Costs Protection in Environmental Cases: Department of Justice proposals to revise the costs capping scheme for eligible environmental challenges

Comments by

Northern Ireland Environment Link

17th February 2016

Northern Ireland Environment Link (NIEL) is the networking and forum body for non-statutory organisations concerned with the environment of Northern Ireland. Its 69 Full Members represent over 90,000 individuals, 262 subsidiary groups, have an annual turnover of £70 million and manage over 314,000 acres of land. Members are involved in environmental issues of all types and at all levels from the local community to the global environment. NIEL brings together a wide range of knowledge, experience and expertise which can be used to help develop policy, practice and implementation across a wide range of environmental fields.

These comments are made on behalf of Members, but some members may be providing independent comments as well. If you would like to discuss these comments further we would be delighted to do so.

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Executive Summary

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.

After a decade of domestic and international scrutiny, in 2013 the devolved administrations of the UK introduced bespoke provisions for environmental cases to comply with EU and international law. The new rules offer many claimants access to environmental justice for the first time in years.

The proposals in this consultation would once again make it extremely difficult for claimants to bring environmental cases and thus take the UK in the opposite direction of travel to compliance with the EU law (the EC Public Participation Directive or PPD) and the United Nations Economic Commission for Europe (UNECE) Aarhus Convention.

Moreover, there would appear to be no evidence, data or even a credible narrative, to show why they are necessary. In fact, evidence obtained from the Department of Justice (DoJ) in 2016 confirms the opposite. The DoJ has confirmed there were 11 cases identified as Aarhus claims between 1st April 2013 and 31st December 2015 in Northern Ireland – this amounts to some 4-5 per year. There is therefore no argument to suggest there is a proliferation of environmental litigation that must be stemmed.

Furthermore, DoJ data confirms that 45.5% of environmental cases were granted leave to proceed over that two and a half year period - contrasting with a figure of 32% for all JRs in 2014. Thus, while environmental cases represent a small proportion of the total number of JRs lodged annually, they have high success rates when compared to JRs as a whole. This confirms that such cases play an essential role in upholding the rule of law whilst also serving to protect the environment.

The corollary of these proposals will be a move away from a situation in which fixed costs caused few delays to one in which satellite litigation (which in itself can be prohibitively expensive) is once again the norm. These costly and time-consuming proceedings will distract from the substantive issues. Furthermore, they will be a cause of great frustration to public bodies and interested parties as well as claimants and ultimately impact on the level of protection for health and the environment.

The Proposals

- **Eligibility for costs protection** – The proposal to confine eligibility to a member of the public could exclude community groups, Parish Councils and even environmental NGOs from costs protection;

- **Level of the caps** – Allowing defendants to challenge the level of the cap conflicts with the requirement for claimant's to have certainty with regard to costs exposure. Proposals to increase the caps from £5,000 (individuals) and £10,000 (other cases) to £10,000 and £20,000 respectively do not satisfy the requirement for costs to be objectively reasonable. It should also be noted that these figures do not represent the claimant's total costs liability – they must also pay the court fee and their own legal costs, which on average total at least £30,000. The total costs exposure of £35,000 – £40,000 plus VAT at 20% is already prohibitively expensive for many claimants, particularly individuals;

- **Schedule of financial resources** - Requiring claimants to submit a schedule of financial resources specifying third party support is unnecessary and unworkable. 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 people, such as children, the elderly and those with disabilities are often members of charities – but the knowledge that they might be exposed to court costs is likely to deter them from joining environmental charities and hence participating in activities associated with improving the environment;

- **Multiple claimants** – Applying separate costs caps to individual claimants could render the claimants' collective costs exposure objectively unreasonable;

- **Challenging Aarhus Convention claims** - Replacing the award of costs on an indemnity basis for challenging the status of an Aarhus claim with the standard basis will encourage defendants to challenge claims and lead to unnecessary satellite litigation;

- **Interim relief (injunctions)** – These proposals would appear to be completely unnecessary in light of the fact there were no applications for injunctive relief in Aarhus claims between 1st April 2013 and December 2015. Moreover, the proposals conflict with CJEU judgments in *Commission v UK* and *Edwards*, the PPD and the Aarhus Convention.

To press ahead with these proposals will return the UK to a position of significant non-compliance with EU law and the Aarhus Convention. The reality is that very few individuals and environmental NGOs are currently pursuing environmental JRs in Northern Ireland. NIEL would therefore point out that any measures should therefore serve to improve access to environmental justice (and thus compliance with EU law) – not make it more difficult.

General comments

The Devolved Administrations of the UK introduced bespoke costs rules for environmental (Aarhus) cases in order to comply with the findings of the Aarhus Convention Compliance Committee (ACCC) in 2010[1], the European Commission's referral of Case C-530/11 (*Commission v UK*) concerning "prohibitive expense" to the Court of Justice of the European Union (CJEU) in April 2011 and in light of Advocate General Kokott's Opinion in *Edwards*[2] in October 2012[3].

The Proposal to revise the costs capping scheme for eligible environmental challenges ("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 case[4]. 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.

NIEL is deeply troubled that the DoJ is reneging on measures to secure compliance with the Aarhus Convention[5], the EC Public Participation Directive[6] ("PPD") and the above judgments so soon after introducing modified rules for environmental cases and after more than a

1 See Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland here: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece_mp.pp_c.1_2010_6_add.3_eng.pdf

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

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

4 *Ibid*, paragraph 49

5 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

6 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

decade of domestic, EU and international scrutiny on costs. 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 in years.

Despite the introduction of new Rules and Regulations across the UK, 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/9n[7] concerning prohibitive expense. Moreover, the Committee invited the UK to submit a second detailed progress report, including an update on the outcome of a UK-wide cross-government review undertaken in 2014/5. The UK's second progress report, submitted in November 2015, provided only a brief summary of the proposals in this consultation paper[8]. In December 2015, RSPB, Friends of the Earth, Friends of the Earth Scotland and Roger Watts (of C&J Black Solicitors in Belfast) submitted a detailed critique of the UK's second progress report, explaining how these proposals would take the UK in the opposite direction of travel to compliance with Article 9(4) of the Aarhus Convention and Decision V/9n[9].

NIEL would also draw the DoJ'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 these 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)).

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 effect of these proposals will be to deter many claimants from bringing cases on the basis of costs. This seems an entirely disproportionate response in light of the failure to adduce any evidence, data or even a credible narrative to show that environmental claims frustrate economic recovery or clog up the legal system.

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7 Letter from Ms Fiona Marshall dated 20/10/2015 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

8 Letter from Mr Ahmed Azam to Ms Fiona Marshall dated 13/11/2015 enclosing the UK's Second Progress Report on Decision V/9n

9 See comments by CAJE dated 17th December 2015 here: http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppcc/envppccimplementation/fifth-meeting-of-the-parties-2014/united-kingdom-decision-v9n.html

In fact, data obtained by RSPB Northern Ireland in February 2016[10] confirms there were only 11 applications for leave for JR in Northern Ireland identified as Aarhus Convention claims between 1st April 2013 and 31st December 2015. This equates to between 4-5 cases per year over that two and a half year period. As the 2014 Courts & Tribunal Service Judicial Statistics[11] suggest there may be in the order of 348 applications for leave to apply for JR per year, Aarhus cases would appear to make up just over 1% of that total.

Moreover, the DoJ data appears to suggest that some 45.5% of Aarhus claims were granted leave to proceed over the period 1st April 2013 – 31st December 2015. This compares favourably with the figure of 32% of all applications for leave to apply for JR being granted (see the 2014 Judicial Statistics). This confirms our view that while the number of environmental cases is small, they play a crucial role in upholding the rule of law and protecting the environment.

In light of the above, NIEL fears these proposals will take us back to the unhelpful position in which costly and time-consuming satellite litigation distracts 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 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.

We urge the DoJ 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, and thus follow-up measures by the CJEU, domestic challenges and further scrutiny by the Aarhus Compliance Committee. Moreover, in light of the clear evidence that very few individuals and environmental NGOs are currently pursuing environmental JRs in Northern Ireland, we would press the DoJ to consider the introduction of measures to improve access to environmental justice as a matter of some urgency.

This response draws heavily on the following: (i) Wildlife and Countryside Link's response to similar proposals in England and Wales issued by the Ministry of Justice in September 2015[12]); (ii) Comments made by Observers on the UK's Second Progress Report on the

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[10] Letter to Ms Michelle Hill, Senior Conservation Officer (Planning), RSPB Northern Ireland from the Department of Justice dated 2nd February 2016 disclosing data under the EIRs 2004 on costs protection in environmental cases (Ref:EIR\15\01)

[11] See https://www.courtsni.gov.uk/en-GB/Services/Statistics%20and%20Research/Documents/Judicial%20Statistics%202014.pdf

[12] See http://www.wcl.org.uk/docs/Wildlife%20and%20Countryside%20Link%20-%20Executive%20Summary%20-%20Cost%20Protection%20in%20Environmental%20Claims.pdf and

implementation of Decision V/9n[13] (referred to above); and (iii) Legal Opinion provided by Nathalie Lieven QC and Andrew Parkinson of Landmark Chambers (London) on the effect of the MoJ proposals in England and Wales on the UK's compliance with EU law and the Aarhus Convention. As many of the points covered in this Advice are relevant to Northern Ireland, we enclose a copy of their legal opinion with this submission.

The Proposals

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

Q1. Do you agree with the proposed changes to the wording of the Regulations regarding eligibility for costs protection? If not, please give your reasons

No. The proposed amendments appear to have no evidential basis and do not comply with the requirements of the PPD[14] and the Aarhus Convention. They have the (presumably) unintended effect of narrowing the scope of the meaning of "*general public*", which conflicts with the Convention's aim to give the public and the public concerned "*wide access to justice*[15]".

The Consultation paper maintains that the intention of introducing the Aarhus costs regime was to protect "*members of the public*". Accordingly, the DoJ proposes to restrict the status of an Aarhus Convention claim to one brought by a member of the public for: (i) a JR under section 18 of the Judicature (Northern Ireland) Act 1978(3) of a decision, act or omission all or part of which is subject to the provisions of the Aarhus Convention; or (ii) a review under the provisions of any statutory provision to the High Court of a decision, act or omission part of which is subject to the provisions of the Aarhus Convention[16].

The Aarhus Convention Implementation Guide[17] 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

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http://www.wcl.org.uk/docs/Wildlife%20and%20Countryside%20Link%20-%20Cost%20Protection%20in%20Environmental%20Claims%20-%20consultation%20response.pdf

13 See http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/frObserver/frObserver_CAJE_V9n_comments_on_Party_concerned_s_second_progress_report_17.12.2015.pdf

14 Articles 3(1) and 4(1)(b) PPD

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

16 Regulation 2(1)(a) and (b) of the proposed amendments to the Aarhus Cost Regulations

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

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 environment[18].

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 environmental NGOs.

In relation to groups of individuals, the High Court in England and Wales has held that Parish Councils are entitled to costs protection (*R (Halebank Parish Council) v Halton Borough Council*[19]). The High Court and the Aarhus Convention 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*[20] [21]). Environmental NGOs are also clearly eligible to bring claims under the Aarhus costs regime[22].

However, references to "*a member of the public*" in Regulation 2(1) 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 (see question 9). 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 Regulations - even though he/she may recognise that this results in a breach of the requirements of the Aarhus Convention - as was the case in the English Court of Appeal case of *Venn*[23].

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

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18 Under Article 9(3) Aarhus Convention

19 [2012] EWHC 1889 (Admin)

20 [2015] EWCA Civ 203

21 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

22 Article 9(2) of the Convention. Also see Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg406* ("the Trianel case")

23 *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, NIEL is unclear why the DoJ is proposing to amend Regulation 2(1)(b) as follows:

""*An Aarhus case" means an application brought by a member of the public … (b) for review under the provisions of any statutory provision to the High Court of a decision, act or omission* ~~*all or*~~ *part of which is subject to the provisions of the Aarhus Convention*".

This amendment would appear to restrict the availability of costs protection to certain statutory reviews and thus introduce an unhelpful inconsistency.

Levels of costs protection available

Q2. 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 PPD 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*[24]". The Supreme Court set out that same position[25]. This is not an either/or requirement – costs must satisfy both limbs of that test. Hence, whatever figure may be deemed to be subjectively reasonable for a claimant must <u>also</u> be one that is objectively reasonable.

The CJEU has confirmed that costs include all the costs that may be incurred by the claimant in a case (see *Commission v UK*[26] and Case C-260/11 *Edwards*[27]). Thus, it is clearly the claimant's total costs liability that must not be prohibitively expensive. 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 their own legal costs (which routinely amount to £30,000 and often more). Thus, the figure for total costs exposure is not £5,000 or £10,000 but £35,000 – £40,000 plus VAT at 20%.

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[24] 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

[25] See, *inter alia*, paragraphs 23(i) and 26

[26] Case C-530/11, paragraphs 44 and 64

[27] Case C-260/11, paragraphs 27 and 28

UK NGOs have maintained in submissions to the Task Force on Access to Justice[28] and the Aarhus Convention Compliance Committee[29] that costs exposure of the above order does not satisfy the requirement for costs to be objectively reasonable. This point was reinforced by Solicitor Roger Watts, when commenting on the UK's second progress report on Decision V/9n in December 2015. He noted that: "*While the 2013 costs protection Regulations have had an immediate and beneficial impact in Northern Ireland since their introduction … As the risk of losing and bearing costs liabilities is the biggest disincentive to bring proceedings it can be seen that the 2013 Regulations ameliorate, but do not address, the entire problem*". Increasing the caps beyond £5,000 and £10,000 therefore 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 DoJ believes that certain claimants may be able to afford legal costs in excess of £35,000 - £40,000, 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 Scotland[30]).

Secondly, the CJEU has confirmed that claimants must have prior certainty in relation to costs protection. In case C-530/11[31] *Commission v UK*[32], 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:

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28 See http://www.wcl.org.uk/docs/Joint%20NIELs%20Statement%20on%20UK%20Access%20to%20Justice.pdf

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

30 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

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

32 See paragraph 34 of the judgment

"*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 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 cap[33] seemingly at any point in the proceeding - 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 clear that "*it would be exceptional for claimants to require more costs protection than is provided by the default costs caps*[34]". NIEL therefore assumes that the majority of applications would be from defendants seeking to increase the caps relying on the subjective limb of *Edwards* and the factors listed in Regulations 3(4)(b)(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 the English Court of Appeal case of *Corner House*[35]), 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 Regulation 3(4)(b)(ii) could introduce an additional stage (post leave but pre-substantive hearing) in the proceedings.

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33 See proposed Regulation 3(6)

34 Consultation paper, paragraph 3.12

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

Finally, the Consultation paper confirms the DoJ 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[36]. We do not agree with this conclusion. 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"[37]. In this respect, we refer the DOJ to submissions to the Aarhus Secretariat dated 22nd January 2015 and 17th December 2015 concerning Decision V/9n (concerning compliance by the UK with its obligations under the Aarhus Convention[38]), in which we highlight the detrimental effect of the cross-cap in complex environmental cases involving issues of public importance cases. Our concerns were illustrated by the following two cases in Northern Ireland.

The first case concerned a proposed 50 mile dual carriageway scheme at a cost of £800m[39]. The road affected 250 farmers, over 100 of whom supported the case. A PCO was obtained, but only after a difficult and fully contested hearing under the pre-regulation law. The Order granted by the High Court was that the objectors would have to pay £20,000 if they lost but there was no cross cap in the event that they won. In the event, the claimants were successful and therefore their full costs were recovered. The case ran for six days in the High Court, was highly technical and very challenging. Their costs came out at between £100k + £150k for the costs of a solicitor, senior and junior counsel, a roads consultant, an environmental consultant and an agricultural consultant. Some of the consultants, counsel and the solicitor proceeded on the basis of concessionary fees (the "true" costs would have been nearer £250,000). The claimants' position would have deteriorated under the 2013 Regulations because, whilst their liability to adverse costs would have been reduced to £10,000, had they lost (they were an unincorporated association) they would have recovered only £35,000 leaving them with a shortfall of close to £100k (or over £200k against the "true costs."). There is little doubt this case would not have been brought had the claimants faced this kind of shortfall, win or lose.

The second case was conducted after the Regulations came into force. It concerned the construction of a sports stadium at a value of approximately £81m. The grouping opposing

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36 Consultation paper, paragraph 3.13

38 See http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/frObserver_CAJE_V9n_Annex_1_22.01.15.pdf and http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/frObserver/frObserver_CAJE_V9n_comments_on_Party_concerned_s_second_progress_report_17.12.2015.pdf

39 This case occurred before the 2013 Regulations came into force

the development consisted of roughly 200 nearby households. The case was again taken on the basis of concessionary fees by both the solicitor and senior counsel (managing without junior counsel reduced costs). Unpredictably, the case ran for 13 days making it, probably, the longest judicial review in Northern Ireland legal history. The residents were successful. They will recover £35,000 plus VAT leaving them approximately £18,000 out of pocket. Had the stadium case been charged at commercial rates the "true" costs would have exceeded £100,000 and the shortfall would have been, beyond argument, prohibitively expensive.

While these cases might be seen as atypical (as they were at the top end in terms of scale and complexity), it is difficult to see how, under current administrative review procedures, the costs for many environmental JRs can be kept below £35,000 by the time solicitor, counsel and all necessary consultants are paid. Environmental challenges are often complex, multifaceted and accompanied by voluminous documentation.

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 claimant[40] - not the defendant public body. For these reasons, NIEL supports the removal of the reciprocal cap or, failing that, the potential for the defendant's cross-cap to be increased "on cause shown" (i.e. as evidenced"), as is currently the case in Scotland[41].

Q3. Do you agree that the criteria set out at proposed regulation 3A(4) at Appendix 1 properly reflect the principles from the Edwards cases? If not, please give your reasons

No. Please see the answer to question 2, 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*[42]. NIEL 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.

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40 See, for example, Communication C27 paragraph 45

41 *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

42 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*"

Q4. Do you agree that it is appropriate for the courts to apply the *Edwards* principles (proposed regulation 3A(4) at Appendix 1) 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 2 and 3, above.

Q5. Should all applicants be required to file at court and serve on the respondent a schedule of their financial resources at the commencement of proceedings? If not, please give your reasons

No. Firstly, the DoJ 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. This view is reinforced by practitioner Roger Watts, whose personal experience affirms just how reticent clients are to do this, and by the English Court of Appeal in the case of *Garner*[43], in which Sullivan LJ said:

"*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*."

Moreover, where a group of residents, who by definition live in a community, are applicants, they will not wish their neighbours to have that degree of insight into their personal financial affairs, let alone the public authority and, as these are open Court proceedings, the public. In no other civil proceedings before the Courts do litigants have to declare their financial resources to the Court and to the other side - save in those unusual cases where there are real and objective concerns that the other party will be unable to pay costs if they lose. Accordingly, applicants in environmental cases will now be treated markedly less favourably under a regime that is supposed to enable access to justice. There is also no doubt that public authorities were alive to the concerns individual applicants have about such disclosure when financial disclosure could be required before the 2013 Regulations came in.

Secondly, the requirement for the schedule to include "*any financial support which any person has provided or is likely to provide to the claimant*" (Regulation 3(5)) will create profound difficulties for the nature of charitable funding, by both threatening the general funding available to charities and reducing the ability and willingness of charities to apply for JR. Third party donations to "fighting funds" are not uncommon. The proposed change

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

will dissuade publicly spirited donors and charities (who support such cases) from providing support. Disclosure here could only be justified if the third party donor is the principal funder. These measures will undoubtedly have the effect of deterring access to environmental justice.

The proposals are also profoundly vague and 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.

For further discussion on why this proposal would be problematic, we refer the DoJ to Wildlife & Countryside Link's response to MOJ proposals on the Provision and Use of Financial Information in Judicial Review (September 2015), attached to this response.

Q6. Do you agree with the proposed approach to the application of costs caps in cases involving a number of applicants or respondents? If not please give your reasons

No. In cases where there are multiple objectors or applicants, it is irrational to say that the cap for four neighbours acting together is to be £20,000 plus VAT, where it would have been £10,000 had they formed an association. The outcomes here will be arbitrary and may lead to artificial practices in the framing of challenges. It is also manifestly unfair, as this principle will rarely apply to the public authority respondents (as there is usually only one such respondent).

We note that a similar issue was addressed by the Aarhus Convention Compliance Committee in Communication C27[44], 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*[45]". 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 meeting[46].

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[44] 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

[45] *Ibid*, paragraph 32

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

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 arbitrary, irrational and objectively unreasonable.

Q7. At what level should the default costs caps be set? Please give your reasons

NIEL 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 to PPD cases in Scotland[47], although we understand they will apply to all environmental cases in due course.

NIEL is strongly opposed to the proposal to increase the caps for individual claimants to (for example) £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 £40,000 - £45,000, which clearly do not satisfy the Aarhus Convention and *Edwards* requirement for costs not to be prohibitively expensive on an objective basis.

Finally, NIEL 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 emphasised on a number of occasions (including in C33[48]), that "fairness" in terms of Article 9(4) of the Convention refers to what is fair for the claimant, not the defendant public body.

Q8. What are your views on the introduction of a range of default costs caps in the future?

NIEL 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

Q9. 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

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47 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

48 See C33 paragraph 135

No. Paragraph 3.23 of the consultation paper explains that this provision was introduced 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. NIEL supports this view - and it has indeed been the case in England and Wales. Information released under the EIRs in 2015 confirms the number of challenges to the status of claims following the introduction of the Aarhus costs rules in England and Wales in April 2013 has been very low:

	2013/2014 (total = 108 cases)	2014/2015 (total = 156 cases)
Successful challenge to status of claim by defendant (England/Wales)	1	8
Unsuccessful challenge to status of claim by defendant (England/Wales)	4	5

We anticipate this situation would also be the case in Northern Ireland (and would welcome the publication of data on this point to confirm).

Proceedings in the English High Court and the Compliance Committee 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.

Q10. 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 Regulations take?

NIEL 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

Q11. Do you have any comments on the proposed revisions to the provision in the Regulations dealing with cross-undertakings in damages?

NIEL does not support the proposed changes to the Regulations with regard to interim relief.

Firstly, the requirement for the application to be made by a member of the public in Regulation 5(1) may prevent qualifying organisations from being able to access relief, thus preventing compliance with the requirement to provide "*adequate and 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 (Article 9(4) Aarhus Convention).

Secondly, in relation to Regulation 5(2), 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 claimant[49]. 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 the answers to questions 2 and 3, above).

Thirdly, in relation to Regulation 5(3), 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 6, above).

Fourthly, in relation to Regulation 5(4)), 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 problematic for the reasons given in answer to question 5, above.

Finally, we would point out that the present situation with regard to interim relief does not comply with the PPD and Article 9(4) 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 DOJ under the EIRs in 2016, which confirms that no applications for interim (injunctive) relief were made in Northern Ireland between 1st April 2013 and 31st December 2015.

NIEL 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 on was unlawfully granted (as was the case in the *Lappel Bank* case); against (ii) granting an interim injunction that may cause significant financial loss to the developer –

[49] See *Commission v UK*, paragraphs 64-72

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.

NIEL 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.

Supplementary points

Article 9(3) of the Convention expressly refers to acts or omissions "by private persons". As the English Court of Appeal has held that private nuisance claims can fall within Article 9(3) of the Convention (*Austin v Argent Miller*[50]) NIEL would argue 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 appeal[51]. The CJEU also held that costs incurred at earlier levels in the same dispute may be taken into account when calculating prohibitive expense[52]. The current position is that caps do not apply to an appeal in an Aarhus Convention case[53]. The CJEU judgments would appear to mean that claimants may not be exposed to higher caps 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.

Enclosures

Annex A – Aarhus Convention Claims Data

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50 [2014] EWCA Civ 1012

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

52 *Ibid*, paragraph 49

53 Regulation 3(8)

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

Legal Opinion provided by Nathalie Lieven QC and Andrew Parkinson of Landmark Chambers (London) on the Ministry of Justice proposals for England and Wales (November 2015)

Annex A - Aarhus Convention Claims Data

Table based on data provided by the Department of Justice on 2nd February 2016 under the EIRs 2004 and the Northern Ireland Courts and Tribunal Service Judicial Statistics 2014[54].

Number and Success Rate of Aarhus Claims	1st April 2013 - 31 December 2015
No of Aarhus Convention Claims	11
% Aarhus Convention claims of total JRs in NI in 2014[55]	Approx 1.2%
No of Aarhus claims granted leave to proceed[56]	5
% success rate of Aarhus claims granted leave to proceed (success rate for all JRs in 2014 = 32%)	45.5%
Number of applications for interim (injunctive) relief	0

[54] Available here: https://www.courtsni.gov.uk/en-GB/Services/Statistics%20and%20Research/Documents/Judicial%20Statistics%202014.pdf

[55] The 2014 Statistics confirm there were 348 applications for leave to apply for JR in 2014. Of that total, 95 were granted leave to continue, 168 were Withdrawn/ Refused/ Dismissed and 34 were categorised as "other". Of the 95 granted leave to continue, there were 29 applications for JR, 49 were Withdrawn/ Refused/ Dismissed and 28 were categorised as "other"

[56] It is possible the figure for claims withdrawn between issue and leave (see n.56, above) may include (an) Aarhus claim(s). The success rate quoted therefore represents the "worst case scenario"