



Access to Environmental Justice Briefing for Government and Parliamentarians

27 October 2011

Key barriers to access to justice in environmental matters

Aarhus demands broad and affordable access to justice¹, but the reality in Scotland is very different. It can be extremely expensive to undertake legal proceedings (environmental or not) in Scotland; with the costs of taking a judicial review together with liability for expenses running into tens of thousands of pounds. In addition, rules on standing – and the interpretation of these rules by the courts – are extremely restrictive, making it very difficult for individuals, communities and NGOs to demonstrate that they have ‘title and interest’ to take an environmental case. This briefing spells out the particular issues in Scotland in relation to ‘costs’ and ‘standing’ and recommends routes forward for Government and Parliamentarians.

Costs

Costs fall into two categories: your own costs, and the other sides should you lose, since in Scotland the ‘loser pays principle’ operates. The Scottish Government’s position is that legal aid (which provides for help with your own costs, and some protection against the other sides costs as an assisted person) and protective expense orders (which puts a cap on your liability for the other sides costs should you lose) 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. This has particularly adverse effect in environmental cases, as by their very nature, they tend to impact on more than one person.

With regards to the other sides costs, the Scottish Government’s position is that protective expenses orders ensure Aarhus compliance. Yet, 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). Consultation on the codification of rules of court on Protective Expense Orders has been promised for some time now, and specifically in response to PQ S4W-00947² (answered July 2011) the consultation was promised for ‘during the course of summer 2011’. However, the most recently available minutes of the meetings of the Court of Session Rules Council, which date from February, May and September 2011, indicate that there has been correspondence with the EC over the draft rules, and that the Commission has expressed unhappiness with them, seemingly partly in relation to the proposed level at which to set a cap and the degree of continued judicial discretion.³ Although the situation in England and Wales is far better than Scotland, the European Commission has referred the UK as a whole to the European Court of Justice. In response, the UK Ministry of Justice are consulting on reforming the costs system in environmental litigation.⁴ This may explain the delay to the Scottish consultation.

Standing

In Scotland, individuals are required to establish both title and interest to sue. In practical terms this has been interpreted as requiring a demonstrable private interest, for example, a proprietary interest in the decision. However, even individuals with an apparently clear private interest can struggle to establish it in a court of law, for example Mrs Forbes, whose home was at threat of compulsory purchase in relation to Donald Trump’s golf course development at Menie was found by the court not to have title and interest to sue. Marco McGinty’s recent case also demonstrates the difficulty with this test.

1 <http://ec.europa.eu/environment/aarhus/>

2 <http://www.scottish.parliament.uk/Apps2/MAQASearch/QAndMSearch.aspx?referencenumber=S4W-00947&isinanything=true&resultsperpage=10>

3 Minutes of meetings held on 14th February and 9th May 2011 available at http://www.scotcourts.gov.uk/session/rules_council.asp.

4 <http://www.justice.gov.uk/consultations/cost-protection-litigants.htm>

We had an important breakthrough recently, where following a written intervention from Friends of the Earth Scotland, the UK Supreme Court ruled that this issue around standing should not be allowed to continue. The judgement states that the Courts current interpretation of 'title and interest' is:

“rooted in private law concepts which are not relevant in the context of applications to the supervisory jurisdiction, and that...[this]...has had a 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.”⁵

The Scottish Government have indicated a willingness to introduce a new test of sufficient interest as a result of Lord Gill's recommendations. However, there is no indication of the timescale for this. Further, it is clear that in order to comply with Aarhus, the application of this test would have to be extremely broad.

Recommendations for Government

We recognise that the Government has a number of consultations out or in the pipeline on relevant issues, and that the Gill Review reforms are moving forward. However, we feel that compliance with the Aarhus Convention needs particular attention because we are currently in breach of our international obligations. We are keen for the Government to open up a focussed debate on achieving access to environmental justice in Scotland, looking at costs and clear, rigorous guidelines for the new 'sufficient interest' test on standing. The SNP manifesto commitment to consult on Environmental courts could offer an avenue in which to do this and we would be keen to engage with Government, perhaps through a joint consultation event, before the public consultation launch.

Recommendations for Parliament

Friends of the Earth Scotland lodged a petition with the Public Petitions Committee in December 2010. The petition, which is still live, has been taken forward by the Committee, and has led to various correspondence between ourselves, Government and the Committee.⁶ To move this forward and stimulate the debate, we would be keen to see the Equal Opportunities Committee take on our petition, and take forward an investigation into the barriers and potential solutions to access to environmental justice. We feel that the Equal Opportunities Committee would be well placed to take on this work because both a) the impacts of environmental injustice and b) the key barriers to accessing justice in environmental matters relate to the equal opportunities agenda.

- a) The environmental justice movement arose out of the civil rights movement in America, as a result of increasing recognition that poor ethnic minority communities were bearing the brunt of environmental damage and pollution. While the concept has evolved from 'environmental racism', environmental damage – whether caused by climate change, pollution or over-development – continues to affect the poor and disadvantaged disproportionately. This is true in present day Scotland: the 2005 Scottish Executive commissioned report 'Investigating environmental justice in Scotland' found that people living in deprived areas in Scotland suffered disproportionately from industrial pollution, poor water and air quality.⁷
- b) In attempting to access the courts to seek remedy for such, or potential injustices, poorer or deprived communities and individuals are again disadvantaged. Effectively the title and interest test bars individuals without a private property interest from taking cases. The extremely prohibitive costs involved bar non-wealthy individuals from taking cases.

In addition, if there is interest from the Justice Committee we would be keen for their involvement in any parliamentary inquiry.

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⁵ Paragraph 171, http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0108_Judgment.pdf

⁶ <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/40063.aspx>

⁷ http://www.staffs.ac.uk/schools/sciences/geography/links/IESR/projects_ej_scot.shtml