

Friends of the Earth Scotland (FoES) and the Environmental Law Centre Scotland (ELCS) joint response to Scottish Government consultation on the treatment of civil appeals from the Court of Session

August 2013

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, 77 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.

Comments

Friends of the Earth Scotland and the Environmental Law Centre Scotland are working together for improved access to environmental justice in Scotland and full compliance with the UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, and it is with this in mind that our response is framed.

CONSULTATION QUESTIONS

Questions - The treatment of civil appeals from the court of session to the United Kingdom Supreme Court

Q1A. Do you agree that the current procedures for appeals to the UK Supreme Court under section 40 of the Court of Session Act should be replaced with a leave stage? If not, why?

Yes **No**

Whilst it might seem reasonable to bring mechanism for appeal to the Supreme Court from the Court of Session in line with provision from courts in England, Wales and Northern Ireland, we note the importance of the role of the Supreme Court in the development of public law in Scotland in recent years. We have a concern that the Court of Session may not always consider the public interest issue of an issue

arising. Accordingly we consider that the introduction of a leave stage has the potential to act as an additional barrier to access to justice in Scotland.

We note that while the consultation paper quotes certain cases (which might be thought to be somewhat selectively), other rulings of the Supreme Court, notably in *AXA vs Lord Advocate* [2011] UKSC 46 have noted the lack of development of public law in Scotland. *AXA* of course changed the restrictive Scots Law test of title and interest to one of sufficient interest, therefore emphasising the vital role that the Supreme Court plays in developing access to justice in Scotland.

Further we note that in *Walton vs Scottish Ministers* [2012] UKSC 44, the Supreme Court chose to re-iterate the comments it made in *AXA* due to the Court of Session's obiter comments which might have suggested a reluctance to apply the new test. Against that background, it might be argued that the parties' Counsel are in the best place to assess the weight of the public interest arguments that arise in any particular case.

We also consider that the comments in Uprichard as quoted in the consultation paper must be viewed against the particular background in that case. Ms Uprichard was granted a Protective Expenses (Costs) Order by the Supreme Court. That application was made on the basis of the principles as set out in *Corner House (R (Corner House Research) v Secretary of State for Trade & Industry* [2005] EWCA Civ 192). One of those principles is of course whether there is a public interest in the issue being determined. It is understood that it was made clear in the application that if Ms Uprichard was not granted a Protective Expenses Order she would not continue with her appeal. The UK Supreme Court granted her a Protective Expenses Order and accordingly it presumably considered there was a public interest in the issue being litigated in the UK Supreme Court. Accordingly, in effect, the UK Supreme Court itself had the ability to regulate whether Ms Uprichard's appeal should proceed by refusing the Protective Expenses Order. In addition, the UK Supreme Court itself allow Ms Uprichard's appeal to proceed although late. Against that background, the subsequent criticism of bringing the appeal is perhaps more difficult to understand.

Q1B. If you agree, on what basis do you consider leave should be granted? Why?

Yes No

Q1C. What impact do you consider the Scottish Government's proposals will have on future civil appeals to the UK Supreme Court? Why?

Yes No