



Environmental
Law Centre
Scotland



**Friends of
the Earth
Scotland**

Evidence to the Scottish Parliament Justice Committee on the Courts Reform (Scotland) Bill

13 March 2014

Introduction

Friends of the Earth Scotland and the Environmental Law Centre Scotland are working for improved access to environmental justice in Scotland and it is with this in mind that our response is framed. Since 2010 our Access to Environmental Justice campaign has sought to expose the barriers that individuals, communities and NGOs face in attempting to undertake legal action in environmental matters. While the Courts Reform (Scotland) Bill presents an important opportunity to tackle some of these barriers, we consider it does not go far enough, and cannot in itself resolve the issue of Aarhus compliance in the manner that the Scottish Government has frequently indicated. We welcome the opportunity to provide evidence to the Justice Committee on this issue.

Context

The UNECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (more commonly known as the Aarhus Convention) recognizes every person's right to a healthy environment – as well as his or her duty to protect it. The EU and the UK are signatories to the Convention, and as justice and the environment are devolved, the Scottish Government is bound to comply with the Convention.

EU Directives on public access to environmental information (Directive 2003/4/EC) and providing for public participation in planning (the 'Public Participation Directive' 2003/35/EC) are in place to facilitate member state implementation of the first two pillars of Aarhus.¹ In Scotland these are translated into freedom of information² and environmental assessment³ legislation.

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

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

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

The third pillar of Aarhus requires that members of the public have access to justice if *rights under the former pillars are denied* (i.e. those enshrined within the PPD and Directive 2003/4/E) and if *national environmental law has been broken*.⁴ Under Article 9 (and the PPD) these procedures must include review of both the “substantive and procedural legality of decisions, acts or omissions”, provide effective remedy and be “fair, equitable, timely, and not prohibitively expensive”.⁵

On ratification of Aarhus, the European Council (EC) made it very clear that the Public Participation Directive (PPD) and the Public Access to Environmental Information Directive did not fully implement the Convention – in particular its access to justice provisions – and that member states were responsible for complying with these remaining obligations.⁶

The PPD only amends Directive 85/337/EEC (Environmental Assessment) and 96/61/EC (Integrated Pollution Prevention and Control). Aarhus cases can fall under other, un-amended Directives such as the Strategic Environmental Assessment Directive, and Article 9(3) makes it clear that the Convention applies to national environmental legislation.⁷

Further, decisions of the European Court of Justice have indicated that Aarhus principles apply to all questions of European environmental law even although not all relevant Directives were amended in light of the Convention.⁸ We consider that the Scottish Government is in fundamental breach of its access to justice obligations not only under the PPD, but also under the third Pillar of the Aarhus Convention as a whole, and that this has a knock on effect on the performance of other Aarhus obligations, since there is little credible threat of legal action from citizens wishing to challenge decisions adversely impacting on the environment.

This is supported by the recent ruling of the CJEU against the UK for non-compliance with the Public Participation Directive (which contains some Aarhus access to justice provisions), particularly in relation to costs.⁹ Whilst the referral was prompted by reports of English cases, it dealt with the Scottish cost regime in terms of Protective Expense Order. Further, we understand that the Commission intends to pursue other compliance issues separately. Indeed our research¹⁰ shows that compliance in Scotland is demonstrably worse than in England and Wales, although recent reforms by the coalition Government suggest that the rest of the UK may be in breach of both Aarhus and PPD.

⁴ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 9 <http://www.unece.org/env/pp/documents/cep43e.pdf>.

⁵ Aarhus Convention Article 9 (4)

⁶ 2005/370/EC: Council Decision of 17 February 2005: “In particular, the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations.” <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005D0370:EN:HTML>

⁷ Aarhus Convention, Article 9(3)

⁸ In Case C240/09, for a preliminary ruling under Article 234 EC from the Najvyšší súd Slovenskej republiky (Slovakia), in the proceedings Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, judgement of Grand Chamber ECJ of 15th March 2011 “It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law”. See Official Journal of the European Union C130/4

⁹ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/439&format=HTML&aged=1&language=EN&guiLanguage=en> and <http://curia.europa.eu/juris/document/document.jsf?text=&docid=147843&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=164515>

¹⁰ See our ‘Tipping the Scales’ report: <http://www.foe-scotland.org.uk/tippingthescales>

Making Justice Work and the scope of the Court Reform Bill

The present Government's response to Lord Gill's 2009 Review of the Scottish Civil Courts in establishing the 'Making Justice Work' programme provides the perfect opportunity to build on progressive Freedom of Information and Strategic Environmental Assessment legislation, by finally implementing the last Pillar of Aarhus, and securing access to environmental justice in Scotland.

However, we do not think the proposals outlined to date under MJW, including those within this Bill, even in their best possible form, will ensure compliance with Aarhus or the PPD, as they do not directly or fully tackle issues of excessive cost in taking action in environmental cases, nor do they tackle the issue of substantive review.

Costs

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*¹¹, the petitioner faces a total bill of around £180,000. In *McGinty v Scottish Ministers*¹², 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.¹³ However, the new rules in Scotland apply only to cases under the Public Participation Directive, and fall far short of providing for the kind of assurance against prohibitive expense required by the Aarhus Convention.¹⁴

Recent rulings from the CJEU confirm 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.

In *Edwards*, the CJEU 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 £21,473¹⁷ 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.

¹¹ <http://www.scotcourts.gov.uk/opinions/2011CSIH59.html>

¹² <http://www.scotcourts.gov.uk/opinions/2011CSOH163.html>

¹³ The Government has previously 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.

¹⁴ The rules ultimately assume that a sum of £35,000 – the presumptive amount an unsuccessful petitioner would be expected to pay – is not prohibitively expensive. Yet average annual earnings in Scotland fall well below this sum, and evidence suggests that deprived communities suffer from 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, this limit therefore disproportionately impacting on these communities. 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> and Advocate General Kokott's opinion in Case C 530/11 *European Commission v United Kingdom of Great Britain and Northern Ireland*.

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 the context of difficulties in accessing legal aid and increases in court fees,¹⁸ these rules do little to substantially improve access to justice, and are ultimately unlikely to satisfy the Commission.

Substantive Review

The Court Reform (Scotland) Bill as drafted does nothing to tackle the issue of substantive review (in other words, the examination by the courts of the merits of a case, rather than just whether due process was followed). In fact, the Scottish Government has stated that in principle it objects to substantive review as a function of the courts.¹⁹

The Scottish Courts rarely stray into the substance of cases and are openly reluctant to do so.²⁰ While understandably there is some tension between the ability of governments to take decisions and be accountable for them, and the availability of judicial review, it could be argued that there is a contrast between the jurisprudence of public law cases north and south of the border, and Aarhus requires both a procedural and substantive review. This may partly be due to a lack of specialism in the Scottish Courts. We note that the Court Reform Bill sets out to implement the Civil Courts Review recommendations in respect of judicial specialisation and welcome this.

However, while we recognise the need to ensure that the courts do not become a 'vehicle to articulate what are essentially political arguments',²¹ we consider that there is scope to revise judicial review to incorporate a substantive element including the merits of a case.

Further, we note that environmental decision making takes place in a highly complex framework of legislation – not all specifically environment-related – and is initiated and regulated by numerous public authorities and bodies. A specialist environmental court or tribunal offers the chance to rationalise and simplify the way this legislation is dealt with, and could also give the judiciary greater authority and confidence examining issues of substantive review.

The Scottish Government has been reluctant to acknowledge the need to comply with Aarhus, and any lack of implementation of the PPD. In a letter to the Scottish Parliament Equal Opportunities Committee in March 2012 the Scottish Government confirmed that the introduction of Protective Expense Orders would not fully cover the wider implications of Aarhus compliance, but indicated that the Court Reform Bill consultation would address these issues.

It is our view that steps taken forward under the Court Reform Bill are insufficient to bring about compliance with the Aarhus Convention, and that efforts date under MJW are not adequate to avoid further legal action from the European Commission in relation to the PPD.

Improving judicial review procedure in the Court of Session

Standing

The Government has accepted the recommendation of the Civil Court Review to replace 'title and interest' with 'sufficient interest', and considers that the changes made in *Axa v Lord*

¹⁸ See our briefing to the European Commission on the excessive costs of challenging environmental decisions in Scottish Courts <http://foe-scotland.org.uk/excessivecostsDec2012>

¹⁹ In Ministerial correspondence dated December 2011 (hard copies available)

²⁰ For example Lord Brailsford in *McGinty v Scottish Ministers* <http://www.scotcourts.gov.uk/opinions/2011CSOH163.html>

²¹ Scottish Government response to the Report and Recommendations of the Scottish Civil Courts Review, November 2010 <http://www.scotland.gov.uk/publications/2010/11/09114610/1>, 168

Advocate and others,²² have effectively broadened the law on standing to the degree required by the Review. As a result, this Bill contains no provision on standing. However, we wish to make a number of points.

We note that, as outlined in the Civil Court Review, sufficient interest is the test used in judicial review in England, Wales and Northern Ireland, where it is seen to be a relatively low hurdle in cases of genuine public interest.

We also note that when the Supreme Court replaced the test of ‘title and interest’ to sue with the broader ‘sufficient interest’, it indicated that the development of public law in Scotland had been severely hindered by decades of judge made law. While the new test of sufficient interest should serve to improve access to justice in environmental – and other public interest – cases, we wish to point out that the Scottish courts have not been quick to apply it. In a recent subsequent ruling, the Supreme Court felt the need to make it clear that legal challenges to important decisions and acts by public authorities are a vital means of upholding the rule of law, following the Inner House’s opinion regarding standing in *Walton v Scottish Ministers*.²³ In its comments on standing in *Walton* the Supreme Court also emphasised the importance of individuals and NGOs taking cases on behalf of the environment, since the environment can’t go to court by itself - one of the fundamental basis of the Aarhus Convention.²⁴

Time limits

While we agree that it is in everyone’s interest that cases for judicial review are brought timously, we are concerned with how that is interpreted and that the proposal to introduce a three-month time limit will cause problems in complex cases and particularly where there is uncertainty in funding. We consider that there is a real issue with a finding a solicitor able to act on a *pro bono*, reduced fee or legally aided basis, and the introduction of even a presumptive three month time limit will exacerbate this.

A three month time limit will create a particular barrier for community groups who will find it extremely difficult to organise, develop collective understanding, agree a course of action and raise the necessary funds to go to court if that is their decision.

Further, we note that there is often a considerable grey area as to when exactly the grounds giving rise to an application begin, and while a degree of flexibility is contained in the Bill, a presumptive three month limit is likely to put potential litigants off (known as a ‘chilling effect’).

Given the historical culture of lack of awareness of legal rights in Scotland and the comparable importance of Aarhus cases to Human Rights cases, if the Government proceed with introducing time limits, it should instead consider a presumptive time limit of a year for such cases.

If the time limit was to be changed, it would be essential to alter the rules on assisted persons within the Legal Aid (Scotland) Act 1986 so that those on emergency legal aid did not have either apply for protective expenses orders at the raising of the case (which could potential be time consuming and may delay the determination of cases) or risk that they do not obtain a full legal aid certificate and acquire the status of assisted person for the purposes of an application for modification. We would also ask that Regulation 15 of the

²² <http://www.supremecourt.gov.uk/decided-cases/index.html>

²³ <http://www.scotcourts.gov.uk/opinions/2012CSIH19.html>

²⁴ www.supremecourt.gov.uk/docs/uksc-2012-0098-judgment.pdf

Civil Legal Aid (Scotland) Regulations 2010 is repealed, which raises much uncertainty as to whether legal aid would be available for actions where there may be a wider public interest (see McCartney 'Public Interest and Legal Aid' 2010 SLT 32). Thought should also be given to allowing a sharing of costs between an individual in receipt of legal aid and a community group.

Leave to proceed

We support the introduction of an appropriately designed leave to proceed stage, and consider that it could help filter out unmeritorious cases. Importantly, a leave stage could also be used to award Protective Expense Order's and settle issues such as standing, thereby reducing the 'chilling effect' where uncertainty created by these matters hanging over the petitioner for the duration of the case put potential litigants off (and cause considerable unnecessary anxiety for those who go ahead).

We note that the Bill as drafted does not indicate at what point leave to proceed would be assessed. However, there is a risk that combined with a three month time limit, a leave stage could actually hinder access to justice as petitioners struggle to access funds and lawyers to marshal the necessary legal arguments to satisfy the Court in order to gain leave to proceed.

We welcome the inclusion of a right to an oral hearing where leave has been refused or granted subject to certain conditions. We consider this to be a very important safeguard for access to justice given that certain public interest cases in England, where a permission stage is already in place, have been initially refused but gone on to win following permission at oral renewal (e.g. the case taken by our sister organisation in England, Wales and Northern Ireland *Friends of the Earth and others v Secretary of State for Energy and Climate Change [2011]*).

About Friends of the Earth Scotland

Friends of the Earth Scotland is an independent Scottish charity with a network of thousands of supporters, and active local groups across Scotland. We are part of Friends of the Earth International, the largest grassroots environmental network in the world, uniting over 2 million supporters, 76 national member groups, and some 5,000 local activist groups - covering every continent. We campaign for environmental justice: no less than a decent environment for all; no more than a fair share of the Earth's resources.

About the Environmental Law Centre Scotland

The Environmental Law Centre Scotland is a charitable law centre using law to protect people, the environment and nature, and increase access to environmental justice. We help protect the environment and support sustainable approaches and solutions by providing advice, advocacy, training, updates and research. We work with both local communities and other non-government organisations to use law to protect the environment. We seek to test the law, and work to ensure that Scotland complies with its European and international obligations.

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