Friends of the Earth Scotland

Environmental Law Centre Scotland

Friends of the Earth Scotland (FoES) and the Environmental Law Centre Scotland (ELCS) briefing on the excessive costs of challenging environmental decisions in Scottish Courts

December 2012

Introduction

1. In Scotland, as throughout the UK, raising challenges to environmental decisions will generally be by way of judicial review or statutory review. There is no doubt that judicial review is very expensive, and prohibitively so for the ordinary person. In *Uprichard v Fife Council*[1], the petitioner faces a total bill of £173,000. In *McGinty v Scottish Ministers*[2], despite being awarded the first ever Protective Expense Order (PEO) in Scotland, the estimation of Mr McGinty's costs was around £80,000 if he was to lose.

2. The Government's moves to tackle the excessive cost of environmental litigation are limited to codification of rules of court for PEOs[3]; however, issues with accessing legal aid and increases in court fees mean these rules are unlikely to significantly increase access to justice in environmental cases.

Protective Expense Orders

3. Competency to grant PEOs was recognized by the Court of Session in 2006[4] however it was not until 2010 that the first such order was made, in *McGinty*.[5] The cap was set apparently arbitrarily at £30,000, in spite of the fact that the petitioner was unemployed and without private means. A year later, the second PEO issued by the Court of Session, in *Roadsense and William Walton v Scottish Ministers*[6], was set at exactly the amount Roadsense estimated they could raise from existing funds and pledged support for legal proceedings, minus their own estimated fees (which were substantially reduced thanks to *pro bono* work by senior counsel). Effectively, the PEO limited the petitioners' total potential outgoings from a maximum of £90,000 to a still pricey £70,000.

4. In ruling on the respondent's motion for expenses in *Uprichard*, the Inner House noted that Ms Uprichard had not taken the opportunity to apply to the court for a PEO, and found that this weighed against her.[7] However, at the time Ms Uprichard began her legal action in 2009, while competency had been recognized, the Scottish Courts had not yet made an award of a PEO. In awarding costs against Ms Uprichard in 2011, the then Lord Justice Clerk, Lord Gill noted:

"*It would have been open to the applicant to seek a protective expenses order*"[8], but also, "*Those who challenge decisions of this nature enter into litigation with their eyes open. They have to expect that if they should fail, the normal consequence will be that they will be liable in expenses. It would be reckless for a litigant to embark on a case of this kind in the hope that if he should fail, the court would relieve him of his liability for the expenses that he caused thereby. It is significant that the applicant was not deterred from raising this application by the possible extent of her liability should she fail*."[9]

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[1] http://www.scotcourts.gov.uk/opinions/2011CSIH59.html
[2] http://www.scotcourts.gov.uk/opinions/2011CSOH163.html
[3] The Government has indicated that the Taylor Review will see to the broader requirements of Aarhus compliance on costs. However, we met with the Secretary to the Taylor Review in February 2012, and we note that the Taylor Review remit does not specifically extend to examining the obligations of the Scottish Government regarding expenses and funding of environmental litigation under the Aarhus Convention.
[4] *McArthur v Lord Advocate* 2006 SLT 170
[5] Marco McGinty v Scottish Ministers [2010] CSOH 5 http://www.scotcourts.gov.uk/opinions/2010csoh5.html
[6] http://www.scotcourts.gov.uk/opinions/2011csoh10.html
[7] Para 22 http://www.scotcourts.gov.uk/opinions/2011CSIH77.html
[8] Ibid, para 18
[9] Ibid, para 14

5. A third PEO was issued in December 2012 to Sustainable Shetland in a judicial review seeking to overturn Scottish Ministers decision to consent an offshore windfarm. Lord Doherty granted the petitioners a PEO of £5,000 – the lowest to date – and also imposed a cross cap of £30,000 on the respondents liability.[10] This order reflects the proposals put forward by the Scottish Government to the Court of Session Rules Council for codification of rules of court on PEOs.

Codification of rules of court for PEOs

6. Codification of the rules of court on PEOs was recommended by the same Lord Gill in his 2009 Review of the Scottish Civil Courts. The review linked PEOs and Aarhus compliance.[11] The Scottish Government accepted this recommendation. However proposals for new rules are limited to judicial and statutory review cases falling under the Public Participation Directive (unlike in England, Wales and Northern Ireland where rules are to apply to all environmental judicial reviews.) The Government has been slow to introduce the new rules: a consultation was published in January 2012; proposals put to the Court of Session Rules Council in September 2012; and the Rules Council are expected to agree draft rules at their next meeting in January 2013, where a decision will be taken as to whether to consult on the rules or to make them into law.[12]

7. While the current proposals are an improvement on those outlined in the earlier consultation paper[13] – which simply replicated the Ministry of Justice's proposals for rules of court in England and Wales, with no regard for the differences in cost regimes between jurisdictions, such as availability of legal aid – we still have a number of concerns with them. Some of our concerns may be clarified when the proposals are transposed into rules by the Rules Council, although it is not clear whether it will be possible to influence the rules at that point, as the Council has not committed to a consultation.

8. The proposals allow environmental NGOs and individuals to apply for an order at the beginning of proceedings in the Court of Session, in cases falling under the PPD only, to limit their liability for the respondent's costs to £5,000.[14] An award of a PEO will also automatically limit the respondent's liability for the petitioner's costs to £30,000. While Friends of the Earth Scotland and others object to the level of the £5,000 cap and the principle of an automatic cross cap, we are encouraged to see that petitioners will be able to apply to lower the £5,000 cap and increase the cross cap.

9. However, while the proposals do not enable the respondents to challenge the level of either cap, nor do they expressly forbid it. Therefore, it is not clear as to whether respondents would be permitted to challenge a petitioner's application to alter the level of either cap. While it is encouraging that respondents are not able to require petitioners to disclose their means, it is not clear from the proposals whether the Court is able to require such disclosure, and whether it has any discretion in granting a PEO based on a petitioners means.

10. The proposals allow for PEOs to be awarded in appeals, but the cost limits are left to judicial discretion, taking into account decisions on costs in the lower court. There are relatively low numbers of environmental cases, and the tendency has been for such cases to be appealed. This might be because cases raised so far tend to raise important points of principle for third parties (such as availability of remedies) not yet litigated in Scotland. Cases might also tend to be appealed due to the absence of any degree of specialist within the judiciary for dealing with environmental cases, or because they are challenges to the largest/most controversial developments in Scotland. We anticipate that cases raised in the immediate future are likely to continue the trend of being appealed. We also think it likely that if the public authority or developer is successful at first instance, they are likely to appeal. Therefore we are concerned with the way in which the proposals for PEOs deal with appeals.

Legal Aid

11. Recent reforms in Scotland mean that more adults now qualify for legal aid purely in financial terms,[15] with the Government claiming the system to be amongst the most generous in the world.[16] Arguably

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[10] see http://www.shetlandtimes.co.uk/2012/12/10/windfarm-campaigners-welcome-cost-capping-ruling ruling not available yet on Scottish Courts website
[11] Lord Gill, 2009, Review of the Scottish Civil Courts Vol 2, chapter 12, para 59-73
[12] The Court of Session passes rules of court as an Act of Seredunt
[13] Legal Challenges to Decisions Under the Public Participation Directive 2003/35/EC, para 36, http://www.scotland.gov.uk/Publications/2012/01/09123750/0
[14] A summary of the current proposals is at http://www.scotland.gov.uk/Publications/2012/10/6740/5
[15] http://www.slab.org.uk/getting_legal_help/Extended_eligibility.html
[16] Letter from the Cabinet Secretary for Environment and Rural Affairs to Bill Wilson MSP, 5/08/10

though, the funding provided to legal practitioners to carry out such legal aid work is in many cases so low as to render this generous provision for individuals meaningless; lawyers are not obliged to take legal aid work, therefore if an individual is granted legal aid they need to find a lawyer who is willing to take the case – and give it the detailed attention it requires – for the often limited financing on offer.

12. However, the real problem with legal aid in relation to our obligations under the Aarhus Convention is that the system has granted very few awards of legal aid for environmental cases and effectively prohibits aid for public interest cases, which most Aarhus challenges are. When deciding whether to grant legal aid, under Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002,[17] the Scottish Legal Aid Board (SLAB) looks at whether 'other persons' might have a joint interest with the applicant. If this is found to be the case SLAB must not grant legal aid if it would be reasonable for those other persons to help fund the case. Further, the test states that the applicant must be 'seriously prejudiced in his or her own right' without legal aid, in order to qualify.[18]

13. 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. This has a particularly adverse effect in relation to Aarhus cases; environmental issues by their very nature tend to affect a large number of people. In fact, it would appear impossible to obtain legal aid on an environmental matter that was purely a public interest issue. Moreover, in contrast to the situation in England and Wales where the system allows for joint funding of a case, community groups cannot apply for legal aid in Scotland.

14. In correspondence with the Scottish Parliament's Public Petitions Committee (regarding FoES petition on Aarhus compliance), SLAB indicated that in a three-year period (2008-2011) only two environmental cases where Regulation 15 was considered had been granted legal aid. [19] In the same period, three cases had been refused Legal Aid citing Regulation 15, and all were environmental cases. Correspondence with SLAB in April 2012 confirmed that two of the three cases refused were later granted on appeal, and by that point a further award of Legal Aid had been granted in a case where Regulation 15 was relevant, amounting to a total of 5 cases granted over a 4 year period. We consider that it is likely most of these cases had a strong private interest. To the best of our knowledge, only one of these grants was in a public interest matter, and this was when the case was on appeal, at which point SLAB somewhat arbitrarily decided that Regulation 15 did not apply to the appeal proceedings. It is not clear on what basis this decision was made, but it may be cited as an example of legal aid being available for public interest cases.

15. A recent Freedom of Information request confirmed that in the last 5 years the Scottish Government had not had any discussions with the Scottish Legal Aid Board on the impact of Regulation 15 in environmental cases. We consider that removal of Regulation 15 is essential for Aarhus – and Public Participation Directive – compliance.

Court Fees

16. In a move that has attracted strong opposition,[20] the Scottish Government is in the process of implementing a policy of full cost recovery in court fees. Fee proposals for the Court of Session will have a serious impact on parties seeking access to justice under the Aarhus Convention, because the complexity of environmental cases and a lack of specialization in the judiciary means environmental judicial reviews tend to require lengthy hearings, and fees include an hourly rate for time in court.

17. Fees for the Court of Session are already very expensive – prohibitively so for the ordinary person – particularly in relation to the time spent in court in judicial review cases. For example in *McGinty* the Outer House hearing took 18 hours, which we estimate would incur costs of approximately £1,620 for the hearing alone; in *Walton* hearings in the Outer House lasted for 22 hours, and in the Inner House for 18 hours amounting in our estimate to £5,580. Under the new regime, McGinty's costs for time spent in court alone would double to £3,240 in 2014; and Walton's more than double to £12,060.

18. Because of the restrictions on legal aid in environmental cases, it follows that such cases are highly

[17] http://www.legislation.gov.uk/ssi/2002/494/regulation/15/made
[18] For a more detailed dissection see Frances McCartney, 'Public interest and legal aid' Scots Law Times, Issue 32: 15-10-2010
[19] http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/40063.aspx
[20] From, amonst others, Faculty of Advocates, the Law Society of Scotland, Consumer Focus Scotland and the Scottish Trade Union Congress

unlikely to secure an exemption from court fees on the basis of legal aid.[21]

Other issues

19. Given the limitations of legal aid in environmental cases, we are concerned that there is a presumption on the part of the Government that litigants are either able to fund their own solicitors or that solicitors and counsel are prepared to work on a speculative basis. Judicial reviews being brought by community groups, NGOs or individuals are relatively rare in Scotland. There may be a number of reasons for that such as costs, knowledge and availability of legal advice. By and large Scottish environmental NGOs do not have in-house solicitors, and this hinders the expertise and development of environmental law in Scotland.

20. Most environmental challenges are brought by way of judicial review proceedings. We consider that changes could be made to procedure across all types of judicial review to make it a speedier and more cost-effective procedure. In particular, there could be case management directions issued in advance of the First Hearing, with the Respondent authority asked to lodge detailed answers in advance. Preliminary issues such as title and interest (now referred to as sufficient interest[22]) and whether a PEO is to be granted, should be raised and ruled on if possible at the initial hearing. The same judge should be assigned to the case throughout, with orders for written submissions and timetabling of cases.

21. Much of the delay – and associated costs – in judicial review cases relate to the time taken to issue decisions, or time between different court days to hear the case. Insufficient attention has been paid to these matters, and the potential for changing to judicial review procedure to deal with the cost of taking this type of action.

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[21] The granting of a legal aid certificate (together with some other exemptions in terms of receipt of certain benefits) give an exemption from the payment of a court fee

[22] See *Axa v Lord Advocate and others* [2011] UKSC 46, and in particular the judgements of Lord Hope and Lord Reed as to the proper test for standing in judicial review cases