COALITION FOR ACCESS TO JUSTICE FOR THE ENVIRONMENT

Legal Challenges to Decisions by Public Authorities under the Public Participation Directive 2003/35/EC:
A Consultation

Summary

- Aarhus claims are inherently in the public interest. The petitioner rarely has any personal financial interest in the outcome of the case and does not stand to profit from winning. Accordingly, it is inappropriate to maintain a system that seeks to put a commercial developer on the same footing as an environmental petitioner. Aarhus cases merit special consideration.

- The scope of the proposals should be extended beyond judicial reviews and statutory reviews within the scope of the Public Participation Directive (PPD) to include all environmental judicial reviews and statutory challenges. As the Convention also encompasses private law environmental cases the government must make separate provision for them.

- A cap of £5,000 on the petitioner's liability for adverse costs is too high and should be reduced to a maximum of £1,000.

- Neither the £5,000 cap, nor the £30,000 cross-cap (if the latter is retained), should be subject to challenge on the basis of information in the public domain. This eliminates certainty and increases the likelihood of disproportionate satellite litigation.

- There should be no explicit cross-cap. Instead, successful petitioner lawyers should be entitled to recover their fees at judicial rates on taxation or by agreement.

- The corollary of the above is that the expenses regime would be simple and certain.

- A decision as to whether a Protective Expenses Order (PEO) will be granted must be made at the earliest opportunity, i.e. at First Orders. There should be no costs in favour of third parties and an absolute limit (lower than or equal to the proposed cap) on what the respondent can recover.

- The level of the cap should not be increased if there is one (or even two) appeal(s). If there is a cross-cap (aimed to represent a reasonable level for the petitioner's costs), this would need to increase accordingly to cover the work involved in the appeal(s).

- The PEO should include a provision to the effect that there will be no order for expenses in favour of an interested party.

- The 'chilling effect' of uncertainty regarding potential liability for damages in order to obtain interim interdict or other interim orders is linked to the question of prohibitive expense. The two must be viewed together when considering compliance with the Aarhus Convention.

Introduction

1. This response is supported by members of the Coalition for Access to Justice for the Environment (CAJE) represented in Scotland, including WWF Scotland, Friends of the Earth Scotland, The RSPB Scotland and the Environmental Law Foundation. This response is also supported by Buglife – The Invertebrate Conservation Trust. We have had sight of, and endorse, the response submitted separately by Friends of the Earth Scotland and the Environmental Law Centre Scotland.

2. CAJE's goal is to ensure that access to justice in environmental matters is fair, equitable and not prohibitively expensive; that it is genuinely accessible to all; and that the justice system, so far as possible, works to protect the environment in accordance with the law.

3. We recognise the UK Government retains ultimate responsibility for Scottish compliance with EU law and the Aarhus Convention, however, we welcome the opportunity to respond to the consultation paper issued by the Scottish Government in January 2012. We also welcome the UK's commitment to address the EU infraction proceedings and the findings of the Aarhus Convention Compliance Committee in Communications C23, C27 and C33. We hope the UK will continue to move swiftly to ensure full compliance with the Convention and EU law at the earliest opportunity.

Purpose of the consultation

4. Firstly, while we welcome the Scottish Government's decision to consult on this issue, it is unfortunate that these proposals are confined to judicial reviews and statutory challenges covered by the EC Public Participation Directive (2003/35/EC) (i.e. effectively cases concerning Environmental Impact Assessment (EIA) and Integrated Pollution prevention and Control (IPPC)). As such, these proposals do not have the capacity to make the UK compliant with Article 9(4) of the Aarhus Convention, which requires review procedures for ***all*** environmental cases, including injunctive relief, to be: "*fair, equitable, timely and not prohibitively expensive*".

5. The consultation paper states that the Scottish Government intends to address the question of compliance with the Aarhus Convention in the wider scope of the detailed review of the cost and funding of litigation in Scotland (under the leadership of Sheriff Principal Taylor) and after further consideration of Lord Gill's recommendations[1]. However, it is our understanding (following a meeting between Friends of the Earth Scotland, the Environmental Law Centre Scotland and the Secretary to the Taylor review on 9th February and subsequent correspondence) that the Taylor Review remit does not specifically extend to examining the obligations of the Scottish Government regarding expenses and the funding of environmental litigation under the Aarhus Convention.

6. There is clearly some confusion on the part of the Government as to how the question of Aarhus compliance will be addressed. This is regrettable given that it is now beyond doubt that the UK is in breach of Article 9(4) of the Aarhus Convention and the 'not prohibitively expensive' requirement in the PPD is taken directly from Article 9(4) of the Aarhus Convention (and thus measures to bring the Scottish Government into compliance with the PPD and the Convention would be identical). It strikes us that it would be prudent for these issues to be addressed concurrently, not least to

[1] Consultation paper, paragraphs 25-29

prevent further Communications being addressed to the Aarhus Convention Compliance Committee.

7. We note that PEOs should also be available for 'mixed' cases. i.e. where the application concerns matters falling within the scope of the PPD, but also raises other matters outwith their scope/ where the claim is grounded on whether the public participation provisions of the PPD apply, and turns on whether those provisions apply or not[2]. However, we note there have been considerable practical problems on the ground in Ireland where a mixed rule already applies. Ireland has one general rule on costs for judicial reviews concerning EIA, IPPC and Strategic Environmental Assessment (SEA) (each side bears its own costs) and another rule for all other environmental judicial reviews (the loser pays). The result is confusion as to which rule applies in 'mixed' cases (e.g. a case that raises EIA and Habitats or Birds Directive issues), and a stifling of the existing model for most public interest environmental litigation. The impecunious claimant with a lawyer acting on a 'no win, no fee' basis no longer works in EIA, SEA and IPPC cases because the 'loser pays' rule no longer applies. Thus, while the existing model was by no means perfect, it at least resulted in *some* public interest litigation[3]**.**

8. We are also of the view that the UK will also need to make provision for private civil law cases if it is to comply with the findings of the Aarhus Convention Compliance Committee in respect of Communication C23.

9. Finally, we make these observations on the assumption that the Scottish Government has considered, and rejected, the possibility of introducing Qualified One-Way Costs Shifting (QuOCS) for environmental claims. We remain of the view that the form of QuOCS advocated in 'Sullivan II[4] (which essentially promotes one-way costs-shifting unless the petitioner has behaved unreasonably) remains the optimal mechanism for ensuring compliance with EU law and the provisions of Article 9(4) of the Convention concerning 'prohibitive expense' and are not aware of any particular issues that would mean that those recommendations should not equally apply in Scotland.

Q. Are you aware of specific instances where a party has been deterred from bringing a case within the scope of the PPD due to concerns over potential liability for adverse costs? If so, please provide specific details including the matter you wished to challenge.

10. We refer the Scottish Government to a paper presented at a CAJE event in 2011 '***Aarhus and Access Rights: the New Landscape***[5]', which discussed the extent to which practitioners and NGOs are aware of good arguable cases that have not gone ahead because of concerns about costs or exposure to costs. While many of the issues raised apply throughout the UK, we note key differences in Scotland. For example, Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 requires that if other people would be affected by the case, and might therefore be reasonably expected to help fund it, legal aid should not be awarded. It also appears to require that the issue to be litigated causes prejudice to the individual. These restrictions have a particularly adverse effect in public interest environmental cases, which may – by their very nature - affect large numbers of individuals. We note that Mr McGinty was refused legal aid under this provision for his challenge regarding the NPF2 for Scotland and concerning the application of the SEA Directive. Similarly, we note that

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2 Consultation paper, paragraph 30

3 Andrew Jackson, Friends of the Irish Environment, *pers comm*

4 Working Group on Access to Environmental Justice (August 2010) *Ensuring access to environmental justice in England and Wales – Update Report.* Available at http://scotland.wwf.org.uk/wwf_articles.cfm?unewsid=4228

5 Available at: http://www.wwf.org.uk/wwf_articles.cfm?unewsid=5383

community groups cannot apply for legal aid in Scotland, in contrast to the situation in England and Wales.

11. While based on a limited sample, the paper concludes that over three quarters (76%) of leading environmental practitioners and NGOs are aware of good, arguable cases that have not proceeded because of concerns about costs. One solicitor said that he could point to at least 10 cases in his first year of practice where clients were "*too scared of incurring huge costs – even with a Protective Costs Order*". One barrister reported that he had advised many smaller environmental NGOs who have not litigated for fear of adverse costs or the costs involved in seeking a PCO where it is opposed, including in cases concerning air quality and transport issues. Friends of the Earth reported that it always advises that costs can be managed but that it "*loses count of the number of community groups who mention to us that they or others thought that they may have grounds for challenge, or were advised they did, but decided not to go ahead because they were put off by the costs risk*"[6].

12. Members of CAJE have also continued to conduct research on this topic in recent years. We refer the Scottish Government to a report by the Environmental Law Foundation in association with BRASS, which refers to a number of potential cases that were halted by cost considerations. This research identified 210 potential JR cases between 2005 and 2009, of which 97 were judged to have a reasonable prospect of proceeding at JR. Of these, over half (54 or 56%) did not proceed explicitly for reasons of cost[7].

The special nature of Aarhus claims

13. Before addressing the remaining questions in the consultation paper in detail, we wish to make a general remark about the special nature of environmental claims. Aarhus cases are inherently in the public interest. The petitioner rarely has any personal financial interest in the outcome of the case and does not stand to profit from winning – it is society as a whole that stands to benefit (or lose) from the outcome of an environmental case, be that a clarification on a point of law, the protection of biodiversity or adherence to environmental standards.

14. Accordingly, it is inappropriate to maintain a system that seeks to put a commercial developer on the same footing as an environmental petitioner. The Aarhus Convention requires contracting Parties to distinguish between normal commercial and policy considerations and those of environmental interest. Put simply, Aarhus claims require a wholly different approach.

15. For this reason, we support a regime tailored specifically for environmental cases.

16. Whilst potentially representing a contribution towards improving access to environmental justice, the proposals do not recognise the unique nature of such claims. Furthermore, there is a fundamental flaw in the basic premise on which the proposals are made concerning the 'purpose' of the cross-cap. We discuss this issue in more detail below.

Making an Application

17. The consultation paper states that a PEO will not be made automatically, but must be applied for and that the costs of the application will not be payable by either party if

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6 CAJE conference paper, pages 17-18

7 Environmental Law Foundation and The Centre for Business Relationships, Accountability, Sustainability & Society (BRASS) (2009) *Costs Barriers to Environmental Justice,* section 6. Available from the ELF

the PEO is applied for with default terms and is made in those terms (i.e. there should be no additional costs element for a 'default' application and order[8]). The consultation paper does not, however, confirm that the application need not be supported by grounds and evidence unless an order other than a default order is sought (as is proposed in England and Wales and Northern Ireland).

18. The CAJE conference paper reported that 72% of respondents to a recent questionnaire on access to environmental justice describe the current PCO regime as "*time consuming, random, complex, costly, inconsistent and ineffective*". One barrister pointed out that the process of applying for a PCO currently invites repeated exchanges of evidence and submissions – in one case alone, 10 separate witness statements referred to the PCO application[9]. The proposal to streamline the process and remove the requirement to produce grounds and evidence in Northern Ireland and England and Wales is welcome and we urge the Scottish Government to give this issue similar consideration.

19. In terms of timing, the consultation paper suggests that a PEO can be applied for at any stage in the proceedings but should be applied for timeously to provide certainty for all parties. We would prefer to see a clear and absolute rule on costs **pre-permission**, i.e. no costs in favour of interested parties and an absolute limit (lower than or equal to the proposed cap) on what the respondent can recover.

The level of the cap

Q. 3 Should the limit be set at £5,000?
Q.4 Should the figure be higher or lower than £5,000?

20. The paper states that the PEO will limit the liability of the petitioner to pay the respondent's costs to £5,000[10]. However, it also raises the possibility that this could be a presumptive limit, and that it would be capable of being lowered (but not raised) where the parties can show good cause[11]. We return to the issue of a presumptive limit, as opposed to an absolute limit, in due course.

21. The consultation paper provides no rationale for the £5,000 cap (other than to support it on the basis that this is what is proposed in England and Wales and Northern Ireland). Consultation papers in England and Wales and Northern Ireland refer to the case of *Garner*[12], in which the Court of Appeal awarded a PCO at £5,000[13]. It is also suggested later in these papers that this sum would not present an insuperable barrier to proceeding, i.e. that a figure of £5,000 would not be 'prohibitively expensive' for most claimants/applicants.

22. However, we would argue that this sum is still too high. It is certainly not consistent with the objective approach proposed in 'Sullivan I'[14] and 'Sullivan II' of focusing on the 'ordinary person'.

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8 Consultation paper, paragraph 30

9 Day, C. (2011) *Tackling Barriers to environmental justice – Access to environmental justice in England and Wales: a decade of leading a horse to water*. Attached as Annex I and available at http://www.wwf.org.uk/wwf_articles.cfm?unewsid=5383

10 Consultation paper, paragraph 36

11 Consultation paper, paragraph 33

12 *R (Garner) v Elmbridge Borough Council* [2011] 1 Costs L.R. 48 (8 September 2010)

13 It should, however, be noted that in this case the Court of Appeal assumed the figure of £5,000 would be shared between three petitioners and not incurred solely by Mr Garner

14 Working Group on Access to Environmental Justice (May 2008) *Ensuring access to environmental justice in England and Wales* ("Sullivan I"). Available at http://www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf

23. In a Scottish context, based on the experience of the Environmental Law Centre Scotland, the sum of £5,000 would be difficult, if not impossible, for many community groups to find - let alone individuals. We are concerned with the presumption that litigants are either able to fund their own solicitors or that solicitors and counsel are prepared to work on a speculative, or no-win no-fee, basis. Our understanding is that this is not the case in Scotland. In other words, even if the cap of £5,000 is appropriate for England & Wales (and we consider it is not) it is not appropriate in Scotland. In fact, in evidence to the Aarhus Compliance Committee, the UK noted that Protective Cost Orders could be awarded for as little as £1,000: we consider that this is the maximum a presumed limit on PEOs should be set at.

24. Evidence suggests that deprived communities bear the brunt of poor environmental decision making, with people living in deprived areas in Scotland suffering disproportionately from industrial pollution, poor water and air quality, therefore such a limit would disproportionately impact on these communities. Should an individual or community lose the case they would additionally be liable for their own sides' fees that could amount to tens of thousands of pounds (under this regime, the Government considers at least £30,000 in addition to the PEO).

25. The level of the PEO cannot be viewed in isolation in relation to the question of what is 'prohibitively expensive'. The proposed limit is particularly unfair considering that legal aid is effectively denied to those seeking to pursue a public interest environmental case, and given the Government's proposals do nothing to tackle difficulties in obtaining legal aid for environmental cases, caused by Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, which, as discussed above, has a particularly adverse effect in environmental cases.

26. CAJE members report routinely spending a significant amount of time seeking costs protection when progressing cases. For example, it is Friends of the Earth England, Wales and Northern Ireland's (EWNI) experience - both from bringing cases in its own right and acting on behalf of individuals and community groups through its Rights & Justice Centre - that in any piece of litigation, 20-30% of the time spent on the case is taken up with dealing with the question of costs protection[15].

27. Put simply, unless the cap is relatively modest and fixed, vastly disproportionate satellite challenges will persist.

28. With the cap set at what may be interpreted as a relatively modest level, it has been noted that this may result in more legal challenges being brought to decisions to approve projects which have the potential to have a significant effect on the environment[16] (the 'floodgates' argument).

29. This issue was addressed in the Sullivan Reports. In Sullivan I, the Working Group assessed the likely increase in the number of cases from the proposals then made and concluded that they would be relatively modest[17]. While now somewhat out of date, the Sullivan Working Group approached the Administrative Court for data on environmental cases, but unfortunately environmental cases are not categorised separately. However, figures were available by date lodged in the categories below:

Category	**2002**	**2007**
Land	40	37
Pollution	4	6

[15] Gita Parihar (Head of the Rights & Justice Centre at Friends of the Earth EWNI), pers. comm..
[16] Consultation paper, paragraphs 22-24
[17] See Sullivan I (May 2008), Chapter 14, §§101-107

Town & Country Planning	119	112
Total	**163**	**155**

30. These figures confirm that environmental cases comprise a very small proportion of the total number of cases in England and Wales; around 20 cases per year of a total of 1.8 million[18]. The figures above also confirm that there has been no great change in the volume or make-up of cases during the five year period studied. Even a 100% increase in the number of cases taken would represent an insignificant increase.

31. These figures are supported by information provided by environmental NGOs routinely pursuing judicial review as a mechanism to challenge the decisions of public bodies. Information supplied to WWF in 2007 from Friends of the Earth (EWNI), Greenpeace and the Royal Society for the Protection of Birds on the number of JRs pursued between 1990 and 2007 shows that, at most, each organisation undertook an average of one environmental judicial review a year over the sample period, and in some years they brought no cases at all. We can confirm this trend has continued between 2007 and 2012.

32. In terms of any increase in the number of cases taken by environmental NGOs were the costs regime to be improved[19], CAJE anticipates that some of its members may take an additional case every 12-24 months. Pursuing judicial review is an inherently time-consuming activity and we would simply be unable to orchestrate many more cases than that. There may also be an appetite on the part of smaller, specialist NGOs currently prohibited by costs to bring a modest number of well-argued cases, however, in reality, this would be dependent upon them finding lawyers prepared to represent them in a field in which is notoriously high-risk and (if the present proposals are effected) and in which their costs when successful would be capped.

33. The Sullivan reports concluded that the permission requirement is a sufficient filter to weed out unmeritorious cases[20] and it is our view that First Orders in the Court of Session could be reformed to accommodate this. However, it is important that UK courts are adequately resourced (including through the deployment of specialist judges to deal with environmental cases) to ensure that sufficient consideration is given to permission applications.

The level of the cross-cap

Q.12 Should there be an automatic cross-cap?
Q.13 If introduced, should the cross-cap be set at £30,000?
Q.14 Should the figure be higher or lower than £30,000?

34. Paragraphs 37 and 38 of the consultation discuss the 'purpose' of the cross-cap as being "*to ensure the petitioner does not run up excessive costs*" and a "*reflection of the reasonable limit for bringing a judicial review or first instance statutory review, and that public resources are not unlimited*". However, this 'purpose' has no basis in the Convention – which concerns prohibitive expense from the *petitioners'* point of view. However sensible or desirable, the Convention says nothing about the need to control the financial outlays of the public body involved. Furthermore, by virtue of the permission filter, petitioners who then go on to lose their claims still had good arguable cases and, as such, it is right and proper that public bodies were required to respond to a challenge. We would therefore question the inclusion of a cross cap that

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18 The total of 1.8 million being the figure discussed in a meeting between CAJE and Steve Uttley and Alasdair Wallace from the Ministry of Justice on 8th December 2011

19 Consultation paper, paragraphs 22-24

20 See Sullivan I (paragraph 106) and Sullivan II (paragraph 37)

has no foundation in the Convention, particularly when it compounds the deleterious effect on the petitioner's position – as discussed below.

35. As to the level of the proposed cross-cap, the paper also gives no basis for the £30,000 figure. However, we infer from paragraph 41 of the consultation paper that it represents a pre-estimate of the petitioner's costs in an average judicial review. We would agree this is a reasonable approximation - providing the case is not unduly complex. We would however note that figures obtained from the Scottish Government as to their Advocates costs in statutory review cases have shown that this figure is easily exceeded in more complex cases.

36. However, as intimated above, the situation as regards the petitioner's costs liability is complicated by the fact that the £5,000 cap does not operate on its own – the effect of it must be viewed together with the petitioner's own costs, which will have to be paid to its own lawyers in the event that the case is lost.

37. Thus, in unsuccessful cases, either petitioners must pay their lawyers' costs (thus facing a total liability of £35,000 - which is clearly prohibitively expensive) or petitioner lawyers must work for free, which is wrong in principle, not consistent with the Convention or a sustainable long-term answer to access to environmental justice. It must be borne in mind that the Scottish bar and legal profession is relatively small, particularly in respect of those will the ability and expertise to take on environmental cases. It is less likely in those circumstances to expect a small pool of lawyers and Advocates to work on a speculative basis or on a *pro bono* basis.

38. Thus, when considering the underlying purpose of the proposals being consulted - whether they would meet the 'not prohibitively expensive' test under the PPD (and Article 9(4) of the Aarhus Convention) – the answer must clearly be "no". Even accepting that the proposed reasonable costs of bringing an environmental judicial review will rarely exceed £30,000, the Aarhus petitioner can expect to face a costs liability of approximately £35,000 to access the Courts. The government's proposals proceed upon a false premise that prohibitive expense relates only to adverse costs - not the petitioners' total costs liability.

39. We believe there are a number of difficulties in setting an explicit cross-cap of £30,000, including:

    (i) while this represents a reasonable figure in a 'average' case, there are clearly occasions when the case is large and/or complex and the costs incurred will be considerably higher. In this case, petitioners will find it difficult to obtain legal representation because petitioner lawyers will be dissuaded from embarking on cases in which they will not be able to recover the majority of their costs if successful. For example, in the 1999 Greenpeace 'offshore case[21]', which raised new and complex issues, their solicitor reports that Greenpeace was served with a costs estimate of £80,000 for one of the interested parties to simply to respond to the Acknowledgement of Service;

    (ii) recognising (a) the proposal in the LASPO Bill to abolish the recoverability of success fees and (b) that only the wealthiest petitioners would be able to pay their lawyers' success fees when a case is won - as a general estimate of costs - £30,000 provides no possibility for petitioner lawyers to act on a no win no fee basis and 'spread their risk'. Again, the corollary of this that petitioners will find it more difficult to secure appropriate legal representation; and

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21 *R v Secretary of State for Trade & Industry & Ors, ex parte Greenpeace Ltd* (2000) Env LR 221

(iii) an inherent difficulty in setting any figure is that procedures will tend to normalise towards it – thus, in cases that are short and/or straightforward the costs will gravitate upwards towards this sum. This is not in the public interest.

40. For these reasons, we believe that it is unhelpful to have an explicit cross-cap. We believe that a better alternative would be for petitioner lawyers to recover their costs at judicial rates on taxation, with the usual potential to apply to the courts for an uplift in judicial expenses. Assuming that petitioner's lawyers would be willing to take on speculative fee arrangements (which as noted above, does not happen often in practice in Scotland) this would provide a mechanism for them to spread their risk to a greater degree than they are currently able to and have the advantages of also: (a) not stifling more complex claims; or (b) over-inflating the cost of straight-forward claims.

41. We consider that the only circumstances in which the cap should not apply are when the petitioner has behaved unreasonably (under the present proposals, it would appear that parties can act as unreasonably or vexatiously as they wish and not be penalised). This qualification necessarily permits an element of judicial discretion, but on a much more tightly defined basis.

42. Where a petitioner has behaved unreasonably in the conduct of the litigation then s/he ought to be at risk of expenses and the usual discretion should apply such that the court will be able to have regard to a range of factors in deciding on the level of any liability for expenses. That is part of the discipline of ensuring not only that only properly arguable cases are allowed to proceed but also that such cases are conducted responsibly. Even in those Tribunals where the general rule is that each party has to bear its own costs, the Tribunal[22] invariably has power to order costs against a party that has behaved unreasonably. However, the threshold of unreasonable behaviour is a high one.

43. However, it would be important to ensure that a respondent or interested party who wishes to claim costs on the basis that there has been some unreasonable conduct has given proper and adequate notice to the petitioner of his intention to do so and the basis of his proposed claim.

Certainty and challenges to the cross-cap

Q.6 Should challenges to the £5,000 limit be allowed?
Q.7 Should it be possible to raise the level, if challenged?
Q.8 If considering challenges to the presumptive limit, should the court be restricted to considering financial information which is already in the public domain?
Q.9 Should challenges only be allowed against organisations or should challenges also be allowed against wealthy individuals?
Q.10 Should a party who unsuccessfully challenges a PEO be liable for costs sanctions?
Q.11 If introduced, what should those sanctions be?
Q.15 Should it be possible to challenge the cross-cap?
Q.16 On what basis should a challenge to a cross-cap be made?
Q.17 Should a party who unsuccessfully challenges a cross-cap be liable for costs sanctions?
Q.18 If introduced, what should those sanctions be?

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[22] See e.g. Rule 10(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and rules in relation to planning appeals

Q.19 If a cross cap were to be challenged, should the level of PEO be reviewed?

44. The consultation paper states that the proposals are designed to "*provide a level of certainty required by the PPD*"[23]. However, the paper provides for the possibility for the respondent to challenge the £5,000 cap (and, specifically, for there to be no costs capping because the petitioner is not in need of costs protection) where information on the petitioner's resources is publicly available[24]. Similarly, the paper suggests that the cross-cap should also be subject to a presumptive limit and would be capable of being displaced[25].

45. We would strongly argue against these proposals on the basis of both principle and practicality.

46. Firstly, the approach should be objective: Aarhus recognises the inherent public interest in environmental matters and environmental decisions being subject to public scrutiny and challenge and it recognises not just the *right* of members of the public to secure adequate protection of the environment but also their *duty* to do so.

47. In this respect, not only does the consultation paper fail to recognise the distinguishing role of NGOs in bringing public interest environmental cases, it actually discriminates against them as a result of the respondent's ability to argue for an increased cap by reference to published accounts[26]. Article 9(2) of the Convention makes explicit reference to the contribution made by NGOs in this regard. As such, we believe it incongruous that the consultation paper, unlike the Convention, fails to reflect and promote the important contribution made by NGOs to environmental protection. Specific reference to the role of NGOs with public interest environmental aims should be made.

48. Secondly, there are considerable practicalities implicit in these proposals. We assume that publicly available information could include land registry information (including whether, for example, an individual has a mortgage over their home). We are aware of a current case in England in which a local planning authority is challenging the level of the PCO obtained by the claimants on the basis of the value of their homes obtained via the Land Registry. There is no reason to assume this practice would not also happen in Scotland.

49. For charities and public limited companies, it would also encompass published accounts. While it may appear that large sums of money are available, in reality most environmental NGOs have relatively limited "free funds". Most funding is 'restricted' (i.e. allocated to projects – most usually as a result of grant in aid) and finding resources to fund legal challenges at short notice is difficult.

50. If a codified PEO regime maintains provision for respondents to challenge means on public information, petitioners will be required to rebut those arguments with personal information. In practice, therefore, we would continue to see intrusive time-consuming and costly satellite litigation, with the judiciary acting as means assessors in many Aarhus cases.

51. To conclude, we believe that requisite certainty can only be achieved by the application of an absolute cap in relation to the petitioner's exposure to the respondent's costs. Thus, respondents cannot argue that a particular petitioner can

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[23] Consultation paper, paragraph 32
[24] Consultation paper, paragraph 30
[25] Consultation paper, paragraph 37
[26] Consultation paper, paragraph 47

afford to pay more than £5,000 (or the lower figure proposed above) if unsuccessful – equally, petitioner lawyers cannot argue that an individual is of so little means that they should pay less.

52. As discussed above, removing the cross-cap would negate the opportunity for respondents to challenge the figure and avoids any misunderstanding that there should be a relationship between the cap and the cross-cap.

53. As such, the regime is simple and fair to everyone and all parties enjoy certainty as to costs liability at the outset in accordance with EU law[27]. In our view, to retain a presumptive limit in which 'exceptional' cases exist (no matter how limited they may be envisaged to be) maintains an inappropriate level of judicial discretion and scope for continuing satellite litigation.

Interested parties

54. The paper says nothing about the position of interested parties. It should be made clear that the PEO will include a provision to the effect that there will be no order for costs in favour of an interested party, with the possible exception of the (rare) situation where the respondent drops out but the interested party carries on in which case they should take the place of the respondent in relation to the £5,000 and £30,000 (or whatever they are). An alternative approach would be to state that the £5,000 (or whatever figure) represents the petitioner's maximum costs exposure in the proceedings in respect of all parties, to be allocated as appropriate by the court at a later stage.

Appeals

Q.20 Should the proposed rules apply to appeals?
Q.21 If the proposed rules are to apply to appeals, how should PEOs be treated?
Q.22 In appeal proceedings, should a higher presumptive limit be set?
Q.23 Should the court have discretion as to the limit of a PEO on appeal?
Q.24 If a presumptive limit should be set, what amount do you consider would be appropriate?

55. Given the aim to ensure that environmental litigation is not prohibitively expensive, it would be inappropriate for the level of the PEO to be increased if there is one (or even two) appeal(s). The cap represents the level above which litigating would be prohibitively expensive for a citizen or an organisation on an objective basis and while petitioners may be able to raise some additional resources as a result of fundraising activities, it is unlikely that the position with regard to prohibitive expense will change significantly within 12 months. In the interests of certainty, and to comply with the requirements of EU law, it should not be possible for respondents to apply to increase the level of the cap in relation to a subsequent appeal.

56. We maintain this should be the case regardless of who is bringing the appeal, in order to ensure equality of arms between petitioners and respondents and to avoid complicated scenarios where, for example, one party wins at first instance and the other at the Inner House or the Supreme Court.

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[27] Case C-427/07 *Commission v Ireland*

57. However, it should be noted that if the regime retains a cross-cap (aimed to represent a reasonable level for the petitioner's costs), the cross-cap would need to increase accordingly to cover the work involved in the appeal(s). Of course, this level of complexity would be unnecessary if there was simply no explicit cross-cap (as suggested above).

Omissions
Injunctive Relief

58. The paper omits key issues covered by the EU infraction proceedings and the findings of the Aarhus Convention Compliance Committee in Communication C33, including the need to ensure that injunctive relief is not prohibitively expensive. If it is impossible to expedite the proceedings so as to avoid the need for an interim interdict, in PPD/Aarhus cases there should be no possibility of obtaining damages if the case subsequently fails. Any potential liability for damages makes it prohibitively expensive to bring the case. Thus, we emphasise that the costs issues and the potential liability for damages must be viewed together when considering prohibitive expense and compliance with the PPD/Aarhus Convention.

59. We note the current consultation paper issued by the Department of the Justice in Northern Ireland[28] addresses the question of interim relief in the following terms:

> "1.11 We also ask questions about cross-undertakings in damages when an interim injunction is sought and the enforcement of these cross-undertakings. The following summarises the main proposals on cross-undertakings:
>
> - The rules are to apply to judicial review cases falling under the Aarhus Convention, including those matters covered by the Public Participation Directive. The rules are to apply in relation to all applicants in the same way, regardless of whether the applicant is a natural or legal person;
>
> - If the application meets the other criteria for granting an interim injunction, the court will grant an interim injunction without a cross-undertaking for damages where, if an injunction were not granted:
>
> - a final judgment in the matter would be impossible to enforce because the factual basis of the proceedings will have been eroded;
> - significant environmental damage would be caused; and
> - the applicant would be likely to discontinue proceedings or the application for an interim injunction if a cross-undertaking in damages was required and would not be acting unreasonably in so doing."

60. While we have some concerns about the proposals in respect of Northern Ireland, we commend the Department of Justice for recognising that interim relief is integral to the question of 'prohibitive expense' and for addressing the issue within its consultation paper. We urge the Scottish Government to consider the Department of

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[28] See paragraphs 3.7 and 4.18-4.33 of the Consultation paper available at: http://www.dojni.gov.uk/index/public-consultations/current-consultations/cost-protection-consultation-pdf-07.12.11.pdf

Justice's proposals and the recommendations in the Sullivan reports in respect of injunctive relief and to make appropriate recommendations.

VAT

61. The figures included in the consultation paper do not appear to include VAT. If they do not, the figure for the cross cap should be inflated by 20%. The PEO figure should not be inflated in the same way as it reflects the total amount which is not prohibitive, whereas the cross cap represents a reasonable figure for the petitioner's costs, plus VAT.

Q.25 Would (in a case within the scope of the PPD) the proposed rules on PEOs enable you to bring a judicial review, or statutory review, in the Court of Session?

62. No. The vast majority of citizens and civil society groups would be unwilling to embark on environmental judicial review with a potential costs liability of £35,000. Even if petitioner lawyers were able to work for free, those same groups would, in most case, still be dissuaded by a £5,000 adverse costs liability. This is compounded by the fact that respondents may be able to increase the £5,000 cap significantly on the basis of information in the public domain, thus resulting in continuing unhelpful and costly satellite litigation.

63. Similarly, wealthier environmental NGOs (which may have considered bringing a small number of additional cases) would be dissuaded by the fact that respondents could access their published accounts and argue that a much higher cap should be imposed. Most environmental NGOs have relatively limited "free funds" – most funding is restricted and finding resources to fund legal challenges at short notice is difficult. This is compounded by the fact that pursuing judicial reviews (as with any type of litigation) is enormously time-consuming and is rarely contemplated unless the issue is an organisational priority.

Conclusion

64. To conclude, the worst-case scenario possible under these proposals is that presumptive limits (as to the cap and a cross cap) will apply and respondents can challenge means on publicly available information. If this is what the Scottish Government adopts – and if current proposals are confined to JRs and statutory reviews falling within the scope of the PPD - it will do little, or nothing, to improve access to environmental justice for individuals and civil society groups in Scotland. It will therefore only be a matter of time before further Communications are submitted to the Aarhus Convention Compliance Committee and/or the European Commission – thus wasting additional time and public funding debating prohibitive expense all over again.

65. If the Scottish Government is intent on pursuing a codification of the PEO regime, we would propose the cap be reduced from £5,000 to £1,000 and that any cross cap is eliminated, thus enabling petitioner lawyers to recover their costs in successful cases at normal judicial rates on taxation. These figures should not be subject to challenge and confirmation that a case falls within the scope of the Convention should be made at the earliest opportunity. Proposals in relation to interim interdicts (currently being consulted on in Northern Ireland) on the basis discussed in the Sullivan reports should also be encompassed within the question of prohibitive expense.