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United Kingdom Without Incineration Network (UKWIN)

Executive summary

The proposals

1 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.

Please enter your response in the text box:
It is unfair and unacceptable that at present various environmental claims do not benefit from the Aarhus cap, such as private law environmental claims (including those covered by Aarhus Convention Article 9, Paragraph 3) and challenges under s288 of the Town and Country Planning Act.

UKWIN would welcome inclusion of s288 challenges within the revised definition of an 'Aarhus Convention claim'. The term 'Aarhus Convention claim' should be interpreted as inclusively as possible, as all cases that impact upon the environment should benefit from the rights established and confirmed within the Aarhus Convention.

Eligibility: types of claimant eligible for costs protection under the Aarhus Convention

2 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.

Please enter your response in the text box:
UKWIN disagrees with the proposed changes.

We believe that:
- The changes risk excluding certain people and groups from getting costs protection and as a result, from being able to access the courts.
- The amendment refers to "a member of the public". This implies that only a single individual should benefit from costs protection, and that groups such as associations, community organisations, and even environmental NGOs, should not. This breaches the Aarhus Convention which gives the public and such groups "wide access to justice".
- The proposals may also exclude cases covering legislation impacting on the environment (such as environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships) that does not specifically mention the environment in its title or heading.

UKWIN's view is that the Government should be more pro-active in widening access to justice in environmental matters.

UKWIN notes the Article 9, Paragraph 4 Aarhus Convention requirement that "the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive..."

Aarhus Article 9, Paragraph 5 states that Parties to the Convention must: "...consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice".

Aarhus Article 9, Paragraph 5 is linked to Aarhus Article 9, Paragraph 4. As the Implementation Guide explains on page 218: "It is essential for access to justice under article 9 that the review procedures in question are affordable for members of the public. In this regard, there is a clear link between the requirement in article 9, paragraph 4, that access to justice procedures not be prohibitively expensive and the obligation on Parties in article 9, paragraph 5, to consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers".

The Implementation Guide states that: "Another important form of support under the Convention is in the context of access to justice. Such support might include regulations entitling environmental associations, organizations and groups to apply for legal aid, or measures exempting them from court fees or litigation costs..."

Organisations are not eligible for legal aid in the UK, and current exemptions from paying costs are inadequate to prevent access to justice being prohibitively expensive. These omissions should be addressed to ensure greater Aarhus compliance.

To quote comments made by Lord Neuberger, President of The Supreme Court, speaking at the Tom Sargant Memorial Lecture 2013 on the topic of 'Justice in an Age of Austerity' on Tuesday the 15th October 2013: "... If a person with a potential claim cannot get legal aid, there are two possible consequences. The first is that the claim is dropped: that is a rank denial of justice and a blot on the rule of law. The second is that the claim is pursued, in which case it will be pursued inefficiently, and will take up much more of the court staffs' time and of the judge's time in and out of court. So that it means greater costs for the court system, and delay for other litigants".

It would be entirely inappropriate to worsen the current situation by restricting access to legal aid in relation to environmental matters, either in terms of who can access legal aid or in terms of what sort of cases are covered by legal aid. It is similarly inappropriate to restrict access to cost protection in relation to claims of an environmental nature.

The Implementation Guide includes a table of "Potential barriers to access to justice". Issues highlighted as possible barriers under Article 9 that are occurring in the UK include: Financial barriers; Limitations on standing; Difficulty in obtaining legal counsel; and Unclear review procedures.

The preamble to the Aarhus Implementation Guide (Second Edition) ('the Implementation Guide') states that the Parties to the Convention are: "Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced".

Tthe Implementation Guide explains that this includes an acknowledgement that "judicial mechanisms for enforcement of the law and for redress in the case of infringement of rights should be accessible to the public" and that "if there are technical barriers to access to the courts, such as unreasonable standing requirements, justice may not be accessible to the public", explaining that "Convention negotiators expressed their concern that NGOs as well as individuals should have standing in representing their rights and interests in the courts, and the standing of NGOs promoting environmental protection is thus specifically mentioned in article 2, paragraph 5, and article 9, paragraph 2".

Everyone has a stake in protecting the environment and a duty to protect those such as the Osprey who cannot represent themselves. Indeed, there is always a public interest in allowing for members of the public to have access to administrative or judicial procedures to challenge unlawful decisions, acts and omissions that may result in environmental harm or contravene their Aarhus rights in relation to public participation in environmental decision-making.

Indeed, the preamble to the Aarhus Convention also recognises that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations" and considers that "to be able to assert this right and observe this duty, citizens must...have access to justice in environmental matters", acknowledging that "in this regard...citizens may need assistance in order to exercise their rights".

Perhaps nowhere is the ability to challenge decisions, acts and omissions more important than for environmental decisions that relate to long-term waste management commitments and activities that consume a significant amount of resources and/or release a significant quantity of harmful emissions.

Incineration results in thousands of tonnes of greenhouse gasses being released over a prolonged period, impacting on the global environment by exacerbating climate change, and resulting in local pollution from the stack and the traffic (e.g. in relation to nitrogen deposition on sensitive habitats). Incineration can also result in the depletion of valuable resources, and this also comes with climate change impacts in relation to the extraction and production of replacements from raw materials as well as resource security implications. Then there are other disamenities relating to traffic and visual amenity, alongside the significant financial commitments that incinerators require from local authorities.

There should be recognition that, from an Aarhus perspective, the interests of a very large number of people potentially come into play in relation to waste infrastructure proposals such as those for incinerators.

Indeed, as the Implementation Guide acknowledges: "While narrower than the 'public,' the 'public concerned' is nevertheless still very broad. With respect to the criterion of 'being affected', this is very much related to the nature of the activity in question. Some of the activities subject to article 6 of the Convention may potentially affect a large number of people".

Indeed, as is noted in the Implementation Guide, the fact that Article 2 Paragraph 5 of the Aarhus Convention refers to, amongst others, "...the public... having an interest in, the environmental decision-making", meaning the definition of "the public concerned" is wider than simply those who would be affected or likely to be affected by the decision.The Guide also notes that setting the bar for standing too high has resulted in adverse judgements against member states.

The Implementation Guide states that: "The Convention also sets out rights for the 'public' (natural or legal persons, and, in accordance with national law or practice, organizations, associations and groups) and 'the public concerned' (those who are affected or likely to be affected by or having an interest in the environmental decision-making). For the purposes of the Convention, NGOs promoting environmental protection and meeting any requirements under national law are to be considered to be part of the 'public concerned'".

Article 2 Paragraph 5 of the Aarhus Convention states that: "'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

And Article 3, Paragraph 4, confirms the need to provide 'appropriate recognition' and indeed 'support' for NGOs: "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".

Problems with the UK's existing legal aid and Costs Protection regimes include:
- The six-week time limit restricts access to environmental justice by making it harder for meritorious claims to be brought, especially by groups and individuals of

little means. Furthermore, it improperly curtails the ability to settle matters out of court, as such discussions could risk missing deadlines.
- Not everyone is eligible for legal aid. For example, legal aid does not cover community groups and Environmental NGOs, and legal aid will not be granted to those with relatively modest means who do not qualify, even if their claim is for wider public and environmental benefit;
- Not all cases benefiting from legal support are eligible for legal aid, e.g. in relation to participation in planning inquiries;
- The relatively small amount paid to lawyers under legal aid discourages some lawyers from participating in the scheme, e.g. environmental law specialists may be unwilling to take up cases, especially complex cases, which prevents some cases from going forward;
- The Community Contribution sometimes required under legal aid can be prohibitively expensive;
- Cost recovery for successful claims can be impeded if not all grounds are successful;
- The £5k - 10k Aarhus cap may still be prohibitive, and the cap on reclaiming costs may discourage more complex cases from coming forward or from being fully argued; and
- In our understanding, costs and potential costs associated with injunctive relief may fall outside the cost protection regime, making it less likely that injunctions will be sought, making injunctive relief prohibitively expensive to members of the public.

3 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.

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.

UKWIN believes that:
- In order to comply with EU law and the Aarhus Convention, costs protection must apply from the point at which the claimant lodges a claim form for judicial review, as is currently the case.
- Claimants must be able to know, before potentially exposing themselves to financial risk, that bringing a claim would not be able to result in prohibitive costs.
- If costs protection is delayed until permission to proceed with a claim has been granted, the claimant may be prevented from making a claim in the first instance, because they won’t have certainty about the maximum level of their exposure to costs.

See also UKWIN's response to Question 2, which highlights the importance of maximising access to environmental justice and removing barriers to such access.

Levels of costs protection

4 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.

Please enter your response in the text box:
No.

UKWIN believes that:
- The cost of legal proceedings must be within the financial means of the claimant and they must be objectively reasonable.
o The default costs caps are currently £5,000 for individuals and £10,000 for organisations. This is already a large sum for many groups to raise. Indeed, in UKWIN's first hand experience the cap has proven prohibitive in relation to preventing meritorious environmental claims from being brought forward.
o In addition to the above costs, the claimant must pay the administrative court fee of £1,000 and their own legal costs which regularly amount to £25,000. Therefore, a more accurate representative figure would be £31,000 - £36,000 not £5,000 - £10,000. Local communities should not have to pay such large sums to protect their local environment.
o The costs of bringing environmental cases outlined above are already prohibitively expensive and therefore should not be increased further.
o The proposals will allow a party to apply to the court to increase or even remove the claimant’s costs cap.
o The court will also be able to change the cap of its own accord.
o As UKWIN has seen, both actual costs and the fear of costs have created uncertainty for claimants as to what the maximum costs of bringing a claim will be and this uncertainty has had a chilling effect on the bringing of meritorious environmental cases.

See also UKWIN's response to Question 2, which highlights the importance of maximising access to environmental justice and removing barriers to such access.

5 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.

Please enter your response in the text box:
UKWIN believes that it does not for the reasons set out in response to questions 2 and 4 above and because:
- The Edwards case confirms that costs must be assessed as a whole.
- Costs in complex environmental cases can make such cases too expensive to win.
- The core requirement for the level of costs protection in environmental cases is that it should be clear, unequivocal and objectively reasonable.

6 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.

Please enter your response in the text box:
UKWIN believes that costs should not be prohibitively expensive, as set out in responses to questions 2, 4 and 5. The overriding objective should be to avoid situations where potentially meritorious environmental claims are not brought due to fear of costs, and to prevent instances where those wanting to bring cases on behalf of the environment in the public interest are lumbered with excessive costs.

7 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.

Please enter your response in the text box:
No.

UKWIN believes that:
- The requirement is vague and cannot work in reality.
- Funding for charities and charitable companies comes from grants, donations, legacies, membership subscriptions etc, none of which may be linked in any way to litigation.
- It is very concerning that defendants will be able to access such information which may contain the names and addresses of children and vulnerable people. Not only is there a significant risk of accidental disclosure, people making donations to charities, groups and organisations are likely to feel very concerned that their names and addresses will be supplied to a public body as supporters
of a charity or organisation that it might dislike.
- There is no need for this provision.

See also UKWIN's response to Question 2, which highlights the importance of maximising access to environmental justice and removing barriers to such access.

8 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.

Please enter your response in the text box:
No.

UKWIN believes that if there were different claimants in a case and separate cost caps were applied to each one then the total figure of costs would very high and would be non-compliant with the Aarhus Convention.

See also UKWIN's response to Question 2, which highlights the importance of maximising access to environmental justice and removing barriers to such access.

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

Please enter your response in the text box:
UKWIN believes that:
- The caps should be no higher than the current levels (£5,000 for individuals and £10,000 other cases), with the option for the cap to be decreased if too expensive for the claimant in question.
- Many organisations that would want to bring an environmental case have very little by way of unallocated funds to risk as part of an environmental cases, and for small association of concerned local residents it could take some time to determine how much money they have available. Given the short time limits for cases to be brought, even this regime could be a barrier to the bringing of meritorious environmental cases. As such, defendants should be given the choice between either allowing more time for a claim to be brought (e.g. to allow for a claimant to assess their financial position and make a case for a reduction in the limit before deciding to expose themselves to risk) or agreeing to the cap being set at £1.
- It should be possible to increase the costs the defendant pays if they lose if there is reason for this, e.g. to allow for the pursuit of more complex cases.
- Caps should not be increased to £10,000 for individual claimants and £20,000 for other claimants as the Government proposes in the consultation, especially with the current time limits for when cases can be brought.
- If the costs caps are increased in the way the Government proposes, the costs of bringing a case would likely rise to £36,000 - £46,000 which is far out of the reach of most individuals and organisations wanting to bring public interest environmental cases.
- Caps should not be reduced for defendants to £25,000.

See also UKWIN's response to Question 2, which highlights the importance of maximising access to environmental justice and removing barriers to such access.

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

Please enter your response in the text box:
UKWIN believes that:
- No range of default cost caps should be introduced because claimants are required to have certainty in advance of bringing a case through clear costs rules.
- Having a range of caps will lead to substantial confusion along with costly and time-consuming litigation.

See also UKWIN's response to Question 2, which highlights the importance of maximising access to environmental justice and removing barriers to such access.

Costs of challenges and of applications to vary costs caps

11 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.

add answer to box :
No.

- Currently, if a defendant unsuccessfully challenges the status of an Aarhus claim, the court will ask the defendant to pay extra heavy costs.
- The Government proposes that a defendant should pay ordinary costs if they lose their challenge.

As this will be less expensive for the defendant, UKWIN believes it will encourage defendants to challenge claims which will lead to unnecessary litigation.

See also UKWIN's response to Question 2, which highlights the importance of maximising access to environmental justice and removing barriers to such access.

12 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?

Please enter your response in the text box:
Environmental claimants should not face the prospect of prohibitive costs. See UKWIN's response to Question 2, which highlights the importance of maximising access to environmental justice and removing barriers to such access.

Cross-undertakings in damages

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

Please enter your response in the text box:
UKWIN does not support the proposed change:
- The requirement in the proposed changes for the application to be made by a member of the public will prevent NGOs and other bodies from using the provisions
- There is currently no certainty about when costs protection will be available in injunction situations and the proposed wording does not help
- The proposals to split costs between group members and for the court to consider financial support provided to the case are unreasonable and unworkable.
- The right approach is to remove the need to pay the costs of injunctions in Aarhus cases and grant injunctions where there is evidence that a failure to grant relief could result in significant and irreparable harm to the environment.

See also UKWIN's response to Question 2, which highlights the importance of maximising access to environmental justice, including by giving rights to organisations to access justice and to ensure that environmental claimants cannot be burdened with the costs of injunctive relief necessary to safeguard the environment.

Other forms of review

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

Are there other types of challenge to which the Environmental Costs Protection Regime should be extended and if so what are they and why?:
UKWIN believes that:
- The Aarhus costs regime should cover all environmental cases (judicial reviews, statutory reviews and private claims) as set out in the Aarhus Convention.
- Costs caps should apply up when a case is heard in the Court of Appeal or the Supreme Court, not only in the High Court.
- The cap should also apply to injunctive relief to ensure costs are not prohibitive to environmental claimants.

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

add answer to box:
Yes.

It is UKWIN's experience that incinerators are often proposed for areas of multiple deprivation. Opposing a local incinerator proposal is often the first time people are engaged in environmental decision-making, and these proposals can entail complicated legal and technical issues. See, for example, the Friends of the Earth publications 'Incinerators and deprivation' and 'Pollution and Poverty - Breaking the link'.

Those opposing environmental decisions relating to incineration developments are likely to be disadvantaged due to their newness to the legal, planning and permitting systems, their limited financial means, and the short time limits within which to bring claims.

The potential for local environmental campaign groups, including those opposing waste incinerator proposals, to be loosely organised slows down internal decision-making and makes it more difficult for them to assess their financial position, and this situation is further complicated when the group is not formally constituted and has not made provision to limit liabilities.

These disadvantages are further compounded by the general complexity of cases that relate to waste incineration, e.g. in the spheres of highly technical and in some cases very lengthy and convoluted procurement, planning, and environmental permitting decisions.

Furthermore, in many cases information regarding the decisions will not be available to the claimant prior to the commencement to litigation (especially in relation to procurement decisions), making it hard to assess the chances of success in such cases, which also has the effect of making it hard to raise funds (e.g. for a community contribution) if the outcome is uncertain due to a lack of available information.

Where proposals relate to large sums of money, e.g. relating to long-term waste management contracts, it is also more likely than normal that any success by environmental claimants will be appealed repeatedly by the defendant, increasing the costs for the environmental claimant even if they are ultimately successful.