RESPONSE BY CAJE TO THE GOVERNMENTS PROPOSALS FOR REFORM OF LEGAL AID IN ENGLAND AND WALES AND REFORM OF CIVIL LITIGATION FUNDING AND COSTS

CAJE is pleased that the Government is consulting on its proposals for reform of the costs system with a view to ensuring access to justice. However, we are concerned that the proposals as drafted do not achieve this aim and in respect of environmental claims, continue to risk breach of the requirements of the Aarhus Convention that costs should not be prohibitively expensive.

Reform of Legal Aid in England and Wales

1. Having sought clarification from the Government in relation to paragraph 4.140, CAJE understands that no change is intended to the current position as regards obtaining legal aid for environmental judicial reviews. We are pleased that the Government recognises the importance of retaining legal aid in environmental cases. We would however highlight the difficulties faced by applicants from poorer communities in fundraising for contributions towards cases, which means that often it is not possible for such communities to make meaningful contributions towards legal aid funding. In addition, CAJE expresses its concerns about the proposals to remove legal aid funding from many other areas of law, which we believe will impact on the ability of the poorest and most vulnerable to obtain access to justice.

2. At paragraph 4.98 of the consultation, the Government states that where alternative forms of dispute resolution, such as complaints procedures or referral to an ombudsman, have not succeeded it does not consider that there are further appropriate forms of advice or assistance to justify the withdrawal of legal aid. We would point out in this regard that judicial review challenges must be brought promptly and in any event within 3 months of a decision being made (with a six week deadline for statutory appeals and some other planning matters). This deadline cannot be extended because a complaints or ombudsman procedure is being followed. As a result it is not possible to rely on an Ombudsman-type procedure as an alternative to an application for judicial review in any case and legal aid must be made available even where such an option exists.

3. In addition, judicial review time limits make it extremely difficult for potential applicants for legal aid to come forward in time to make an application to the LSC and still meet the court deadline. In two recent cases in which it acted, Friends of the Earth's Rights & Justice Centre was approached by potentially eligible legal aid applicants at a point when it was too late to make an application on their behalf and

put together a case in time to meet the deadline. We would therefore urge that devolved powers to grant legal aid to permission stage are extended to all firms practising in environmental judicial review.

4. We note the proposals in relation to legal aid continuing to be available for borderline cases which have a Significant Wider Public Interest (SWPI). In the view of CAJE, environmental cases falling under the Aarhus Convention automatically exhibit public interest, as set out within that Convention and decisions such as *Garner* (referred to by the Government in its civil costs consultation).

Reform of civil litigation funding and costs in England and Wales

1. We note the comments made in relation to the Upper Tribunal at paragraph 4.234 of the consultation. We would point out that such cases can raise complex issues of law, Friends of the Earth's Rights & Justice Centre acted pro bono on behalf of a client in relation to an appeal to the Upper Tribunal from the Freedom of Information Tribunal. The appeal concerned complex legal issues relating to the interpretation of and interaction between FOIA, the Environmental Information Regulations and the European Directive on which the latter were based, as well as matters relating to the exercise of power and discretion. The matter in dispute related to the Government's failure to provide information concerning discussions on compliance by the UK with EU air quality legislation. The issues raised in the case necessitated the instruction of experienced Counsel, who agreed to act pro bono. The usual costs rules do not apply under the Upper Tribunal system and therefore it is not possible to use CFAs. In order to address this problem we consider that there ought to be an option to apply for legal aid to cover Counsel's fees in Upper Tribunal cases which raise matters akin to judicial review challenges to ensure that representation can be secured when it is really needed.

Conditional Fee Arrangements

2. The Government comments at point 3 of the Executive summary that the current arrangements, particularly those under CFAs, impact disproportionately on Defendants and that success fees in CFAs should no longer be recoverable from the defendant and should be payable by the claimant in a case. It would appear that this proposal is made with personal injury claims in mind, using the findings of the Jackson report[1] as a basis.

It is our view that measures taken to address concerns in personal injury claims cannot be transplanted into the very different context of judicial review. It is much

[1] The final report can be accessed via http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/civil-litigation-costs-review-reports

easier to estimate prospects of success in PI (and other damages) claims because the issues are much simpler than in jr so the risks to the lawyers are much less in those cases. Also, costs are always paid by defendants when the cases settle, as they often do. As a result, a reduced or capped uplift is much less of a problem in personal injury cases.

3. It is clear from his report that Jackson LJ recognised the special nature of judicial review claims. His report refers to a paper by Mike Fordham and Jessica Boyd and states:

> "*..it is not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the very considerable financial risks involved*."

4. In addition, the Jackson report recognises the legal obligation on the UK to ensure that access to review of environmental decisions is not prohibitively expensive in accordance with Article 9(4) of the Aarhus Convention (indeed compliance with the Convention is the first reason Jackson LJ cites in proposing a change to the current system). It is our view that requiring claimants in judicial cases where damages are not recovered to pay success fees would operate as an additional prohibition on bringing a case, negating the potential benefits of Qualified One Way Costs Shifting (QuOCS) as to which see further below. We note the proposal for an increase of 10% in general damages to cover this change, but such a change is of no use in the public law context where damages are not awarded.

5. At paragraph 69 of the consultation, the Government notes concerns regarding the consequences of abolishing the recoverability of CFA success fees. These include the fact that it might no longer be possible to use CFAs in judicial review if success fees are to be recovered from the client as they wouldn't be able to afford to pay. It therefore proposes an option to allow success fees to be recoverable in such cases but to cap the maximum recoverable to 25%. It goes on to say that the solicitor could still claim 100% but the defendant would only be liable for 25%- it is unclear whether the expectation is for the rest to be recoverable from their own client, but in either case, given the high fees charged in judicial review cases, requiring a client to pay even 25% of a success fee would in the view of CAJE cause the costs of proceedings to become prohibitively expensive and therefore breach the Government's obligations under the Aarhus Convention.

6. It is also worth noting that in many cases a "reciprocal costs cap" is applied to Claimant's costs where a PCO is granted. As a result, if such a case is brought using a PCO, the success fee can often not be applied in practice.

7. Because judicial review also is much less predictable than personal injury claims, when cases settle (often with a substantive cost that is good for the claimant), defendants can resist paying costs. As a result of this, and as a result of the case of *Boxall*, the risk to the legal representatives of a claimant of not getting paid are higher all round.

8. The Jackson report proposes that the rule in *Boxall* mentioned above be reversed, to create a presumption that the defendant pays the claimants costs if they concede the case after a judicial review starts, having not done so in response to the letter before claim. CAJE notes that the Government does not take up this suggestion in its consultation response, however, in our view such an approach would greatly mitigate the problem flagged above and create a powerful incentive to public bodies to engage with legal challenges in an earlier and more effective way than at present.

QuOCS and Protective Costs Orders

9. CAJE welcomes the Government's proposal for Qualified One Way Costs shifting (QuOCS) to apply to all judicial reviews. However, we are concerned that what is being proposed by the Government is a different version of QuOCS to that set out by Jackson LJ in his report and to that proposed by the Sullivan Working Group in its update report[2].

10. As pointed out in the Jackson report, qualified one way costs shifting is the simplest and most obvious way of meeting the UK's obligations under the Aarhus Convention; it is undesirable to have different costs rules for environmental judicial reviews and other judicial reviews and the permission requirement is an effective filter to weed out unmeritorious cases.

11. However, the Government's proposes that courts should be able to take into account various factors such as the financial circumstances of the parties and the specifics of the case in deciding whether to order costs or set a cap on costs. In environmental cases a further distinction is made between cases brought by individuals, to which QuOCS is proposed to apply, with a separate regime for environmental cases brought by organisations and groups. CAJE does not believe that the formulation proposed by the Government meets the requirements of the Aarhus Convention and is also concerned that it will not be workable in practice. Firstly, it is not a sensible or appropriate use of judicial time to determine the potential liability of each claimant on a case by case basis, often on the basis of information that should not be disclosed in open court. Secondly, it will result in costly, confusing and time-consuming satellite litigation, as evidenced in the numerous – often conflicting – judgments following the Corner House[3] case. Finally, the costs rules cannot be used as a proxy for the permission stage of a judicial review claim, there is no correlation between the wealth of a claimant and the merit of the claim.

Qualified One Way Costs Shifting (QuOCS)

11.1 The Government is proposing that in judicial review cases a fixed cap should be introduced in respect of a claimant's costs, of an amount "sufficient to deter

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2 See http://www.wwf.org.uk/wwf_articles.cfm?unewsid=4228

3 [2008] EWHC 246 (Admin)

frivolous claims" but "not so large that claimants would need to take out ATE insurance as they do now." We would point out that in judicial review cases it is extremely difficult to obtain ATE insurance, meaning that the only real option available to a non-legally aided claimant who wishes to limit their costs exposure is to apply for a PCO. We would also point out that in judicial review cases it is extremely difficult to obtain ATE insurance, indeed Jackson references CAJE's comments in this regard in his report[4]. The proposal goes on to state that a claimant will have an opportunity of persuading the judge that in the particular circumstances of their case, no order as to costs should be made. Likewise, the costs would be recoverable at a level higher than the cap if the claimant is a "conspicuously wealthy" individual or the defendant is a "small organisation".

11.2 This formulation is different to that proposed by Jackson LJ in his review and the further variation proposed by the Sullivan Working Group. The Government proposes not to accept either formulation on the basis that "this would have the potential to encourage a significant increase in unmeritorious claims which would increase the costs of public bodies without any real benefit to the Claimant." However, in our view the formulation proposed by the Government would be unworkable without drawing the Court into a detailed financial assessment procedure (see above), which of itself would require further guidelines and again take up time, detracting from the purpose of the litigation at hand.

11.3 As far as the proposal for tariffs is concerned, CAJE does not object in principle to this idea, but in our opinion the tariffs set out are too high. In the view of CAJE, costs up to permission stage in particular should be minimal and ideally set at no higher than £500.

11.4 In order to ensure certainty for claimants in environmental cases, CAJE proposes that any allegations as to unreasonable conduct should be raised and determined as they arise, rather than at the end of the case. Clear and narrowly-drawn guidelines should be developed setting out what kind of behaviour is to be regarded as "unreasonable" to avoid expensive and time-consuming satellite litigation, or a chilling effect on reasonable conduct of litigation in the fear that a judge might regard it as unreasonable. In our view, renewing an application for permission at an oral hearing should neither be regarded as unreasonable nor open a claimant to the risk of paying all of the defendants costs, it should be subject to costs limits in the same way as the "on paper" permission stage. If such steps are not taken, CAJE is of the view that the proposed application of QuOCS will not create certainty for the claimant and therefore continue to breach the requirements of the Aarhus Convention.

11.5 Further, for the purposes of environmental cases, the Aarhus Convention does not distinguish between "small" or "large" public bodies - the prohibitive costs

[4] Para 3.6 page 307

rules under the Aarhus Convention thus apply to both and in our view so should QuOCS. In addition, QUOCS should also apply to the costs of interested parties.

11.6 We are pleased the Government recognises that in certain circumstances a claimant could have no liability at for costs at all, but again believe that guidance as to "reasonableness" is necessary to avoid protracted litigation. For example, would a claimant who had applied for legal aid and been refused be regarded as acting reasonably if he then brought a case through QuOCS? In our view the presumption should be that the Claimant has acted reasonably in such circumstances, particularly given that legal aid funding ensures recovery of own side's legal fees regardless of the outcome of the case, includes the possibility of paying for expert witnesses as necessary and so on.

11.7 Additionally, CAJE is of the view that costs rules should not be used to form a deterrent function in judicial review claims. Not only are costs unlikely to deter the conspicuously wealthy, there is no correlation between the wealth of the claimant and the viability of the claim. The appropriate way in which to ensure that only meritorious claims proceed to final hearing is to ensure a robust consideration of the issues raised at permission stage, rather than using the "blunt weapon" of costs.

11.8 We note the Government's comments at paragraph 152 that the "loser pays" or normal costs rule should not generally be extended beyond claims brought by individuals as "many NGOs, for example, are large well-resourced national organisations." We would point out in this regard that many NGOs (including all of the members of CAJE) are largely reliant on public donations for their work and subject to the requirement to meet their charitable objectives. The vast majority of funding is committed to projects (against which funding has been secured) and "free money" for litigation is very limited. Additionally, litigation is very resource intensive and most NGOs rarely pursue judicial reviews unless all other avenues have been exhausted". As a result of this, we believe that such organisations should be treated in the same way as individuals and therefore that QuOCS should apply to non-commercial organisations bringing claims in the public interest.

11.9 We agree that a distinction should be made between commercial and non-commercial organisations for the purposes of bringing judicial review claims. The Government proposes defining the public interest in such cases on the basis of existing case law. We would point out that environmental judicial reviews are automatically to be regarded as being in the public interest, a point we develop further below.

Protective Costs Orders

11.10 Paragraph 166 states "where appropriate organisations such as environmental groups and local residents associations would be able to apply,

as now, for a Protective Costs Order where the claim is brought in the public interest." The consultation goes on to state "A PCO ought to provide better costs protection than QuOCS, because under a PCO it will be clear from the outset what costs the claimant would have to pay if the claim is unsuccessful. This same certainty is not achieved by QuOCS given the very different financial resources of claimants who are not individuals." We set out below our comments on the functioning of the PCO regime but would point out that operating QuOCS using the formulation proposed by the Sullivan Working Group would provide certainty to individuals and non-commercial organisations bringing environmental cases, who are very unlikely to be regarded as acting "unreasonably" if this term is defined appropriately, i.e. in the sense intended by Jackson LJ or the Sullivan Working Group.

11.11 The consultation states at paragraph 168 that the Government is working to amend the Civil Procedure Rules to codify the current case law on PCOs for environmental judicial review proceedings, with the aim of making the law and procedure more certain and transparent. At present we remain unclear on the difference between these rules and those on QuOCS in practice. In particular, it is unclear whether the limits on PCOs will be set at the same level as the proposed tariffs on QuOCS. Finally, it is unclear whether the practice on "reciprocal" costs caps applied in some cases is intended to be retained.

11.12 If the regime on QuOCS operates in a way that results in individuals being put in a better position than organisations subject to PCOs (or vice versa), then we can envisage a situation where potential litigants are advised for and against forming campaigning groups on the basis of what is most advantageous for costs purposes, or litigation concerning whether a particular claimant who represents an unincorporated campaign group is to be regarded as an "individual" or a group. Under the Aarhus Convention there is no basis for distinguishing between claimants bringing environmental cases in this way. In our view, attempting such a differentiation would create a strong potential for satellite litigation and uncertainty. For this reason we do not believe that codifying the current PCO regime would assist the UK in addressing the infraction proceedings being taken by the EU Commission and the recommendations of the Aarhus Convention Compliance Committee. Instead, we would propose that the QuOCS regime, modified to take into account the concerns raised above, should apply to all claimants.

CAJE

Gita Parihar, Head of Legal, Friends of the Earth
Carol Hatton, Solicitor, WWF-UK
Debbie Tripley, Chief Executive, Environmental Law Foundation
Maria Adebowale, Director, Capacity Global
Kate Harrison, External Solicitor, Greenpeace
Rosie Sutherland, Legal Advisor RSPB
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