmental Justice in England and Wales, examined UK compliance with the third pillar of Aarhus, and concluded that for the ordinary citizen, there was no doubt that the Court's procedures are prohibitively expensive. The 2010 update agrees with Jackson's findings and recommends one-way cost shifting, instead of tinkering with the PCO system. Further, Sullivan noted that the UK's position that this is a matter for the Courts is clearly contradicted by the Courts themselves in calling for Aarhus compliance to be secured through "changes to the Rules rather than further development of Judge-made law."[12]

[11] Jackson, Review of Civil Litigation Costs: Final Report (2010), para 4.6
[12] Sullivan, Ensuring access to environmental justice in England and Wales, Update Report (2010), para 29

There are additional, more intangible barriers to access to justice in Scotland than simply prohibitive costs and restrictive standing. The Gill Review, along with groups like Consumer Focus Scotland, have also recognized the need for greater public legal education; making information and help more accessible and inclusive; and creating a more streamlined, user-friendly court system and wider legal culture in which citizens recognize their legal, and environmental, rights and duties, and learn to recognize problems and injustices which may have a potential legal solution.

Why access to environmental justice and the Aarhus Convention matters

Aarhus enshrines the fact that the environment belongs to all, demands that individuals have the opportunity to participate in decision making that affects the environment, but recognizes that the state "has great powers to positively or negatively influence the environment, by acting or omitting to act", and therefore that the courts must act as arbiters between the administration and the individuals in the case of controversy.[13]

As signatories to Aarhus, as members of the EU and UK as a whole, we have a legal obligation to comply with the Convention. Given the recent findings that the UK is in breach – particularly over prohibitive costs, an area in which Scotland is far behind – Scotland must improve access to justice to make it ***fair, equitable, timely, and free or inexpensive***, and so finally comply with the third pillar of Aarhus.

The fear that opening up access to the courts in environmental cases would open the flood gates simply does not stand up to scrutiny. Data from Member States where Aarhus is more fully implemented shows that these apprehensions are unfounded, as the number of court cases in environmental matters is very small.

Aarhus compliant access to the courts in environmental matters "increases the relevance of environmental protection in day-to-day discussions and policy, ensures the acceptance of administrative decisions and gives individuals the feeling that their commitment to environmental protection is being respected."[14] In addition, increased access to the courts tends to ensure that administrations better prepare their decisions and consider omissions to act with more care.[15]

The Scottish Government needs the help of Scottish citizens to help meet climate change, energy and biodiversity targets. To demand such support whilst restricting citizens' recourse to scrutinize Government will do little to build public confidence in Government decision making. Complying with Aarhus will benefit the relationship between the government and the public.

About Friends of the Earth Scotland

We are the leading organisation in Scotland that is working for environmental justice, campaigning for the planet and its people. We have a track record in opposing major projects that harm the environment, such as the: Harris superquarry; Donald Trump's development at the Menie estate; M74 extension; Aberdeen Western Peripheral Route; Hunterston coal fired power station; and the Second Forth Road Bridge.

[13] Milieu, Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters (2007); pp 21-22
[14] Summary Report pp 21-22
[15] Ibid.