

Aarhus Costs Protection in Environmental Judicial Review

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Agenda

- changes introduced by the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017
- recent report of the Aarhus Convention Compliance Committee
- recent successful challenge to the Aarhus rules in England by RSPB, FoE and ClientEarth
- the *Unison* case on fees
- future issues

Costs Protection (Aarhus Convention) Regulations NI 2013

- Covers public law cases only (eg not tort)
- Applies where part only of the challenge is subject to the Aarhus Convention
 - Broad meaning: catch most if not all planning cases
- Applicant has to opt in
- Had £5k/£10k & £35k fixed caps
- Protection presumed unless challenged under Reg 4 (penalised if challenge fails)
- Reg 5 covers undertakings in damages

2017 Amendment Regulations

- Applies to proceedings commenced after 14 February 2017
- Introduce a number of significant changes
- Clarifies that only applies to members of the public under the Convention
- Covers businesses and organisations
- But does not cover public bodies
- Numerous E&W cases where claimants were public authorities (eg LPA, PC, etc)

Amendment of costs caps

- Amendments to Reg 3
- Cap figures of £5k/£10k & £35k remain
- But can apply to amend them to favour applicant further
- Decrease amount applicant pays and increase the amount he recovers
- Where Court satisfied that not doing so would make costs prohibitively expensive

Determination of prohibitive expense

6. Proceedings are to be considered prohibitively expensive... if, having regard to any court fee an applicant is liable to pay, their likely costs either—
 - (a) exceed the financial means of the applicant; or
 - (b) are objectively unreasonable having regard to—
 - (i) the situation of the parties;
 - (ii) whether the applicant has a reasonable prospect of success;
 - (iii) the importance of what is at stake for the applicant;
 - (iv) the importance of what is at stake for the environment;
 - (v) the complexity of the relevant law and procedure; and
 - (vi) whether the case is frivolous.

Costs in appeals

- New Reg 3A to replace former Reg 3(7)
- Specific rules now applied for appeals, rather than a wider discretion
- CoA should make order for appeal costs
- Should be limited to £5k/£10k & £35k caps
- But subject to same powers to adjust figures from the caps to favour challenger
- So recover 2 x £35k if win on appeal

Implications

- Increased costs for defendants
- Make public law challenges cheaper to bring, against councils, Dept & PAC
- Not just individuals or campaigners – also commercial rivals or disappointed developers, if they wish given cross-cap
- Likely to encourage such challenges

Aarhus Convention Compliance Committee

- Generally welcomed 2017 Regs changes
- Endorsed inability to increase the cap
- Issues raised about non-compliance:
 - Exclusion of private law claims
 - Cross-undertaking in damages for injunctions provisions not a clear, consistent and transparent framework as required

Time limits

- Committee wanted promptness requirement removed for Aarhus cases
- Rules of Court of Judicature (NI) (Amendment) 2017 (SI 2017 No 213)
- Omits “promptly and in any event” from Ord 53, r4(1)
- Applies to JRs on or after 8 January 2018
- Ex Mem said due to *Uniplex* and Aarhus

Time limits: implications

- 3 months to bring planning and environment JRs (6 weeks in England)
- Ex Mem said no impact on business
- But will enable more 'late' JRs to proceed
- Previously claims refused as not prompt, even within 3 months
 - *Ards & North Down BC* [2017] NIQB 73 at [14]
 - Speed, great expedition, well within 3 months

RSPB, FoE and ClientEarth case

- [2017] EWHC 2309 (Admin), 15.9.17
- JR of 2017 amendments to CPR
- 3 grounds of challenge:
 - Varying the limits of the costs cap
 - Private hearings for discussion of financial resources of claimant and supporters
 - Claimant's own costs included within prohibitively expensive assessment

Varying limits of the cost cap

- Ability to vary cost cap upwards at any stage has a deterrent or chilling effect and does not provide reasonable predictability
- Must have regard to court rules / practice:
 - Application to vary cost caps must be made at the outset, before permission granted, based on claimant's financial information provided
 - Subsequently, application would only be entertained if (a) false information provided or (b) financial circumstances of claimant changed

Private hearings on financial resources

- Schedule of financial resources should be confidential – and for supporters also
- Chilling effect of providing financial information which may become public
- Should apply to all persons, and both initial and any later stage
- Rules not lawful as they did not provide for this

Inclusion of claimant's own costs

- SoS accepted this was a relevant consideration
- Should consider all the costs potentially involved in bringing a claim
- Clear from case law eg CJEU in *Edwards*
- No need for a declaration as claimants sought

Implications

- Might encourage NI DoJ to re-consider bringing in further changes here, eg:
 - Disclosure of financial information
 - Ability to adjust cost cap upwards as well
- But have been criticised in CPR by Aarhus Convention Compliance Committee
- Remains to be seen how generous DoJ will be in the future – kept under review

Court fees

- Court fees relevant to access to justice
- ACCC praised exclusion of Aarhus claims from recent increase in court fees in NI
 - Court of Judicature Fees (Amendment) Order (Northern Ireland) 2017 (SI 2017 No 16)
- *R (Unison) v Lord Chancellor* [2017] UKSC 51
 - fees imposed for employment tribunal cases were unlawful because of their effects on access to justice

Unison case

- Common law right of access to justice
- Constitutional right of access to the courts is inherent in the rule of law
- Without access, laws are liable to become a dead letter and democracy may become a meaningless charade
- Knowing persons can resort to the courts underpins government and business

Unison case

- Interference with access to the courts will be unlawful unless it can be justified as reasonably necessary to meet a legitimate objective
- Degree of intrusion must be no greater than is justified
- Sacrifice of ordinary and reasonable expenditure could not properly be the price of access to one's rights

Unison case

- Some parallels to judicial review
 - Role of JR in upholding rights and rule of law
 - Cases often deal with important points of genuine uncertainty in the law
 - Not usually any financial awards in JR
- May mean JR fees are kept low in the future – especially for Aarhus claims

Future of costs in JR

- Jackson LJ report on fixed recoverable costs in E&W (July 2017)
- Aarhus cost rules to be adapted and applied to all JR cases – can opt in
- Subject to means testing and disclosure of financial information
- Caps could be varied either way
- Will gov't accept claimant friendly change?

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