



Stop Climate Chaos Scotland

Briefing on Judicial Review

Introduction

Under the Aarhus Convention environmental NGOs and indeed members of the public should enjoy access to timely, affordable review procedures that can consider the merits of the decision, not just its procedure. We call this 'Aarhus-compliant challenge'.

In Scotland and the UK more generally, Ministers have claimed that Judicial Review is adequate. We believe it is inadequate on two grounds in Scotland: the costs involved, and particularly the risk of a punitive costs award; and the limitation to challenge only procedural matters.

Amendment 248 in the name of Alison McInnes

Before section 62, insert—
<Judicial review

(1) In any application for judicial review relating to or arising out of the provisions of this Act, it will be enough for any party to show sufficient interest in order to satisfy the common law tests of title and interest.

(2) "Sufficient interest" is to be interpreted in accordance with the criteria laid out in Article 9 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters signed at Aarhus on 25 June 1998 ("the Aarhus Convention").

(3) In relation to the expenses associated with any judicial review proceedings under this Act, the court may impose a cap on, or otherwise regulate, the extent of liability for expenses between the parties; and such applications may be competently made at any stage of the proceedings.

(4) When determining an application made under subsection (3) above, the court is to have regard to the need to remove or reduce financial or other barriers to access to justice, in accordance with the principles laid out in Article 9 of the Aarhus Convention.

(5) In any application for judicial review under this Act, the court may competently consider both the substantive and the procedural legality of the decision, act or omission under review.>

Accountability and Access to Justice

This amendment is designed to ensure that Ministers are properly accountable to both parliament and the public for the conduct of their duties under the Act. In theory, Minister's decisions under this Act are judicially reviewable. The key problem is that access to judicial review in Scotland is costly, difficult and not in line with the Aarhus

Convention. This amendment would enshrine the principles of Aarhus in the Act, ensuring that the Scottish courts would comply with them in such cases.

The amendment aims to ensure that Ministers are fully accountable for the conduct of their duties under the Act. Parliamentary accountability is firmly established under the Bill, but given the 40 year lifespan of the Act it is right to ensure that appropriate opportunity is established for the courts to enforce provisions under the Act.

Judicial review is the key process by which such enforcement can be delivered. As is normal, such a procedure does not turn over decision making to the courts, but enables the courts to quash decisions. Under the Aarhus convention – already ratified by the UK but yet to be completely transposed into European law, judicial review (or an equivalent) should be available to the interested public in environmental matters such as those arising under the Bill.

Coming into line with Aarhus

In Scotland at present, unlike in England, there are uncertainties over the standing of environmental interests. In addition there aren't established provisions to limit the financial risks associated with taking a case (the English courts have established the use of protective costs orders). Finally, judicial review cases do not typically consider the full range of aspects of substantive and procedural legality that are required by the Convention.

This amendment – drafted by a leading QC - would ensure that – at a minimum, or perhaps best seen as 'as a precedent' - cases arising under this Bill meet Aarhus standards for access to justice. It deals with the three key issues of standing, affordability and the scope of challenges. As a result it also provides a valuable backstop to the existing accountability provisions in the bill, and enhances the incentives faced by all Ministers to comply fully with the duties set out in the Bill over the coming decades.

What Stop Climate Chaos Scotland would like to see

The ideal outcome for both accountability under the Bill and more widely would be for the rules of court in Scotland to be changed for environmental cases to address the principles of Aarhus. If the Minister is able to provide a sufficiently strong commitment to work with the Lord President to deliver such rule changes, then this amendment would perhaps not be required. However passage of the amendment would not preclude wider changes to the rules of court and, as such SCCS strongly supports this amendment.