**COALITION FOR ACCESS TO JUSTICE FOR THE ENVIRONMENT**

Lord Dyson,

Master of the Rolls and Head of Civil Justice,

Civil Procedure Rule Committee,

Ministry of Justice,

102 Petty France,

London SW1H 9AJ

11th December 2014

FAO: jane.wright@justice.gsi.gov.uk

Dear Lord Dyson,

**Re: Amendments to Civil Procedure Rule 45.41 concerning Access to Environmental Justice and compliance with the UNECE Aarhus Convention**

We have recently been made aware that the Ministry of Justice is conducting an internal review of the costs rules for environmental cases.

Rule 45.41 (limit on costs recoverable from a party in an Aarhus Convention claim) came into effect on 1st April 2013 to ensure compliance with the decision of the Court of Justice of the European Union (CJEU) in *Commission v UK*[[1]](#footnote-1)and the findings of the Aarhus Convention Compliance Committee (ACCC) concerning the UK’s compliance with Article 9(4) of the Convention with regard to prohibitive expense[[2]](#footnote-2). The Civil Procedure Rule Committee’s decision to effect this amendment was widely welcomed by environmental NGOs.

We have always maintained in representations to the MoJ and the UK Aarhus Focal Point at Defra that, whilst representing a significant improvement in the previous position, Rule 45.41 is deficient in a number of ways. One of these shortcomings was highlighted on 27th November 2014 by the Court of Appeal in *Secretary of State for Communities & Local Government v Sarah Louise Venn[[3]](#footnote-3)*.

The case concerns an application under section 288 of the Town and Country Planning Act 1990 to quash a grant of planning permission by an inspector appointed by the respondent Secretary of State. Both the High Court and the Court of Appeal held the application was an environmental challenge falling within Article 9(3) of the Aarhus Convention. However, Hon. Justice Lang held that it was not an “Aarhus Convention claim” for the purposes of CPR 45.41 because costs protection under that rule was confined to claims for judicial review.

Lord Justice Sullivan endorsed the Judge’s conclusion that the Claimant’s section 288 application falls within Article 9(3) of Aarhus and made the following observations in respect of CPR 45.41:

*“34. … In the light of my conclusion on Article 9(3), and the decisions of the Aarhus Compliance Committee and the CJEU in Commission v UK … it is now clear that the costs protection regime introduced by CPR 45.41 is not Aarhus compliant insofar as it is confined to applications for judicial review, and excludes statutory appeals and applications. A costs regime for environmental cases falling within Aarhus under which costs protection depends not on the nature of the environmental decision or the legal principles upon which it may be challenged, but upon the identity of the decision-taker, is systemically flawed in terms of Aarhus compliance.*

*35. This Court is not able to remedy that flaw by the exercise of a judicial discretion. If the flaw is to be remedied action by the legislature is necessary. We were told that the government is reviewing the current costs regime in environmental cases, and that as part of that review the Government will consider whether the current costs regime for Aarhus claims should make provision for statutory review proceedings dealing with environmental matters … That review will be able to take our conclusions in this Appeal, including our conclusion as to the scope of Article 9(3), into account in the formulation of a costs regime that is Aarhus compliant.*

Lady Justice Gloster and Lord Justice Vos, sitting alongside Lord Justice Sullivan, agreed with his judgment.

We therefore respectfully ask the CPRC to effect the requisite amendments to Rule 45.41 to encompass reviews to the High Court under the provisions of any statutory provision of a decision subject to the Aarhus Convention (as is currently the case in Northern Ireland[[4]](#footnote-4)).

Should the CPRC move to achieve compliance with the Aarhus Convention and EU law, there are a number of other deficiencies in Rule 45.41 that it may wish to consider concurrently. These include:

* The CJEU judgment in *Commission v UK* confirmed that the cost of legal proceedings must not “*exceed the financial resources of the person concerned, nor must they be* *objectively unreasonable[[5]](#footnote-5)*”. With respect to the subjective limb of this test, it is our view that there should be the possibility for the Courts to reduce (but not increase) the adverse caps of £5,000 and £10,000 on cause shown (as is currently the position in Scotland[[6]](#footnote-6)). In this respect, it should be recalled that the adverse caps do not operate in isolation - they exist over and above the requirement to pay one’s own legal costs. In this respect, it is important to note that the CJEU reinforced that the prohibitive nature of costs must be assessed “*as a whole, taking into account all the costs borne by the party concerned[[7]](#footnote-7)*”.
* The CJEU did not have enough evidence before it to come to a conclusion on the imposition of reciprocal caps. However, as highlighted above, the judgment confirms that the prohibitive nature of costs must be assessed as a whole. It is our view that the costs in complex environmental cases engaging public interest issues of EU and/or domestic law may exceed the present reciprocal cap (£35,000), after which claimant lawyers are effectively working *pro bono*. There is also precedent for this in Scotland as petitioners can apply to raise the reciprocal cap on cause shown[[8]](#footnote-8).
* The CJEU judgment confirms that the assessment as to what is prohibitively expensive applies to all stages of the case[[9]](#footnote-9). There is presently confusion as to whether, on appeal(s), the original £5,000 and £10,000 caps encompass subsequent proceedings, the same cap is imposed again (i.e. effectively doubling or tripling the adverse costs cap depending on the number of appeals) or whether a completely new assessment is required[[10]](#footnote-10). As both the CJEU and the ACCC stress the importance of advance certainty for claimants, this issue would clearly benefit from clarity in the CPR. It is our view the caps imposed at first instance should cover any subsequent appeal(s) as what is prohibitively expensive (particularly for an individual) at first instance will be equally so at later stages of the case.

We urge the Committee to effect further amendments to Rule 45.41 to strengthen the UK’s compliance with the Aarhus Convention and to ensure that any proposals emanating from the Ministry of Justice as a result of the current review serve to strengthen the UK’s present position. The UK’s compliance with EU and international environmental law is particularly important in light of measures to restrict the possibility for individuals and NGOs to bring legal challenges (e.g. the clauses in part 4 of the Criminal Justice and Courts Bill currently before Parliament) in order to speed up infrastructure delivery.

Yours sincerely,

Debbie Tripley, Solicitor, **WWF-UK**

Rosie Sutherland, in-house Solicitor, the **RSPB**

Gita Parihar, Solicitor and Head of the Rights and Justice Centre, **Friends of the Earth**

Ralph Smyth, Transport Campaign Manager and Barrister, **CPRE**

Copies to: Lord Justice Sullivan, Court of Appeal

 Mr Paul Speight, Head of Infringements Unit, DG Environment, European Commission

Ms Fiona Marshall, Environmental Affairs Officer, UNECE Aarhus Secretariat

Ms Dawn Sanderson, A2J Strategy and Specialist Policy, Ministry of Justice

Mr Ahmed Azam, UK Aarhus Focal Point, Defra

1. Case C-530/11) [2014] 3 WLR 853 (“*Commission v UK*”) [↑](#footnote-ref-1)
2. See Communication C33 concerning the UK available at: <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece_mp.pp_c.1_2010_6_add.3_eng.pdf> [↑](#footnote-ref-2)
3. [2014] EWCA Civ 1539 [↑](#footnote-ref-3)
4. See The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, s.2(1)(b) available at: <http://www.legislation.gov.uk/nisr/2013/81/regulation/2/made> [↑](#footnote-ref-4)
5. 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 [↑](#footnote-ref-5)
6. 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> [↑](#footnote-ref-6)
7. Case C-530, paragraph 44 [↑](#footnote-ref-7)
8. *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 [↑](#footnote-ref-8)
9. Case C-530/11, paragraph 51 [↑](#footnote-ref-9)
10. See *R (on the application of Edwards and another (Appellant)) v Environment Agency and others (Respondents) (No 2),* paragraphs 29-39 available at: <https://www.supremecourt.uk/decided-cases/docs/UKSC_2010_0030_Judgment.pdf> [↑](#footnote-ref-10)