Coalition for Access to Justice for the Environment

Briefing

Access to environmental justice: making it affordable

The cost of enforcing environmental law in England and Wales has been too high for too long for most people and organisations. It is generally regarded as the highest in Europe. The judiciary has begun to recognise the problem but Government action is now needed.

Environmental Law Foundation

In an article about environmental litigation in 1999 Sir Robert Carnwath, now Lord Justice Carnwath, wrote that "*litigation through the Courts is prohibitively expensive for most people, unless they are either poor enough to qualify for legal aid, or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds*."

This briefing offers a positive proposal, developed by a coalition of NGOs, to help reduce the costs (and risk) for individuals and public interest groups using the law to protect the environment.

Friends of the Earth

BACKGROUND

In 1998 the UK signed up to the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters. The UK has been preparing for ratification for several years and plans do so shortly. It must therefore ensure that it complies with its obligations under the Convention.

GREENPEACE

The Convention is a novel step forward in guaranteeing rights to promote environmental democracy across Europe and holds the promise of helping people to re-engage with environmental decision making; if we ratify it properly.

The Convention guarantees rights to environmental information and to participate in environmental decision making. It also guarantees citizens the right to have access to the courts through procedures that are '*fair, equitable, timely and not prohibitively expensive*' where they are alleging that environmental laws have been broken.

RSPB

Five studies covering different aspects of environmental justice have been published over the last 18 months, all funded or supported either by DEFRA or the European Commission. These studies identify a number of barriers and contraventions of the Aarhus Convention. These include an inability to secure interim relief (injunctions) without the need to give unlimited financial undertakings to the other side and the absence of a guaranteed right of standing before the courts, which collectively prevent the courts from truly delivering environmental justice. Whilst those, and other issues amount to real barriers to achieving environmental justice, issues of expense, and particularly of legal costs, are repeatedly identified as the most significant barrier.

More than five years after Aarhus was signed and as the EU is preparing to ratify the Convention, now is the time for the UK to act. Doing so will be good for the environment and good for restoring people's faith in public bodies, as well as demonstrating the Government's respect for international law.

WWF

WHAT IS THE PROBLEM?

The normal rule in litigation in the UK is that the loser must pay the winner's legal costs. This rule evolved from simple civil cases between private parties. It was then applied (almost by default) to judicial review cases where there are quite different public policy considerations that make the general rule much less appropriate.

Suite 309
16 Baldwins Gardens
London EC1N 7RJ
t. 020 7404 1030
f. 020 7404 1032
info@elflaw.org

Coalition for Access to Justice for the Environment

Judicial Review cases account for a large proportion of environmental cases and are the way by which public bodies are held accountable for the legality of their actions. They are also a particular focus of the Aarhus Convention.

The problem is of *exposure* and of *uncertainty*. At the outset of a case it is impossible for a citizen or organisation to know how much money they might have to find if they lose. The possibility of having to pay a massive (and uncertain) bill for the public body's (or even a private company's) costs means that people are unwilling to risk bringing legal proceedings to hold a public body to account for breaking the law. A recent study by the Environmental Law Foundation analysed hundreds of potential claims that did not make it to Court and found that 'too often, legal action that had reasonable prospects of success has not been pursued because it has been prohibitively expensive to do so.'[1] In the short term, the right of access to justice cannot be enforced and potentially unlawful decisions proceed simply for lack of a suitably wealthy challenger. In the longer term, people feel dis-empowered. They feel detached from the democratic process and from the environmental decision making that the Government wants them to be engaged in.

We need to find a way to reduce the uncertainty and exposure, while at the same time not giving a green light to poor cases. One way to do this starts with the mechanisms that the judges have already started to adopt.

Examples of prohibitive expense

In 2002, residents sought to resist a proposal by Canterbury College to develop a travel plan which they believed would have a significant adverse environmental impact with little real gain and which would have been unlawful. Canterbury City Council approved the planning permission. The group decided to make an application for judicial review. As the case progressed the Council dropped out leaving the residents facing the College. Lawyers representing the College threatened that if the matter went to court they could face a costs bill of £126,000 – putting their houses at risk. It is hard to avoid the conclusion that the threat was intended to dissuade the group from continuing their case. Despite this, the residents pursued the case, the court found that the Council's decision was unlawful and quashed the decision.

In a case involving Nestlé Purina, local residents in Wisbech, Cambridgeshire have been trying to stop odour and noise pollution from the nearby pet food factory for some years. More recently, a planning application to extend the factory was granted and any money raised by residents was used to pay for legal representation at the planning committee hearing. A member of Nestlé Purina Action Group commented that: 'these large companies realise that the cost of opposing planning application or obtaining basic human rights is beyond the financial power of most action groups. ... Wisbech is an environmental nightmare as effects are felt from four other factories in the town. Time and again, residents formed action groups to try and resolve these problems, yet each group has failed through lack of finance. ...[T]ackling local environmental problems are a struggle, which often requires expensive legal assistance. In many cases, such expenses act as an insurmountable obstacle to citizens obtaining the justice to which they are entitled. It is difficult for us to remain hopeful in the face of such recurrent problems.'

In a recent judicial review Friends of the Earth (FOE) challenged the Environment Agency's decision to issue a licence to a company to scrap a number of ships in Hartlepool. On the day before the proceedings the company whose licence was being challenged, warned that, if FOE lost the case, then they would seek £100,000 of legal costs from FOE. Again, fortunately, FOE won the case although at the start of the case it had no way of knowing the level of costs that it could face.

In a recent case brought by Greenpeace seeking to prevent the import of nuclear waste into the UK, the NGO was threatened with potential costs of £70,000 for a half-day hearing.

BUILDING ON JUDICIAL WORK

Although the general rule is that the loser pays the winner's costs, the Court has a discretion in relation to costs and has already started to recognise the barrier posed by the usual 'loser pays' rule.

[1] Page 44 Stookes, P (2003), *Civil law aspects of environmental justice*. ELF: London.

Sometimes, for example, at the end of a case the judges have decided that the case was brought in the public interest and so the losing citizen or organisation should not have to pay the public body's or the company's costs. In a recent Privy Council case brought by the Belize Association of Conservation NGOs (BACONGO) the Privy Council held that 'because this was a public interest case' BACONGO would not be ordered to pay the costs of the Belizean government despite losing.

In a judicial review brought by Friends of the Earth and Greenpeace in 2001 in relation to the Sellafield Mox Plant the Court of Appeal noted: 'the public interest in this particular area, the area of public health and well being, is obviously very great and very exceptional, and it is right that that public interest be borne clearly in mind.'[2] As a result FOE was not required to pay costs in the Court of Appeal (although they still had to pay the government's costs in the High Court of £35,000).

However, the critical point in both these cases is that the groups had no idea, until the end of the proceedings that they would not have to pay the other side's costs should they lose. Very few organisations are able to risk having paying tens, and sometimes hundreds, of thousands of pounds. Orders such as these are also very much the exception. In the MOX case the court ruled that its decision was 'to be regarded as a highly exceptional course. It should not encourage public interest groups generally to suppose they will be immune from any adverse orders for costs on appeal …'[3]

Another way in which the court currently recognises the public interest importance of a case is by way of a 'pre-emptive costs order'. This order, made at the start of the case, limits the costs the public authority can recover at the end of the case (if successful). This is helpful because the claimant will then know at the outset what costs it may face if unsuccessful. A recent example of this was in a challenge by CND in which the court ordered that CND would not be required to pay more than £25,000 in costs if it lost. At present, such an order is made only in very exceptional circumstances[4] because the test for granting it is extremely restrictive. Further, considerable expense and court time can be taken up even seeking such an order. And, if unsuccessful, then the claimant will normally be required to pay the (potentially large) costs of such making the application.

ONE SOLUTION: A PUBLIC INTEREST 'AARHUS CERTIFICATE'

We believe that the best way to address the barrier of prohibitively expensive and unpredictable costs in environmental cases[5] is by way of an **Aarhus Certificate**[6] at an early stage of the proceedings. In judicial review this would be at the permission stage and could operate as follows.

An **Aarhus Certificate** would be applied for by a claimant e.g. a concerned citizen or NGO) at the outset of a judicial review application. To obtain such a certificate, in the form of a Court Order, the claimant would need to persuade the court that 1) the case falls within the ambit of the Aarhus Convention i.e. law relating to the environment,[7] 2) that the case was a 'public interest' case and 3) that the case was arguable. The double test of 'arguability' and 'public interest' would help ensure that the system did not encourage frivolous claims or overburden the courts.

What is a 'public interest' case? The key distinction is between a case brought *exclusively* to protect a particular private interest (such as an interest in land) and a case brought wholly or partly to protect or advance a wider public interest. However, a small

[2] *R v SSEFRA ex p Friends of the Earth & another* [2001] EWCA Civ 1950.
[3] *ibid.*
[4] The authors are not aware of any other cases in which such an order has been granted for a public interest challenge.
[5] This system would also apply to statutory appeals and reviews and would be particularly appropriate once/if a permission stage is added to those procedures as a result of the current DCA consultation.
[6] In an environment law context we refer to an 'Aarhus Certificate' to reflect its background in that Convention. In theory the certificate could be expanded to be a Public Interest Certificate for other types of public interest cases.
[7] Article 9(3) of the Aarhus Convention

number of environmental cases raise both, which is why guidance would need to be prepared (perhaps in a Practice Direction) setting out the ambit of 'public interest'. It is notable that the Legal Services Commission's Public Interest Advisory Panel already makes determinations on the question of 'public interest' in public law cases (including environmental cases) for the closely related purpose of determining public funding ('legal aid').

Although similar in form to a pre-emptive costs order (above) there are key differences. In particular, there would be a presumption in favour of granting an **Aarhus Certificate** for cases that met those tests. Further, this system would be explicitly provided for in the Rules of Court and clear guidance set out so that the public and the court would have a degree of clarity at the outset. The **Aarhus Certificate** would give the courts the discretion to make orders with several different effects. The court could order that an unsuccessful claimant is not required to pay the costs of the public body or any other interested party (broadly consistent with current case law) while still requiring them to meet their own legal costs. In other cases, the court could order that the defendant is entitled, if successful, to recover their costs from the claimant but only up to a certain figure. In exceptional circumstances, the court could order that an unsuccessful claimant could recover a proportion, or all, of its costs from the public body perhaps, for example, because an important point of wide public importance was clarified by a case.

Because of its two-stage procedure, judicial review is particularly suited to the Certificate system because the court must make a preliminary assessment of the merits of the claim before allowing it to proceed to a full hearing. That first 'permission' stage is the ideal stage for the court to consider an application for a Certificate. However, the **Aarhus Certificate** could also theoretically apply both to certain private cases raising environmental issues of public interest and also to other areas of the law - although there are reasons why it is particularly suitable to environmental law, namely:

- The UK is a signatory to the Aarhus Convention and is committed to ratifying it. The Aarhus Convention will oblige the UK to provide access to legal procedures to challenge contraventions of environmental law in a manner that is 'not prohibitively expensive.' The UK system does not currently comply as the current system is 'prohibitively expensive' in the very real sense that members of the public and NGOs are regularly prevented from challenging perceived contraventions of environmental law by the fear of large adverse costs orders.
- The environment is unusual in that it does not have a voice; concerned citizens or their groups must represent its interests.
- Environmental decisions usually affect large numbers of people now and for generations to come as well as the environment itself, often, far more than other areas of decision making. The fact that legal procedures require specifically named persons to commence proceedings should not result in those persons being the ones to bear the costs of an unsuccessful challenge.

What would be the effect on public bodies of this change? In cases where the regulator is challenged by a legally aided claimant the regulator will, in any event, have to pay their own costs; win or lose. Such costs are already built in to a regulator's running costs. This is no different. In addition, regulators would only be paying their own costs where the Court has certified that bringing the case is in the general public interest; in such cases it must be right that the cost of meeting that general public interest be met from the public purse.

June 2004

Coalition for Access to Justice for the Environment