Environmental Law Centre Scotland

Friends of the Earth Scotland

Prohibitive Expense in Environmental Cases

Friends of the Earth Scotland and Environmental Law Centre Scotland briefing

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Introduction

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 £180,000. 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.

In response to legal action from the European Commission, the Government's moves to tackle the excessive cost of environmental litigation are limited to codification of rules of court for PEOs[3]; however, in light of issues with accessing legal aid and increases in court fees the new rules of court are of limited value.

Background to Protective Expense Orders

Protective Expenses Orders are one way of tackling the issue of prohibitive expense in environmental cases, as they can provide some certainty and clarity in relation to costs from an early stage.

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.

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

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[1] http://www.scotcourts.gov.uk/opinions/2011CSIH59.html
[2] http://www.scotcourts.gov.uk/opinions/2011CSOH163.html Mr McGinty's appeal of this ruling, including the level of costs, was heard at the Inner House in February 2013.
[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

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]

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

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 the 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.) This means the new rules would not have applied in Penny Uprichard's or Marco McGinty's cases even if in force at the time.

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 Court of Session finally laid the new rules before Parliament on 1 March;[12] and they came into force on 25 March 2013.

Aspects of the rules reflect 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.

However, we consider that the new rules in Scotland fall far considerably short of providing for the kind of assurance against prohibitive expense required by the PPD and the Aarhus Convention. A summary of the rules is available at http://www.scotland.gov.uk/Publications/2012/10/6740/2 and the rules are available at http://www.legislation.gov.uk/ssi/2013/81/made. Our key concerns are outlined below.

- **Level of Cap**

The presumptive cap of £5,000 for petitioners is in our opinion much too high. 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. Evidence suggests that deprived communities suffer from the brunt of poor environmental decision making, with people

[8] Ibid, para 18
[9] Ibid, para 14
[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

living in deprived areas in Scotland suffering disproportionately from industrial pollution, poor water and air quality, [14] therefore such a limit would disproportionately impact on these communities.

A recent ruling from the CJEU in *R Edwards v Environment Agency* confirms that the requirement for proceedings to be 'not prohibitively expensive' applies to all costs arising from engaging in judicial proceedings.[15] Therefore, PEOs cannot be viewed in isolation. Should an individual or community lose a 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 – the level at which a presumptive cross-cap has been set – in addition to the PEO.

Edwards further finds that "the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable".[16] Given that the average (median) annual earnings in the UK is £21,473[17] we consider the prospect of paying out £35,000 is undoubtedly prohibitively expensive for most individuals, and therefore the presumptive levels of cap and cross-cap are too high, particularly in light of difficulties in accessing legal aid (see below).

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. In our experience this is not the case. There are relatively few judicial review cases and generally a poor success rate for Petitioners. Very few solicitors work in the field and speculative or no-win no-fee cases will only operate in a market where there are a high turn over of cases, with the opportunity for the solicitors and advocates (barristers) to have sufficient 'wins' to cancel out the lost cases.

While we object to the level of the £5,000 cap, and the principle of an automatic cross cap, we note that petitioners will be able to apply to lower the £5,000 cap and increase the cross cap. We assume the requirement for certainty as to potential adverse liability (as required by Case C-427/07 *Commission v Ireland*) can be assured in this situation as petitioners have certainty as to their maximum adverse costs liability. 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 whether respondents would be permitted to challenge a petitioner's application to alter the level of either cap. This possibility clearly detracts from the ability of the system to provide the certainty required by EU law.

- **Judicial discretion**

Despite the fact that the rules only apply to cases falling under the Public Participation Directive – which requires challenges not to be prohibitively expensive – petitioners taking a case under the PPD are not automatically considered to be eligible for a PEO. Instead applications must be made by motion therefore potentially incurring not inconsiderable expense in getting to this stage:

> **58A.2.**(4) ….where the court is satisfied that the proceedings are prohibitively expensive for the applicant, it must make a protective expenses order.

Should a PEO be awarded with both cap and cross cap at presumptive levels, the amount a petitioner is liable for if they lose amounts to £35,000. Given average earnings in Scotland, and the requirement in *Edwards* that the cost of proceedings must not be objectively unreasonable, it is hard to imagine a case where a sum of more than £35,000 would be considered not prohibitively expensive. Therefore we consider that if a case falls under the PPD then petitioners should automatically be awarded a PEO under these rules.

While it is encouraging that respondents are not able to require petitioners to disclose their means, it is not clear whether the Court is able to require such disclosure, and whether it has any discretion

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[14] SNIFFER, Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation, 2005
http://www.sniffer.org.uk/Webcontrol/Secure/ClientSpecific/ResourceManagement/UploadedFiles/UE4%2803%2901.pdf
[15] R Edwards v Environment Agency http://www.bailii.org/eu/cases/EUECJ/2013/C26011.html
[16] Edwards 40-41
[17] ONS Annual Survey of Hours and Earnings, 2012 Provisional Results
http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-280149

in granting a PEO based on a petitioners means. We note that the application process includes the following provision in relation to lowering the cap or raising the cross cap, indicating that petitioners may have to disclose their means:

> **58A.3.** (4)(e)in the case of an application for liability in expenses to be limited to an amount lower or, as the case may be, higher than a sum mentioned in rule 58A.4, set out the grounds on which that lower or higher figure is applied for.

We are very concerned about the prospect of petitioners being required to disclose their means to the court under any circumstances, and point to *Walton*, where the petitioner disclosed his financial means in court and a national newspaper published his salary on its front page.

- **Eligibility**

Further we are concerned that the rules apply only to individuals and 'non-governmental organisations promoting environmental protection'; and specifically preclude:

> **58A.1.** (2) …references to applicants who are individuals do not include persons who are acting as a representative of an unincorporated body or in a special capacity such as trustee.

This provision would exclude an appellant such as William Walton, who acted in his capacity as Chairman of Roadsense, an unincorporated body, in *Roadsense v Scottish Ministers,* from applying for a PEO under these rules. While a petitioner in this position could of course apply under the rules as an individual, we consider this provision puts a barrier in the way of community groups wishing to take legal action. Community groups understandably may wish to take action as a joint entity so that liability does not rest on a single individual, but also to ensure that decisions taken as to the litigation and its conduct of the litigation reflect the wishes to the community, through the democratic decision making process of the community group. We also observe it is more cost effective for the public purse for communities to pursue an action as one instead of potential multiple actions.

- **Appeals**

The rules 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. We note that in *Edwards* the CJEU found that "the requirement that judicial proceedings should not be prohibitively expensive cannot be assessed differently by a national court depending on whether it is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal." [18]

There are relatively low numbers of environmental cases, and the tendency has been for such cases to be appealed. We do not know the exact reasons for the relatively high appeal rates, but it might be because cases raised so far tend to raise important points of principle for third parties (such as availability of remedies and the standing requirements to bring cases) which have not yet been fully litigated in Scotland. Cases might also tend to be appealed due to the absence of any degree of specialism within the judiciary for dealing with environmental cases, and 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, at least for the foreseeable future. We also think it likely that if the public authority or developer is unsuccessful at first instance, they are likely to appeal. Therefore we do not think the way that the rules deal with appeals is compliant with the PPD or Aarhus.

Legal Aid

While recent reforms in Scotland mean that more adults now qualify for civil legal aid purely in financial terms,[19] applying for legal aid is an increasingly complex and time consuming process. The first type of legal aid – advice and assistance – has more restrictive financial criteria than civil

[18] Edwards 44-45
[19] http://www.slab.org.uk/getting_legal_help/Extended_eligibility.html

legal aid. As a result, there is more limited access to a solicitor to obtain initial advice and help on environmental issues.

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[20] 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,[21] 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.[22]

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. 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.

This situation is exacerbated by the Scottish Legal Aid Board's recent introduction of a system whereby all the expenses of the case to be covered by legal aid (including Counsel's fees, solicitors fees and outlays) will be capped at £7,000. We think that £7,000 is an unrealistic figure to run a complex environmental judicial review. While applications can be made to increase the cap, this system is likely to further lessen the number of solicitors willing to act in this area as they run the risk of incurring liability for counsel's fees and outlays which are not covered by the level of the cap particularly in a fast moving litigation, when it can be difficult to anticipate all costs in advance.

Moreover, while environmental cases tend to affect more than one person, community groups cannot apply for legal aid in Scotland. By contrast, England and Wales has a system that allows the joint funding of a case, where the Legal Services Commission grants legal aid to an individual subject to a wider community contribution, based on what the community group can pay. By their very nature environmental cases tend to affect a large number of people, therefore it makes sense to provide for joint applications. It is also a more sensible use of public money than potentially funding multiple individual cases and, in cases against public authorities, defending those actions.

Lastly we are aware of difficulties that arise due to the restrictions on protection from liability for expenses under the Legal Aid (Scotland) Act 1986. Generally in Scotland someone with a full legal aid certificate will have any liability for expenses modified unless they have acted in a manner which has prolonged or increased the costs of the litigation. However, these provisions do not apply to someone who has not been granted full legal aid certificate and thus is not designed as an 'assisted person' for the purposes of the legislation. This again has a 'chilling effect'; given the uncertainties over obtaining legal aid in environmental cases, many persons would be reluctant to raise proceedings until full legal aid is granted. However, this can mean that there are months of delay before a case is raised, which in turn only adds more uncertainty for the public authority and

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[20] 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 (http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/40063.aspx). 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.

[21] http://www.legislation.gov.uk/ssi/2002/494/regulation/15/made

[22] For a more detailed dissection see Frances McCartney, 'Public interest and legal aid' Scots Law Times, Issue 32: 15-10-2010

developer. We would ask that the legislation is changed to give protection to an individual from the outset of the case.

Court Fees

In a move that has attracted strong opposition,[23] 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.

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.

Because of the restrictions on legal aid in environmental cases, it follows that such cases are highly unlikely to secure an exemption from court fees on the basis of legal aid.[24]

Other issues

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.

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[25]) 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.

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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[23] From, amonst others, Faculty of Advocates, the Law Society of Scotland, Consumer Focus Scotland and the Scottish Trade Union Congress
[24] 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
[25] 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