

Parliamentary Briefing: Environmental Rights

For the Scottish Government debate on Dignity, Equality and Human Rights for All, Tuesday 19 September 2017

Summary

A healthy and safe environment is “essential to...the enjoyment of basic human rights, including the right to life itself.”¹ Recognising the importance of achieving this, the UN Aarhus Convention establishes key rights – and responsibilities – in relation to environmental matters. However, the Scottish Government is failing in its duty under international law to ensure that these rights are provided for in our legal system, in particular, those which enable citizens and NGOs to go to court to defend the environment.

- The Scottish Government is in breach of key obligations under the Convention in relation to access to justice in environmental matters, particularly regarding the **high cost of legal action** and lack of **substantive review** in the Scottish courts;
- Scotland has been reprimanded by the Aarhus Compliance Committee repeatedly, most recently in a decision upheld by the 6th Meeting of the Parties to the Convention in September 2017;
- Alone, the introduction of Protective Expense Orders is entirely insufficient in tackling the issue of prohibitive expense in environmental cases in the Scottish courts;
- The Civil Litigation Bill is an obvious vehicle to address certain aspects of prohibitive expense, however Aarhus compliance is absent from its approach at the outset;
- In March 2016 the Scottish Government consulted developments in environmental justice and specifically on the need for a specialist environmental court or tribunal – more than a year later it has failed to publish analysis of response or its recommendations;
- The recent announcement of an expert advisory group to make recommendations on human rights, including environmental rights, presents an opportunity to review Scotland’s compliance with the Aarhus Convention.

Environmental rights under the Aarhus Convention

The environment cannot represent itself in human institutions, therefore it relies on people and NGOs to do so on its behalf: participating in decision making processes that impact on the environment, and ultimately taking legal action if necessary. The Aarhus Convention enables this by establishing right and responsibilities in relation to access to information, public participation and access to justice in environmental matters.

EU Directives² are in place to implement Aarhus provisions on access to information and public participation. In Scotland, these are translated into freedom of information³ and environmental assessment⁴ legislation. The third ‘pillar’ of Aarhus requires that members of the public and NGOs have access to justice if rights under the former pillars are denied and if national environmental law has been broken. 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

The access to justice provisions of Aarhus have been only partially transposed into EU law⁶, however, on ratification of Aarhus, the European Council made it very clear that member states were responsible for complying with the remaining obligations.⁷ Scotland is a signatory to the Aarhus Convention by way of ratification by both the UK and the EU in 2005, and therefore obliged to fully implement its provisions.

Environmental Rights in Scotland

The Aarhus Compliance Committee has reported to three consecutive Meetings of Parties to the Convention (in 2011, 2014 and 2017) on the UK's – and Scotland's – failure to comply with key provisions on access to justice.⁸ Further, the European Court of Justice has found the UK to be non-compliant with access to justice provisions of the Convention as implemented under the Public Participation Directive.⁹

“Fair, equitable, timely, and not prohibitively expensive”

The Aarhus requirement that access to justice must not be “prohibitively expensive” applies to all costs faced by litigants in environmental cases.¹⁰ It is clear that the Scottish Government has failed to take this approach.¹¹ Environmental litigation in Scotland is carried out mainly by way of judicial review, which is very expensive, often running into many tens of thousands of pounds.¹² While Protective Expenses Orders (PEO), created in 2014 and extended in 2016,¹³ have improved the cost regime to a certain extent, very few have been granted, and there are a number of structural problems with the PEO system which limit their ability to meet Scotland's obligations under the Aarhus Convention.

PEOs are designed to reduce uncertainty and limit liability for the other side's costs (to an arbitrary £5,000) – they offer no assistance to a litigant for their own legal expenses. The legal aid system in Scotland grants very few awards of legal aid for environmental cases¹⁴ and effectively excludes aid for public interest cases, which most environmental challenges are.¹⁵ Moreover, while environmental cases tend to affect more than one person, community groups cannot apply for legal aid in Scotland. Certain court fees have doubled in recent years, a move which exacerbates the issue of prohibitive expense in Aarhus cases. With hearing fees in the Court of Session at up to £500 per half hour, a complex judicial review risks running up several thousands of pounds in fees alone. The three-month time limit on bringing a judicial review creates an additional barrier for communities to organise, develop collective understanding, agree a course of action and raise the necessary funds to go to court if that is their decision.

“Substantive ... legality of decisions, acts or omissions”

Aarhus specifically requires substantive or merits review of “decisions, acts or omissions” impacting on the environment, and “effective remedies”.¹⁶ Judicial review is limited to procedural legality, and when judges have strayed into the merits of a case they have been openly reluctant to do so,¹⁷ and are often overturned.¹⁸ This may be in part due to a lack of specialism in the Scottish Courts.

During the passing of the Courts Reform (Scotland) Act 2014, the Justice Committee took evidence from Scottish Environment LINK members which highlighted the systemic issues with prohibitive expense, as well as the lack of substantive review offered by judicial review proceedings. The Committee highlighted in its Stage 1 Report “the differences between the requirements of the Aarhus Convention and the scope of judicial review in Scots Law” and its “[sympathy] to calls for the introduction of an environmental tribunal for Scotland”¹⁹, as an important step towards a fair, just and Aarhus-compliant legal regime.

In March 2016, the Scottish Government invited views on developments in environmental justice in Scotland. A number of respondents, including FoES, recommended the establishment of a specialist environmental court or tribunal to help improve access to justice, while the majority of responses were broadly critical of the very limited approach to Aarhus matters in the paper.²⁰ The Government has yet to publish a formal response to this consultation over a year later.

Recommendations

- The Scottish Government should urgently undertake a comprehensive review of the legal system in relation to Aarhus obligations, including the role that a specialist environmental court or tribunal could play in improving compliance.
- The Civil Litigation Bill should be amended to help tackle prohibitive expense in all Aarhus cases.

¹ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, preamble <http://www.unece.org/env/pp/documents/cep43e.pdf>

² 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.

³ Environmental Information (Scotland) Regulations 2004

⁴ Environmental Assessment (Scotland) Act 2005 and Environmental Impact Assessment (Scotland) Regulations 2011

⁵ Aarhus Convention Article 9 (4)

⁶ by way of the Public Participation Directive 2003/35/EC

⁷ 2005/370/EC: Council Decision of 17 February 2005: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005D0370:EN:HTML>. Further, decisions of the CJEU have made it clear that Article 9 provisions for access to justice are of indirect effect.

⁸ In 2011, on recommendation of the Aarhus Convention Compliance Committee (ACCC), the 4th Meeting of the Parties (MOP4) to the Aarhus Convention found the UK to be in non-compliance with Article 9 (Decision IV/9i). In 2014 the UK was found by MOP5 to be in continued non-compliance (Decision V/9n). Draft Decision VI/8k for consideration by MOP6, endorses the recent report of the ACCC that the UK – and Scotland specifically – is still not compliant with the Convention. See the report of the Compliance Committee to the 6th Meeting of the Parties to the Aarhus Convention on Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention, August 2017

http://www.unece.org/fileadmin/DAM/env/pp/mop6/Documents_aec/ECE.MP.PP.2017.46_as_submitted_advance.pdf and Draft Decision VI/8k http://www.unece.org/fileadmin/DAM/env/pp/mop6/English/ECE_MP.PP_2017_30_E.pdf

⁹ See Judgment of the European Court of Justice, February 2014 *European Commission v United Kingdom of Great Britain and Northern Ireland*. Case C-530/11. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0530>

¹⁰ Established by *Edwards vs Environment Agency* C-260/11

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=136149&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=167588>

¹¹ See letter from Paul Wheelhouse, Minister for Community Safety and Legal Affairs to the Convener of the Equal Opportunities Committee at the Scottish Parliament, June 2015. The Minister acknowledges that Aarhus cases are different, and that it hasn't been possible to assess the overall costs in Aarhus litigation

[http://www.parliament.scot/S4_EqualOpportunitiesCommittee/General%20Documents/Letter_from_Mr_Wheelhouse_Petition_1372_\(2\).pdf](http://www.parliament.scot/S4_EqualOpportunitiesCommittee/General%20Documents/Letter_from_Mr_Wheelhouse_Petition_1372_(2).pdf)

¹² For example, in *McGinty and Another* [2010] CSOH 5, the petitioner's potential liability was stated as £80,000 for his own legal expenses, and a potential £90,000 liability for the expenses of the respondent were he to be unsuccessful (para 4 of the judgement). More recently, the John Muir Trust had to pay expenses of £120,000 to the Scottish Government and SSE following judicial review in the Outer House (where the John Muir Trust was successful), and an appeal to the Inner House (in addition to two unsuccessful PEO applications) – *The John Muir Trust v The Scottish Ministers and SSE Generation Limited and SSE Renewables Developments (UK) Limited* [2016] CSIH 61. See <http://thirdforcenews.org.uk/tfn-news/huge-legal-costs-could-cripple-campaigning-charities>.

¹³ Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 (SSI 2013/81), as amended by Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015 (SSI 2015/408).

¹⁴ Data collection on awards of Legal Aid in environmental cases is in our view poor. A letter from the Scottish Legal Aid Board to the Scottish Parliament's Equal Opportunities Committee in June 2015 indicates that in a four year period, 7 out of 33 applications for legal aid that were identified as having 'an environmental aspect' were granted. Six of these had declared a joint interest. The data is highly problematic in terms of getting a full picture of awards in Aarhus cases e.g. it is not clear how 'an environmental aspect' is defined, which has an important bearing given that certain kinds of environmental cases tend to have a stronger private interest than others. Nor is it clear whether the joint interest was necessarily indicative of a broader public interest issue.

http://www.scottish.parliament.uk/S4_EqualOpportunitiesCommittee/General%20Documents/Letter_to_Margaret_McCulloch_MSP_-_4_6_15_%28pdf%29.pdf

¹⁵ When deciding whether to grant legal aid, under Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 (<http://www.legislation.gov.uk/ssi/2002/494/regulation/15/made>), 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. For a more detailed dissection see Frances McCartney, 'Public interest and legal aid' Scots Law Times, Issue 32: 15-10-2010

¹⁶ Aarhus Convention Article 9 (4)

¹⁷ For example, Lord Brailsford in *McGinty v Scottish Ministers* <http://www.scotcourts.gov.uk/opinions/2011CSOH163.html>

¹⁸ For example, in *RSPB vs Scottish Ministers & Others* [2017] CSIH 31: "Despite paying lip service to the correct legal test for judicial review, the Lord Ordinary has strayed well beyond the limits of testing the legality of the process and has turned himself into the decision-maker following what appears to have been treated as an appeal against the respondents' decisions on the facts. He has acted, almost as if he were the reporter at such an inquiry, as a finder of fact on matters of scientific fact and methodology which, whatever the judge's own particular skills may be, are not within the proper province of a court of review. For this reason alone, his decision on this ground cannot be sustained."

¹⁹ Justice Committee Stage 1 Report on the Courts Reform (Scotland) Bill para 322

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/76275.aspx#v>

²⁰ See <https://consult.scotland.gov.uk/courts-judicial-appointments-policy-unit/environmentaljustice>