Access to Environmental Justice

Briefing on Scottish compliance with international law on environmental matters

January 2012

Environmental justice and the Aarhus Convention

The UN Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters is an international treaty that recognizes every person's right to a healthy environment – as well as his or her duty to protect it.

The Convention requires signatories to meet a certain standard in national legislation under each of the three 'Pillars' identified in its full title. The EU and the UK are signatories to the Convention, and as justice is a devolved matter, the Scottish Government is bound to comply with it.

EU Directives[1] are in place to facilitate member state implementation of the first two pillars of Aarhus – the right to be informed about and the right to participate in decisions that impact on the environment – and in Scotland these are translated into freedom of information[2] and environmental assessment[3] legislation.

The third pillar of Aarhus demands the right of broad and affordable access to justice if rights under the former pillars are denied or if national environmental law has been broken. On ratification of Aarhus, the European Council (EC) made it very clear that the two Directives did not fully implement the Convention – in particular Access to Justice provisions – and that member states were responsible for complying with these remaining obligations.[4]

It is our position that the Scottish Government has not yet adequately complied with these obligations, and that this has a knock on negative effect on the performance of duties under the first two pillars of Aarhus. This is supported by the fact that in 2011 the EC referred the UK to the European Court of Justice (ECJ) for non-compliance with the access to justice provisions of Aarhus, with regards to costs, based on cases from England and Wales. Our research[5] shows that the Scottish compliance is demonstrably worse than in England and Wales.

Compliance with the access to justice provisions of Aarhus falls into three key categories: the cost and affordability of taking a case to court; who qualifies to have a case heard by the courts, or 'standing'; and whether the Courts are able to review the substance or merits of a case. These are dealt with in more detail below.

Costs

Aarhus demands that access to justice is not 'prohibitively expensive',[6] but the reality in Scotland is very different. It can be extremely expensive to undertake legal proceedings (environmental or not), with the costs of taking a judicial review (under which most Aarhus cases would be taken) together with liability for expenses running into tens of thousands of pounds.

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[1] For Pillar 1, Directive 2003/4/EC on public access to environmental information (repealing Council Directive 90/313/EEC); for Pillar 2 Directive 2003/35/EC providing for public participation in planning, which amended Directives 85/337/EEC (Environmental Assessment) and 96/61/EC (Integrated Pollution Prevention and Control) in relation to public participation and access to justice.

[2] Environmental Information (Scotland) Regulations 2004 http://www.hmso.gov.uk/legislation/scotland/ssi2004/20040520.htm

[3] Environmental Assessment (Scotland) Act 2005 http://www.legislation.gov.uk/asp/2005/15/contents and Environmental Impact Assessment (Scotland) Regulations 2011 http://www.legislation.gov.uk/ssi/2011/139/signature/made

[4] 2005/370/EC: Council Decision of 17 February 2005: "In particular, the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations." http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005D0370:EN:HTML

[5] See our 'Tipping the Scales' report: http://www.foe-scotland.org.uk/tippingthescales

Costs fall into two categories: your own costs, and the other sides should you lose, since the private law principle that the 'loser pays' has been applied to public interest cases in Scotland. The Scottish Government's position is that the availability of legal aid (to help with your own costs) and Protective Expense Orders (cost capping orders to limit your liability for the other sides' costs) ensure Aarhus compliance in terms of costs.

However, it is extremely rare for legal aid to be awarded in environmental cases due to Regulation 15 of the Civil Legal Aid Regulations (2002) which requires that if other people would be affected by the case, and therefore reasonably expected to help fund it, legal aid should not be awarded.[7] This has particularly adverse effect in environmental cases, as by their very nature, they tend to impact on more than one person. In fact, it would appear impossible to obtain legal aid on an environmental matter that was purely a public interest issue. Removal of Regulation 15 is essential for Aarhus compliance.

Only two protective expense orders have ever been issued in Scotland, and in each, the cap was set high (in McGinty at £30,000 in Walton at £40,000). Lord Gill in his 2009 review of the Scottish Civil Courts recommended codification of the rules of court on PEOs to help meet Aarhus requirements. The Government recently issued a consultation on their proposals for PEO rules, however they fall considerably short of compliance both in scope and design: the rules would not apply to all Aarhus cases; the presumed level of cap is set too high; and the inclusion of an automatic cross cap could leave individuals who take and win a public interest case considerably out of pocket for their trouble.[8]

We believe that the best way to ensure Aarhus compliance in this area is to introduce 'One Way Cost Shifting', where unsuccessful litigants should not be ordered to pay the costs of any other party unless they had acted unreasonably taking the case. This is the cost regime recommended by senior English judges, who point to inherent shortcomings with cost capping orders.[9] A 'permission' stage that had to be passed at a very early point in the proceedings could determine whether the case is a genuine Aarhus case, and filter out unmeritorious claims, therefore ensuring that public money is only used in cases of real concern.[10]

Standing

Aarhus introduces extremely broad standing criteria, effectively requiring that concerned members of the public and NGOs with an environmental interest should have the right to take cases that fall under the Convention to court.[11]

This is a far cry from the recent status quo in Scotland, where individuals have been required to satisfy an archaic technicality 'title and interest' to have their case heard by the courts. In practical terms this has been interpreted as requiring a demonstrable private – usually property – interest, making it almost impossible to take a pubic interest case.

This has led to the perverse situation where individuals, communities and NGOs were forced to demonstrate some kind of private interest in order to take a public interest case, when ultimately public interest litigation plays a vital part in holding authorities to account in a healthy, functioning democracy.

However, following our intervention in a case at the UK Supreme Court, there has been a crucial breakthrough on the issue of standing. Lord Reed and Lord Hope expressed the opinion that 'title and interest' had "no place" in public interest litigation in Scotland, and that a broad new 'sufficient interest' test must be introduced. The ruling was damning about the negative effect that years of judge-made law has had on the development of public law in Scotland, and effectively calls into question the basic premise of applying private law principles in public law cases.[12]

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[7] For a fuller examination of the problem with legal aid see Frances McCartney, 'Public interest and legal aid' in Scots Law Times: Issue 32: 15.10.2010

[8] The consultation proposes rules only for cases falling under the Public Participation Directive, not the Aarhus Convention as a whole, while the Ministry of Justice is consulting on equivalent rules for all Aarhus cases in England and Wales; the proposed £5,000 cap is arguably too high for non wealthy individuals and communities; the proposed cross cap is set at £30,000 meaning a case where the petitioners costs were £80,000 (as in Marco McGinty's recent judicial review) would see a litigant forking out up to £50,000 to successfully hold the Government to account for poor decision making.

[9] In spite of the fact that the English Protective Cost Order regime is considerably more advanced than Scottish PEOs

[10] Lord Sullivan in Ensuring access to environmental justice in England and Wales, Update Report (2010) and Lord Jackson in Review of Civil Litigation Costs: Final Report (2010)

[11] Aarhus Convention, Article 9(2)

[12] AXA Paragraph 171, http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0108_Judgment.pdf "rooted in private law concepts which are not relevant in the context of applications to the supervisory jurisdiction, and that…[this]…has had a

Substantive review

Finally, Aarhus also requires that both the "substantive and procedural legality of any decision, act or omission" relating to environmental matters can be reviewed by the courts.[13] In other words, the courts must be allowed to examine the merits of a case, rather than just whether due process was followed.

However, the Courts are traditionally reluctant to comment on the substance of cases, and the Scottish Government has done nothing to tackle the issue of substantive review. In fact, the Government has stated that in principle it objection to substantive review as a function of the courts.[14]

Arguably a lack of specialism in environmental public law makes it difficult to implement substantive review in the current system, therefore the best way of achieving compliance in this respect is to introduce specialist environmental courts or tribunals, perhaps modelled on the existing Scottish Land Court. The Government's manifesto commitment to look into environmental courts / tribunals is the perfect opportunity to open this debate.[15]

Recommendations

We recognize that the Government is taking forward the Gill Review reforms through its 'Making Justice Work' Programme, and that they see Aarhus compliance in this context. However, we feel that Aarhus compliance needs particular attention because we are currently in breach of international law. We are keen for the Government to open up a focused debate on achieving access to environmental justice in the broadest sense, in Scotland.

We are calling on the Government to:

1. Ensure that access to environmental justice is free or inexpensive by:
- introducing one-way cost shifting so that individuals, communities and NGOs taking an environmental case or other public law case can be confident that they will not be liable for the other side's costs.
- removing the test for legal aid that effectively bars individuals from accessing aid if their case affects more than one person, and improving access to legal aid for community groups in environmental cases.

2. Introduce a 'permission' or 'leave' stage (or improve First Orders procedure) for judicial review to ensure that questions as to whether a case has merit; whether the petitioner has standing; and whether the petitioner should be liable for costs, are established at the earliest possible point (and without risk of high costs to any party in getting to that stage). This will ensure that 'frivolous' cases and timewasters are filtered out at the earliest point, saving the courts time and public money.

3. Take measures to ensure that both the procedural and substantive legality – including the merits – of a decision can be reviewed. This could include:
- Revision of judicial review to incorporate procedural and substantive legality in Aarhus Cases – including the merits of a case – and provide for appropriate remedy;
- Setting up an Environmental Court or Tribunal to simplify environmental appeals and the regulatory system while increasing specialisation in environmental law.

4. Improve public legal education, and make the court system more user friendly, so that people learn to recognise problems and injustices that may have a legal solution, and aren't put off by an archaic system.

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damaging effect on the development of public law in Scotland. This unsatisfactory situation should not be allowed to persist. The time has also come when the courts should cease to use the inappropriate terminology of title and interest in relation to such applications, and should refer instead to standing, based upon a sufficient interest."

[13] Article 9(2) http://www.unece.org/env/pp/documents/cep43e.pdf

[14] In Ministerial correspondence dated December 2011 (hard copies availables)

[15] SNP Manifesto 2011, page 39 at http://votesnp.com/campaigns/SNP_Manifesto_2011_lowRes.pdf