

Wildlife and Countryside Link Response to Ministry of Justice Proposals on Costs Protection in Environmental Claims

10th December 2015

Introduction

Wildlife and Countryside Link (Link) brings together 46 voluntary organisations concerned with the conservation and protection of wildlife and the countryside. Our members practise and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together our members have the support of over 8 million people in the UK and manage over 750,000 hectares of land.

This response, and accompanying Executive Summary, are supported by the following members of Link:

- Amphibian and Reptile Conservation
- Bat Conservation Trust
- Buglife – The Invertebrate Conservation Trust
- Campaign for National Parks
- ClientEarth
- Friends of the Earth
- John Muir Trust
- Marine Conservation Society
- Open Spaces Society
- Plantlife
- RSPB
- Salmon and Trout Conservation
- The Ramblers
- The Wildlife Trusts
- Whale and Dolphin Conservation
- Wildfowl and Wetlands Trust
- Woodland Trust
- WWF

This response is also supported by:

- Fish Legal

General comments

Judicial Review (JR) is an essential foundation of the rule of law and almost the sole mechanism for civil society to challenge unlawful decisions affecting the environment and achieve a remedy in the courts.

The Aarhus costs rules were introduced in order to comply with the findings of the Aarhus Convention Compliance Committee (ACCC) in 2010, the European Commission's referral of the case to the Court of Justice of the European Union (CJEU) on prohibitive expense in April 2011 and in light of Advocate General Kokott's Opinion in *Edwards*¹ in October 2012².

¹ Case C-260/11 *Edwards v Environment Agency* [2013] 1 W.L.R. 2914



The Ministry of Justice Proposals on Costs Protection in Environmental Claims (“the consultation” or “the proposals”) seek to position the introduction of the current rules as independent of, and prior to, the CJEU’s decision in *Edwards*, and the subsequent Supreme Court decision. This is somewhat disingenuous, as the new rules were introduced in full knowledge of the likely approach of the CJEU to the issue of prohibitive expense and, in particular, the requirement to consider both the objective and subjective circumstances of the case³. It is therefore regrettable that the proposals do not comply with the CJEU rulings in *Edwards* or *Commission v UK*, as detailed in our response.

Link is deeply troubled the Government is renegeing on measures to secure compliance with the Aarhus Convention, the PPD and the above judgments so soon after introducing bespoke rules for environmental cases and after more than a decade of domestic, EU and international scrutiny of the issue. Our experience since 2013 has been that the new rules, whilst imperfect, represent a robust and workable structure offering many claimants’ access to environmental justice for the first time.

Despite the introduction of the Aarhus costs rules, neither the European Commission nor the Compliance Committee has since declared the UK to be in compliance with the relevant provisions of the PPD or Article 9(4) of the Aarhus Convention. In October 2015, the Compliance Committee confirmed that, whilst welcoming steps taken since 2011, the UK has not yet fulfilled the requirements of Decision V/9n⁴ concerning prohibitive expense. Moreover, the Committee invited the UK to submit a second detailed progress report, including an update on the outcome of England and Wales’ cross-government review. The UK’s second progress report, submitted in November, provides a brief summary of the proposals in this consultation paper⁵. As an Observer to the proceedings, Link will provide a full critique of the proposals explaining how the combined effect of these, and recent proposals in relation to JR more widely, take the UK in the opposite direction of travel to compliance with the Article 9(4) of the Convention and Decision V/9n.

Link would also draw the Government’s attention to Article 3(4) of the Aarhus Convention, which provides that “*Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation*”. We believe the current proposals introduce unnecessary obstacles to community groups and environmental NGOs considering legal challenges in the interests of environmental protection and therefore also prevent the UK from being able to comply with the obligation in Article 3(4)).

While the Government repeatedly emphasises the importance of maintaining the rule of law⁶, these proposals compound previous restrictions on the process of JR. Their cumulative effect will be to deter many claimants from bringing cases on the basis of costs.

² AG Kokott’s Opinion can be accessed here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=128663&pageIndex=0&oclang=EN&mode=lst&dir=&occ=first&part=1&cid=455181>

³ *Ibid*, paragraph 49

⁴ Letter from Ms Fiona Marshall dated 20th October 2015 to Mr Ahmed Azam enclosing the Compliance Committee’s First progress review of the Implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention

⁵ Letter from Mr Ahmed Azam to Ms Fiona Marshall dated 13th November 2015 enclosing the UK’s Second Progress Report on Decision V/9n

⁶ See, for example, the Ministerial Foreword to the Ministry of Justice consultation The Reform of Judicial Review: Provision and use of financial information (July 2015) at: https://consult.justice.gov.uk/digital-communications/reform-of-judicial-review-proposals-for-the-provis/supporting_documents/reformofjudicialreview.pdf



This seems disproportionate in light of the Government's failure to adduce any evidence, data or even a credible narrative to show that Environmental claims frustrate economic recovery or clog up the Administrative Court. In fact, evidence obtained from the Ministry of Justice between in 2015⁷ confirms:

- **Number of environmental cases** - the number of environmental cases lodged annually in England and Wales did not increase following the introduction of the Aarhus costs rules in April 2013. The only published data covering environmental cases prior to 2013 can be found in the report of the Sullivan Working Group on Access to Environmental Justice⁸. This report concludes there were 163 cases in 2002 and 155 cases in 2007 and that this would appear to represent a reasonable estimate as to the average number of cases. Data obtained from the MoJ in 2015 confirms there were 118 Aarhus claims in March 2013-April 2014 and 153 in March 2014-April 2015⁹. This represents a very small (less than 1%) percentage of the total number of JRs lodged on an annual basis (some 20,000). There is therefore no argument to support the contention that the introduction of the costs rules has led to a proliferation of environmental litigation that needs to be stemmed. Notwithstanding the above, some increase in cases is to be applauded as it would demonstrate that the purpose of the Convention is being achieved¹⁰;
- **Success rate of environmental cases** - between April 2013 and March 2015, nearly half (an average of 48%) of environmental cases were granted permission to proceed. This contrasts with a figure of 16% for all other Judicial Review cases in 2014 and 7% in the first quarter of 2015. Between April 2013 and March 2015, on average, a total of 24% of environmental cases were successful for the claimant. This contrasts with a success rate of 2% for all cases in 2014. Thus, while environmental cases represent a very small proportion of the total number of cases, they have very high success rates when compared to JR as a whole. Environmental cases therefore play an essential role in upholding the rule of law, protecting the environment and improving the quality of life - they represent "good value for money".

Link is also concerned that these proposals will lead to an extraordinary increase in satellite litigation, thus returning England and Wales to a situation in which time-consuming proceedings distract the courts and the parties from the substantive issues. This is to say nothing of the increased costs incurred by the new requirements, including the submission of information/questionnaires, permission hearings and hearings to determine the extent of financial liability. Not only will this be a cause of great frustration for defendant public bodies, interested third parties and claimants it may seriously jeopardise charitable funding as potential donors are deterred from providing funds.

While we welcome the opportunity to respond to this consultation paper, Link is disappointed to have received no prior warning of these proposals. This is pertinent in light of the Joint Links' Statement on Access to Justice¹¹ submitted to the UNECE Task Force on Access to Justice in June 2015 (at which representatives of both Defra and the Ministry of Justice were present). Our Joint Statement (and our presentation to the Task Force based on it) would have been entirely different had we been aware of these proposals.

⁷ As a result of information requests under the EIRs submitted by Leigh Day – results summarised in Annex A

⁸ See paragraph 53 of the report, available at: http://www.wwf.org.uk/filelibrary/pdf/justice_report_o8.pdf

⁹ See Annex A

¹⁰ See Recitals 7 and 8 and Article 1 of the Convention

¹¹ See http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/TF8-2015/8TF.AJ_JointLinks_UK.pdf



It is also disappointing that the MOJ has refused to meet any stakeholders in an attempt to understand their concerns. This is somewhat paradoxical in light of the subject matter of the consultation and regrettable in light of the Aarhus Convention's role in ensuring the public plays an active and constructive role in the development and implementation of environmental legislation and policy.

Link urges the Government to withdraw these unwarranted and damaging proposals. To press ahead will return the UK to a position of significant non-compliance with the PPD and the Aarhus Convention, which is likely to result in follow-up measures by the CJEU, domestic challenges and further scrutiny by the Aarhus Convention Compliance Committee.

The Proposals

The definition of an 'Aarhus Convention claim'

Q1. Do you agree with the revised definition proposed for an 'Aarhus Convention claim'? If not how do you think it should be defined? Please give your reasons.

1. No. While Link welcomes the extension of the costs regime to include other environmental challenges, the proposals do not address the failure of the regime to comply with Article 9(3) of the Aarhus Convention as noted by the Court of Appeal in *Venn*¹²:

"34. ... In the light of my conclusion on Article 9(3), and the decisions of the Aarhus Compliance Committee and the CJEU in Commission v UK ... it is now clear that the costs protection regime introduced by CPR 45.41 is not Aarhus compliant insofar as it is confined to applications for judicial review, and excludes statutory appeals and applications. A costs regime for environmental cases falling within Aarhus under which costs protection depends not on the nature of the environmental decision or the legal principles upon which it may be challenged, but upon the identity of the decision-taker, is systemically flawed in terms of Aarhus compliance.

35. This Court is not able to remedy that flaw by the exercise of a judicial discretion. If the flaw is to be remedied action by the legislature is necessary. We were told that the government is reviewing the current costs regime in environmental cases, and that as part of that review the Government will consider whether the current costs regime for Aarhus claims should make provision for statutory review proceedings dealing with environmental matters ... That review will be able to take our conclusions in this Appeal, including our conclusion as to the scope of Article 9(3), into account in the formulation of a costs regime that is Aarhus compliant."

As such, the proposals do not address the concerns raised by the Court of Appeal (as echoed by the Aarhus Compliance Committee in responding to the UK's first progress report on Decision V/9n) in relation to statutory review.

We would also emphasise that the current proposal to extend costs protection to include certain statutory reviews¹³ within the scope of the PPD would appear to make little appreciable difference to the number of cases benefitting from costs protection.

According to data provided by the MOJ under the EIRs in October 2015, a total of 433 applications were made under s.288 TCPA 1990, s.289(1) and (2) TCPA 1990 and s.65(1)

¹² *Secretary of State for Communities & Local Government v Sarah Louise Venn* [2014] EWCA Civ 1539

¹³ Including s.288 TCPA 1990, s.289(1) and (2) TCPA 1990 and s.65(1) Planning (Listed Building Conservation Areas) Act 1990



Planning (Listed Building Conservation Areas) Act 1990 between 1st April 2013 and 31st August 2015¹⁴.

The Government could not confirm how many of these applications fall within the scope of the PPD (and would thus qualify for costs protection under the proposals). However, the MOJ provided the Crown Office Reference numbers for the 433 cases. Link was able to locate 97 judgments from these CO numbers^{15 16}. On examination, it would appear that 4 cases (4%) engaged the PPD and would, therefore, be eligible for costs protection under the new regime. The results of this research are presented in Annex B to this response.

It should be noted that the remaining 93 cases raise a myriad of important environmental issues, including (but not confined to) those listed below, which would not be eligible for costs protection:

- Interpretation of NPPF policies including sustainable development and the meaning of harm and special circumstances justifying development in the Green Belt;
- Proposals involving SEA;
- Consideration of flooding;
- Issues around Tree Preservation Orders;
- Location of solar energy developments and wind farms;
- Change of land use within a National Park;
- Meaning of harm within the special character and interest of a listed building;
- Treatment of “green gaps” in planning proposals; and
- Expansion of a waste transfer facility in the Green Belt

It is therefore clear that if the proposals are to be both effective and Aarhus-compliant, then statutory reviews concerning all matters within the scope of Article 9(3) of the Aarhus Convention should be encompassed - as is currently the case in Northern Ireland¹⁷.

Eligibility – types of claimant eligible for costs protection under the Environmental Costs Protection Regime

Q2. Do you agree with the proposed changes to the wording of the rules and Practice Directions regarding eligibility for costs protection? If not, please give your reasons.

No. The proposed amendments have no evidential basis and do not comply with the requirements of the PPD¹⁸ and the Aarhus Convention, in that they have the unintended effect of narrowing the scope of the meaning of “general public”. This conflicts with the Convention’s aim to give the public and the public concerned “*wide access to justice*”¹⁹.

¹⁴ s. 288 TCPA 1990) – 333 (30 successful); s.289(1) and (2) TCPA 1990 - 100 (6 successful); and s.65(1) Planning (Listed Building Conservation Areas) Act 1990 – no applications received

¹⁵ The MOJ confirmed it held no further information about these cases. It pointed out that some cases will not yet have concluded and others will not have been reported.

¹⁶ It would be helpful to do more research on these cases to clarify the number of cases falling within the PPD with precision. Firstly, at times multiple CO numbers referred to the same judgment. Secondly, Link only had access to the judgments so in theory it is possible that some cases were EIA development but this was not noted in the judgment

¹⁷ See The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, s.2(1)(b) available at: <http://www.legislation.gov.uk/nisr/2013/81/regulation/2/made>

¹⁸ Articles 3(1) and 4(1)(b) PPD

¹⁹ Articles 9(2) and 9(3) Aarhus Convention and pages 188 and 195 of the Aarhus Implementation Guide



The Consultation paper maintains that the intention of introducing the Aarhus costs regime was to protect “*members of the public*”. Accordingly, the proposals replace the existing status of an Aarhus Convention claim (which derives from the definition of environmental Information in Article 2(3) of the Convention) with a claim brought by a member of the public by way of JR under Articles 9(1) and 9(3) of the Convention and JR or certain types of statutory review (i.e. those covered by the PPD) under Article 9(2) of the Convention.

The Aarhus Convention Implementation Guide²⁰ confirms that, as a minimum, members of the “*public concerned*” either having a sufficient interest or maintaining impairment of a right have standing to review the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 - and that members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment²¹.

The Convention defines “*the public*” in Article 2(4) as “*one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups*”. The Implementation Guide provides helpful commentary on the meaning of “*the public*”, which is clearly intended to be broad, and expressly to include community groups and NGOs.

In relation to groups of individuals, the domestic courts have already held that Parish Councils are entitled to costs protection (*R (Halebank Parish Council) v Halton Borough Council*²²). The Courts and the Compliance Committee also see no reason why Local Authorities (when not acting in the capacity of decision-maker) should be excluded from costs protection (*R (HS2 Action Alliance Ltd & London Borough of Hillingdon) v. Secretary of State for Transport*^{23 24}). Environmental NGOs are clearly eligible to bring claims under the Aarhus costs regime²⁵.

However, references to “a member of the public” in proposed Rules 45.41(2) and 45.43(1)²⁶ may encourage defendants to argue that only a named individual should benefit from costs protection, and that eligible claimants - including associations, organizations, groups and even environmental NGOs – should not. Such challenges will be made easier by virtue of the proposed removal of the risk of costs being awarded on an indemnity basis when challenging the status of the claim. It is also possible that a judge considering costs protection may feel unable to grant costs protection to qualifying individuals by virtue of the wording of the above Rules - even though he/she may recognise that this results in a breach of the requirements of the Aarhus Convention - as was the case in *Venn*²⁷.

While we assume it is not the Government’s intention to exclude community groups and environmental NGOs from costs protection, moving to a position in which costs protection is

²⁰ See http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

²¹ Under Article 9(3) Aarhus Convention

²² [2012] EWHC 1889 (Admin)

²³ [2015] EWCA Civ 203

²⁴ See also the Compliance Committee’s decision in ACCC/C/2012/68 at http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-44/ECE_MP.PP_C.1_2014_5_ENG.pdf

²⁵ Article 9(2) of the Convention. Also see Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg*⁴⁰⁶ (“the Trianel case”)

²⁶ See Annex A of the consultation paper

²⁷ *Secretary of State for Communities & Local Government v Sarah Louise Venn* [2014] EWCA Civ 1539



so clearly limited in statute may, at best, lead to substantial satellite litigation and, at worst, to non-compliance with the PPD and Articles 9(2) and 9(3) of the Convention.

Finally, Link is also concerned that the wording of Rules 45.41 and 45.43 may exclude some environmental cases currently qualifying for costs protection. A claim is currently eligible for costs protection if it is an Aarhus Convention claim as defined at CPR 45.41(2) as:

“a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.” (own emphasis added)

However, proposed Rule 45.41(2)(c) provides that costs protection will only be available for a claim by way of JR which challenges the legality of any act or omission of a public body within the scope of Article 9(3) of the Aarhus Convention (i.e. those contravening provisions of national law relating to the environment).

Article 9(3) of the Convention is currently considered to include claims concerning provisions of EU law²⁸, nuisance actions²⁹ (including between private parties), wildlife protection³⁰ and most, if not all, planning matters³¹. However, the Aarhus Implementation Guide states that “*national laws relating to the environment*” extend beyond information or public participation rights guaranteed by the Convention and legislation in which the environment is mentioned in the title or heading to encompass provisions which, in some way, relates to the environment. Thus, Article 9(3) should also include acts and omissions contravening provisions on such matters as environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships, regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws.

Link is concerned that while the current definition of an environmental claim is broad enough to encompass all of these matters, the proposed definition of cases qualifying for costs protection in Rules 45.41 and 45.43 will be too prescriptive. Link therefore advocates the definition of what constitutes an Aarhus claim should remain as it is.

Q3. Should claimants only be granted costs protection under the Environmental Costs Protection Regime once permission to apply for judicial review or statutory review (where relevant) has been given? If not, then please give your reasons.

No. Delaying costs protection until permission to proceed has been granted does not comply with the requirements of the PPD and the Aarhus Convention.

Firstly, as the decision on costs capping will not be made until permission is granted, the claimants’ position as to their costs liability will be uncertain. This uncertainty is compounded because, as a result of the reduced time limit for bringing certain claims (such as those under the Planning Acts), a claimant may be forced to issue proceedings before receiving the defendant’s response through the Pre-Application Protocol procedure. This proposal is therefore open to abuse by a defendant who may delay or withhold information until after the issue of proceedings.

²⁸ See ACCC/C/2006/18, paragraph 26

²⁹ See ACCC/C/2008/C33, paragraphs 44-45 , ACCC/C85 and 86; *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012 and *Coventry v Lawrence* [2014] 3 W.L.R. 555

³⁰ See Communication ACCC/C/2006/18

³¹ See *Secretary of State for Communities & Local Government v Sarah Louise Venn* [2014] EWCA Civ 1539, paragraphs 10-18



Secondly, the ACC has already found that costs before permission can be prohibitive under the current regime. In Communication C77³², Greenpeace submitted a Communication to the ACCC regarding the UK's alleged failure to conduct a lawful consultation regarding the designation of a Nuclear National Policy Statement (NPS). Greenpeace applied to the High Court for a JR of the designation of the NPS. In December 2011, the Court refused permission and Greenpeace was ordered to pay £11,813 for the Government's costs in preparing the Acknowledgement of Service. Greenpeace disputed the costs awarded on the grounds that the amount was excessive and the case fell within the scope of the Aarhus Convention and requested that an award of costs set at a maximum of £1,500 would be appropriate. This request was refused, and Greenpeace was duly ordered to pay the Government £8,000 (instead of £11,813).

The Compliance Committee found: *"the amount of £8,000 that the communicant was ordered to pay the defendant makes the procedures prohibitively expensive, even if the court, in revising the original amount (£11,813) took into account the fact that the communicant was acting in the public interest"*. If a costs award of this order is deemed prohibitively expensive under the current Aarhus costs regime, increasing the caps still further (see later) will take the UK further into a situation of non-compliance.

Link is also concerned that the effect of this approach will be to create an absolute restriction on costs protection in cases where permission is not granted – regardless of the actual financial resources of the claimant. We would also point out that consideration of the merits of a claim was only one factor to be taken into account in deciding on costs protection – the CJEU has confirmed that a range of factors must be considered in reaching a judgment on whether the level of costs payable is reasonable³³.

Finally, we would point out that while the number of statutory reviews benefitting from costs protection under the new regime would appear to be very small (see question 1), the introduction of a permission stage in statutory review on 26th October 2015 will mean that a greater number of cases will be affected by this new rule³⁴.

In order to comply with the PPD and the Aarhus Convention, costs protection must apply from the point at which the claimant lodges the claim form (as is currently the case).

Levels of costs protection available

Q4. Do you agree with the proposal to introduce a 'hybrid' approach to govern the level of the costs caps? If not, please give your reasons.

No. These provisions will return the UK to non-compliance with the PPD³⁵ and Article 9(4) of the Aarhus Convention.

In *Commission v UK*, the CJEU confirmed that the cost of legal proceedings must not *"exceed the financial resources of the person concerned, nor must they be objectively unreasonable"*³⁶. The Supreme Court set out that same position³⁷. This is not an either/or requirement – costs must satisfy both limbs of that test. Hence, whatever figure may be

³² Findings and recommendations with regard to communication ACCC/C/2012/77 concerning compliance by the United Kingdom of Great Britain and Northern Ireland

³³ See Case C-260/11, *Edwards*, paragraph 42

³⁴ Section 91 and schedule 16 of the Criminal Justice and Courts Act 2015 subject to transitional provisions in the Criminal Justice and Courts Act 2015 (Commencement No. 3 and Transitional Provisions) Order 2015)

³⁵ Article 3(7) amending the EIA Directive and Article 4(4) amending the IPPC Directive

³⁶ See Case C-530/11, paragraph 47 and Case C-260/11 *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*, paragraph 40

³⁷ See, *inter alia*, paragraphs 23(i) and 26



deemed to be subjectively reasonable for a claimant must also be one that is objectively reasonable.

As to what is objectively reasonable, it is important to recognise that adverse costs exposure of £5,000 or £10,000 does not represent the claimant's total costs liability. The claimant must also pay the Administrative Court fee (now just under £1,000, that figure having doubled in the last year³⁸) and their own legal costs, which routinely amount to £25,000 and often more. Thus, the figure for total costs exposure is not £5,000 or £10,000 but £31,000 – £36,000. As the CJEU has confirmed that costs include *all* the costs in a case (see *Commission v UK*³⁹ and Case C-260/11 *Edwards*⁴⁰) it is clearly the claimant's total costs liability that must not be prohibitively expensive.

Both Link and the Coalition for Access to Justice for the Environment (CAJE) have repeatedly maintained in submissions to the Task Force on Access to Justice⁴¹ and the Compliance Committee⁴² that costs exposure of this order does not satisfy the requirement for costs to be objectively reasonable. To increase the caps beyond £5,000 and £10,000 continues to take the UK in the opposite direction of travel to compliance with Decision V/9n and Article 9(4) of the Convention.

Thus, even if the Government believes that certain claimants may be able to afford legal costs in excess of £31,000 - £36,000, the requirement to also comply with the objective limb of the test means that the caps can only go down where claimants are of limited means, not up (as is currently the case in Scotland⁴³).

Secondly, the CJEU has confirmed that claimants must have prior certainty in relation to costs protection. In case C-530/11⁴⁴ *Commission v UK*⁴⁵, the CJEU held:

“In particular, where the relevant provision is designed to create rights for individuals, the legal situation must be sufficiently precise and clear, and the persons concerned must be put in a position to know the full extent of their rights and, where appropriate, to be able to rely on them before the national courts (see, to this effect, inter alia, Case C-233/00 Commission v France [2003] ECR I-6625, paragraph 76)”

Moreover, in paragraph 56, the CJEU identified the need for clear rules in order to ensure specific rights:

“In that regard, the mere fact that, in order to determine whether national law meets the objectives of Directive 2003/35, the Court is obliged to analyse and assess the

³⁸ See <https://www.justice.gov.uk/downloads/courts/administrative-court/aco-fees-22-apr-2014.doc>

³⁹ Case C-530/11, paragraphs 44 and 64

⁴⁰ Case C-260/11, paragraphs 27 and 28

⁴¹ See

<http://www.wcl.org.uk/docs/Joint%20Links%20Statement%20on%20UK%20Access%20to%20Justice.pdf>

⁴² See

http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/frObserver_CAJE_V9n_Annex_1_22.01.15.pdf

⁴³ See Chapter 58A Protective Expenses Orders in Environmental Appeals and Judicial Review. Rule 58A.4(2) provides that the court may, on cause shown by the applicant, lower the sum of £5,000. Chapter 58A available at: <http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chapter58a-1.pdf?sfvrsn=6>

⁴⁴ See

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=147843&pageIndex=0&dclang=EN&mode=lst&dir=&occ=first&part=1&cid=139953>

⁴⁵ See paragraph 34 of the judgment



effect – which is moreover subject to debate – of various decisions of the national courts, and therefore of a body of case-law, whereas European Union law confers on individuals specific rights which would need unequivocal rules in order to be effective, leads to the view that the transposition relied upon by the United Kingdom is in any event not sufficiently clear and precise” (own emphasis added)

The fact that any party will be able to make an application to the court to increase or even remove the claimant’s default costs cap⁴⁶ (seemingly at any point in the proceedings) and that the court will also be able to vary the caps of its own motion - removes the requisite element of prior certainty for the claimant and will deter them from bringing cases.

Contrariwise, the ability to decrease the caps in adverse costs liability (and increase the cross-cap) do not offend the requirement for certainty because the claimant is aware of the full extent of their liability (the “worst case scenario”) and can decide whether they are willing to proceed on that basis.

The Consultation paper makes it abundantly clear that “*it would be exceptional for claimants to require more costs protection than is provided by the default costs caps*”. Link therefore assumes the vast majority of applications would be from defendants seeking to increase the caps relying on the subjective limb of *Edwards* and the issues set out in Rule 45.44(4)(i)-(vi). This would effectively take us back to the pre-Aarhus costs rules situation in which claimants were required to apply for a Protective Costs Order (relying on the principles established in *Corner House*⁴⁷), which resulted in lengthy and costly satellite litigation just to determine the extent of a claimant’s costs liability. In fact, it could be even more restrictive than the regime under *Corner House*, as it would appear that a defendant (or the court) could apply for the default costs cap to be raised or even removed at any point in the proceedings. At least in *Corner House*, a claimant could withdraw a claim if a PCO was not obtained. Here, a claimant would be proceeding in the knowledge that the situation could change dramatically at any time.

This problem is compounded by the possibility that the need to consider whether the claimant “*has a reasonable prospect of success*” (see proposed r. 45.44(4)(b)(ii)) could introduce an additional stage (post permission but pre-substantive hearing) in the proceedings.

Finally, the Consultation paper confirms the Government does not consider the level of a defendant’s costs cap to be relevant to whether proceedings are prohibitively expensive for the purposes of the Aarhus Convention or the PPD. Link does not agree with this assertion. While the CJEU did not have enough evidence before it to reach a conclusion on reciprocal caps, the judgments in *Commission v UK* and *Edwards* confirm that costs must be assessed as a whole. Our experience is that the costs in complex environmental cases can render such cases “too expensive to win”⁴⁸. In actuality, there is no basis for a cross-cap in the Aarhus Convention – the Compliance Committee has reiterated on many occasions that requirements of prohibitive expense and fairness apply to the claimant⁴⁹ (not the defendant public body). For these reasons, Link supports the removal of the reciprocal cap or, failing

⁴⁶ See proposed rule 45.44 and proposed paragraph 5 of Practice Direction 45

⁴⁷ *R (on the application of Corner House Research) v Secretary of State for Trade & Industry* [2004] EWHC 3011 (Admin)

⁴⁸ See CAJE’s submission to the Aarhus Secretariat dated 22nd January 2015 on Decision V/9n concerning compliance by the UK with its obligations under the Aarhus Convention) at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/frObserver_CAJE_V9n_Annex_1_22.01.15.pdf

⁴⁹ See, for example, Communication C27 paragraph 45



that, the potential for the defendant's cross-cap to be increased "on cause shown" (i.e. as evidenced⁵⁰), as is currently the case in Scotland⁵⁰.

Q5. Do you agree that the criteria set out at proposed rule 45.44(4) at Annex A properly reflect the principles from the Edwards cases? If not, please give your reasons.

No. Please see the answer to question 4, above.

The CJEU set out a number of issues that serve to inform the level of costs protection for claimants in paragraph 49 of *Commission v UK*⁵¹. Link believes these while these factors inform the objective limb of the *Edwards* test (i.e. they can support an argument for the cap to go down) they cannot replace the requirement for the level of costs protection afforded to claimants to be clear, unequivocal and subjectively reasonable.

Q6. Do you agree that it is appropriate for the courts to apply the Edwards principles (proposed rule 45.44 at Annex A) to decide whether to vary costs caps? If not, please give your reasons.

Yes, but only insofar as the caps are decreased. Please see the answers to questions 4 and 5, above.

Q7. Should all claimants be required to file at court and serve on the defendant a schedule of their financial resources at the commencement of proceedings? If not, please give your reasons.

No. Firstly, the Government has failed to provide any evidence to suggest why such a burdensome imposition on claimants is necessary. It will deter people from bringing cases for fear that their personal financial details will be in the public domain. In *Garner*⁵², the Court of Appeal held:

"52 The more intrusive the investigation into the means of those who seek PCOs and the more detail that is required of them, the more likely it is that there will be a chilling effect on the willingness of ordinary members of the public (who need the protection that a PCO would afford) to challenge the lawfulness of environmental decisions."

Secondly, the requirement for the schedule to include "*any financial support which any person has provided or is likely to provide to the claimant*" (PD 45 paragraph 5.2) is completely unworkable. In the case of charities and charitable companies, the proposal has the capacity to include a myriad of grants, donations, legacies, membership subscriptions etc, none of which may be linked in any way to litigation. Even quite small environmental charities can have many members, and large charities can have a membership of hundreds of thousands or even millions. These memberships include a diversity of people, including vulnerable groups such as children and the elderly.

⁵⁰ *Supra*, no. 6. Rule 58A.4(4) provides that the court may, on cause shown by the applicant, raise the cross-cap above £30,000

⁵¹ Including "*the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the law and the applicable procedure and the potentially frivolous nature of the claim at its various stages (see, to this effect, Edwards and Pallikaropoulos, paragraph 42 and the case-law cited), but also, where appropriate, costs already incurred at earlier levels in the same dispute*"

⁵² *R (Garner) v Elmbridge Borough Council* [2012] P.T.S.R. 250 at 50-53



The proposals are also profoundly vague. For example, it is not clear from the consultation paper whether a claimant must file just the schedule referred to in paragraph 5.8 of Annex A or whether they must file the above plus a completed questionnaire, as referred to in the previous consultation on the Provision and Use of Financial Information in Judicial Review⁵³.

For further and related submissions on this point, we refer the Government to Link's response to the recent consultation on the provision and use of financial information in JR (September 2015, attached for ease of reference).

Q8. Do you agree with the proposed approach to the application of costs caps in claims involving multiple claimants or defendants? If not please give your reasons.

No. A similar issue was addressed by the Compliance Committee in Communication C27⁵⁴, in which the UK argued that a costs order of £39,454 against the Cultra Residents Association was “*neither deterrent nor prohibitive, taking into account the involvement of five residents’ associations and the number of their members*”⁵⁵. The possibility of “splitting” a total costs award between claimants in this way was also raised orally by the UK Government before the Compliance Committee at its twenty fifth meeting⁵⁶.

In its findings, the Compliance Committee found not only the quantum of costs awarded rendered the proceedings prohibitively expensive in this case, but also that the manner of allocating the costs was unfair, within the meaning of Article 9(4) and thus amounted to non-compliance. It may therefore be assumed that a similar approach, whereby each claimant bringing a legal action attracts an individual cap, may also be non-compliant on the basis that the total figure would be objectively unreasonable.

Q9. At what level should the default costs caps be set? Please give your reasons.

Link does not believe the caps should be viewed as “default caps”. Our view is that the caps should be fixed at the current levels (£5,000 for individuals and £10,000 other cases), with provision for them to be decreased and for the reciprocal cap to be increased on cause shown in order to comply with the subjective limb of the *Edwards* test for prohibitive expense. These arrangements currently apply in Scotland⁵⁷.

Link is strongly opposed to the proposal to increase the caps for individual claimants to £10,000 and £20,000 for other claimants and reducing the cap for defendants to £25,000. This would mean the figures for the claimants’ total costs liability would rise to £36,000 - £46,000, which clearly do not satisfy the Aarhus Convention and *Edwards* requirement for costs not to be prohibitively expensive on an objective basis.

Finally, Link would also point out that such increases seem self-serving and unfair to the claimant given that JRs are against public bodies. The Compliance Committee has

⁵³ See https://consult.justice.gov.uk/digital-communications/reform-of-judicial-review-proposals-for-the-provis/supporting_documents/reformofjudicialreview.pdf

⁵⁴ Findings and recommendations with regard to communication ACCC/C/2008/27 concerning compliance by the United Kingdom of Great Britain and Northern Ireland available at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-27/DFR/ece_mp.pp_c.1_2010_6_add.2_eng.pdf

⁵⁵ *Ibid*, paragraph 32

⁵⁶ Carol Day, *pers comm.*, who attended the meeting and spoke as an Observer

⁵⁷ See Chapter 58A Protective Expenses Orders in Environmental Appeals and Judicial Review. Rule 58A.4(2) provides that the court may, on cause shown by the applicant, lower the sum of £5,000. Chapter 58A available at: <http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chapter58a-1.pdf?sfvrsn=6>



emphasised on a number of occasions (including in C33⁵⁸), that “fairness” in terms of Article 9(4) of the Convention refers to what is fair for the claimant, not the defendant public body.

Q10. What are your views on the introduction of a range of default costs caps in the future?

Link is opposed to the introduction of a range of default caps on the basis that claimants require advance certainty in the form of unequivocal costs rules.

Costs of challenges and of applications to vary costs caps

Q11. Do you agree that where a defendant unsuccessfully challenges whether a claim is an Aarhus Convention claim, costs of that challenge should normally be ordered on the standard basis? If not please give your reasons.

No. The consultation paper explains that the Government introduced this provision to address fears that defendants might be encouraged to bring weak challenges if there was no penalty for contesting that a case engaged the Environmental Costs Protection Regime, and that without some sanction this would lead to unnecessary satellite litigation. Link supports this view - and it has indeed been the case. Information released to Link under the EIRs in 2015 confirms the number of challenges to the status of claims following the introduction of the Aarhus costs rules in April 2013 has been very low:

| | 2013/2014 | 2014/2015 |
|--------------------------------------------------------|-----------|-----------|
| Successful challenge to status of claim by defendant | 1 | 8 |
| Unsuccessful challenge to status of claim by defendant | 4 | 5 |

Proceedings in the High Court and the ACC have now clarified the situation with regard to costs protection. Those qualifying include individuals, community groups, Parish Councils, environmental NGOs and Local Authorities (when not acting in the capacity of decision-maker). Non-qualifying claimants include purely commercial bodies such as supermarkets.

To move to a situation in which challenging the status of cases is less onerous will inevitably lead to uncertainty as to which bodies qualify and an increase in satellite litigation.

Q12. Do you think the Environmental Costs Protection Regime should make specific provision for how the courts should normally deal with the costs of applications to vary costs caps? If so, what approach should the rules take?

Link does not consider the capacity to increase costs caps consistent with the UK's obligations under the PPD and the Aarhus Convention for the reasons given above.

Cross-undertakings in damages

Q13. Do you have any comments on the proposed revisions to Practice Direction 25A?

Link does not support the proposed changes to paragraph 5 of Practice Direction 25A with regard to interim relief.

Firstly, the requirement for the application to be made by a member of the public in paragraph 5.1B(1) may prevent qualifying organisations from being able to access relief. This will prevent compliance with Article 9(4) of the Aarhus Convention, which requires review procedures covered by Articles 9(1),(2) and (3) of the Convention to provide “adequate and

⁵⁸ See C33 paragraph 135



effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive” for members of the public and the public concerned.

Secondly, in relation to paragraph 5.1B(3), the CJEU has confirmed that interim relief, and the issue of cross undertakings in damages in particular, must be taken into account when evaluating what is prohibitively expensive for the claimant⁵⁹. The revised text does not reflect the judgments of the CJEU in *Commission v UK* or the Supreme Court in *Edwards* in a number of ways (see question 4).

Thirdly, in relation to paragraph 5.1B(4), the Compliance Committee has already considered the possibility of splitting larger costs awards between group members and has found this approach to be in breach of Article 9(4) of the Aarhus Convention (see question 8).

Fourthly, in relation to Paragraph 5.1B(5), the requirement for the court to have regard to any financial support which any person has provided or is likely to provide to the claimant is completely unworkable (see question 7).

Finally, Link has always maintained that the present situation with regard to interim relief does not comply with the PPD and Article 9(5) of the Aarhus Convention. We believe claimants are deterred from pursuing interim relief because they experience considerable uncertainty as to whether the court will order a cross-undertaking in damages and, if so, to what extent. These concerns are reinforced by information released by the MOJ under the EIRs in November 2015 relating to Aarhus cases in which injunctive relief was sought between April 2013 and May 2015:

| | |
|-------------------------------------------------------------------------------|--------------------------------|
| No of cases in which an injunction was sought | 12 |
| No of cases in which an injunction was granted | 8 |
| No of cases in which a cross-undertaking was required | 5 |
| No of cases in which it is unclear whether a cross-undertaking was required | 5 |
| No of cases in which a cross-undertaking was given and the quantum of damages | 2 (£3,000 and “not specified”) |

This data suggests the following:

- The number of applications for interim injunctive relief in Aarhus claims is low – only 12 cases in two years - thus confirming there is no basis for the process of obtaining relief to be made more difficult than it currently is;
- Although Practice Direction 25A does not currently require the court to require the claimant to give a cross-undertaking in damages in Aarhus Convention claims⁶⁰, it is clear the High Court is still requiring claimants to provide such an undertaking in between 50-83% of cases in which relief is sought; and
- While the information available is limited, the proportion of cases in which a cross-undertaking in damages was provided by the claimant also appears to be low. This suggests that claimants are not generally able or willing to provide such an undertaking.

Link believes the difficulty with interim relief arises because in deciding whether to grant it, a court will apply the balance of convenience test. In an environmental case, a judge must balance: (i) refusing the injunction and allowing a development to proceed, possibly with irreparable harm to the environment - even though it may transpire the consent being relied

⁵⁹ See *Commission v UK*, paragraphs 64-72

⁶⁰ See Practice Direction 25A, paragraph 5.1B



on was unlawfully granted (as was the case in *Lappel Bank*); against (ii) granting an interim injunction that may cause significant financial loss to the developer – even though the developer’s consent may subsequently be found to be lawful. A Court is likely to favour (ii) because the risk of damage in granting the injunction has a remedy – the developer can sue on the cross-undertaking. If, however, there is no cross-undertaking the Court will be far less likely to grant the injunction in the first place. The difficulty is that for the cross-undertaking to provide a meaningful remedy in this situation, it is almost certainly going to be prohibitively expensive for the claimant.

Link recognises the difficulty of this position. However, if claimants are not to be unfairly prejudiced and exposed to uncertainty, the requirement for cross-undertakings in damages must be removed from the consideration of injunctive relief in Aarhus claims. Moreover, there should be a presumption in favour of granting relief where a failure to do so would result in significant and irreparable harm to the environment. In order to prevent the developer being unduly prejudiced by the injunction, the case should be expedited.

Other forms of review

Q14. Are there other types of challenge to which the Environmental Costs Protection Regime should be extended and if so what are they and why?

Yes. We have already explained that if the costs regime is to be Aarhus-compliant it must cover all statutory reviews concerning environmental matters (see question 1).

Secondly Article 9(3) of the Convention expressly refers to acts or omissions “*by private persons*”. As the Court of Appeal has held that private nuisance claims can fall within Article 9(3) of the Convention (*Austin v Argent Miller*⁶¹) the costs regime should be extended to include them.

We would also make one final observation about the scope of the costs regime. In *Commission v UK*, the CJEU confirmed that the assessment of what is prohibitively expensive cannot differ depending on whether the national court is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal⁶². The Court also held that costs incurred at earlier levels in the same dispute may be taken into account when calculating prohibitive expense⁶³. The current position is that caps apply up until the end of the proceedings at first instance, but they do not automatically apply in the Court of Appeal⁶⁴ or the Supreme Court⁶⁵. The CJEU judgments would appear to mean that claimants may not be exposed to higher caps in the Court of Appeal and the Supreme Court than at first instance, but that caps after first instance could be reduced where the imposition of the same cap would cause the legal action to become prohibitively expensive.

Q15. From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals to revise the Environmental Costs Protection Regime?

⁶¹ [2014] EWCA Civ 1012

⁶² *Commission v UK*, paragraph 51 and *Edwards*, paragraph 45

⁶³ *Ibid*, paragraph 49

⁶⁴ See CPR 52.9A: in a case where Aarhus costs rules applied below a discretion to limit costs having regard to: (i) means of parties; (ii) all the circumstances of the case; and (iii) the need to facilitate access to justice

⁶⁵ See PD 13 (from November 2013), para 2.2 a discretion to make “*an order limiting the recoverable costs of an appeal in an Aarhus Convention claim or in proceedings in which costs recovery is limited or excluded at first instance*”



Yes. Research conducted by the Environmental Law Foundation⁶⁶ shows that the majority of people requesting legal advice were from the lowest income group in society. A follow-up report in 2009 also concluded that the majority of people contacting ELF for legal advice about environmental issues primarily consisted of “*not very wealthy people concerned primarily about the impact of development in the area in which they live*”⁶⁷. It is therefore clear that the poorest members of society will potentially be most affected by these proposals.

Finally, as pointed out in Link’s response to the recent consultation on the provision and use of financial information, charity membership is an affordable way for people with limited resources to contribute to the protection and enhancement of the environment and civil society. Vulnerable categories of society, such as children, older people and people with disabilities are also often members of charities – but the knowledge that membership may expose them to court costs is likely to deter such individuals from joining environmental charities and hence participating in activities associated with improving the environment.

Enclosures:

Annex A – Aarhus Convention Claims Data

Annex B – Statutory Review Research

Annex C - Applications for interim injunctive relief in Aarhus Convention Claims (April 2013 - May 2015)

Legal Opinion on the MJ proposals by Andrew Parkinson and Nathalie Lieven QC, Landmark Chambers dated 18th November 2015

Wildlife & Countryside Link response to MOJ proposals on the Provision and Use of Financial Information in Judicial Review (September 2015)

⁶⁶ See Stookes, P. for ELF (2003) *Civil Law Aspects of Environmental Justice*. Available at: <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexDCivillawaspectsofEnvJustice.pdf>

⁶⁷ ELF and the Centre for Business Relationships, Accountability, Sustainability and Society (BRASS) (2009) *Costs Barriers to Environmental Justice, conclusion*. Available at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/correspondence/FrELF_Report2009.pdf

