

RE: COSTS PROTECTION IN ENVIRONMENTAL CLAIMS

OPINION

Introduction

1. We are instructed on behalf of members of Wildlife & Countryside Link, including the Royal Society for the Protection of Birds (“RSPB”), ClientEarth, Friends of the Earth, the Open Spaces Society (“OSS”) and The Wildlife Trusts (“TWTs”) to advise in relation to the Ministry of Justice (“MoJ”) consultation on costs protection in environmental claims, entitled *“Costs Protection in Environmental Claims: Proposals to revise the costs capping scheme for eligible environmental challenges”* (“the Consultation”).
2. In particular, we are asked to advise as to whether the proposals comply with either:
 - (1) The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 (“the Aarhus Convention/the Convention”); or
 - (2) EU law, primarily Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programme relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC (subsequently repealed and re-enacted in a modified form in Directive 2011/92/EU) and Directive 96/61/EC (“the PPD”).
3. In summary, we conclude that the proposed changes in the Consultation do not comply with the PPD and/or the Convention for the following reasons:
 - (1) The proposed costs regime does not cover all of the potential claims that could fall within the scope of the Convention. It also fails to cover all potential applications for interim relief that fall within the scope of the Convention.

- (2) The costs protection is only afforded to “*a member of the public*”. This narrow definition conflicts with the broad definition given to “*members of the public*” under the Convention.
- (3) The proposal to remove costs protection under the CPR to claimants who do not receive permission to apply for judicial review will create a considerable amount of uncertainty, and is likely to dissuade potential claimants from bringing claims, even where the merits are strong. It also proceeds on a misunderstanding of the judgment of the CJEU in case C-260/11, Edwards and Pallikaropoulos.
- (4) Similarly, the proposed “hybrid” cost regime will also deter claimants, and also proceeds on a misunderstanding of the judgment in Edwards.

Legal Framework

- 4. The Aarhus Convention came into force in 2001 and was ratified by the UK in 2005. It is built on three main pillars: (i) access to environmental information – Art. 5 (ii) public participation in environmental decision-making – Arts. 6-8 and (iii) access to justice in environmental matters – Art. 9.
- 5. The purpose of Article 9 is to ensure that independent administrative or judicial processes exist by which the public can participate in and challenge decisions and actions affecting the environment. There are three broad categories of case that fall within its provisions:
 - (1) Challenges to decisions relating to requests for environmental information (Art. 9(1));
 - (2) Challenges by “*the public concerned*” to decisions, acts or omissions concerning the permitting of activities covered by Article 6 of the Convention (Art. 9(2)). These in turn are:
 - a. Article 6(1)(a): “*decisions on whether to permit proposed activities listed in Annex 1*”. Annex 1 lists a number of major project types and is broadly modelled on Annex 1 to the Environmental Impact Assessment Directive (“EIA Directive”).

b. Article 6(1)(b): *"in accordance with its national law...decisions on proposed activities not listed in Annex 1 which may have a significant effect on the environment"*.

(3) Challenges, by *"members of the public"*, to other acts or omissions *"by private persons and public authorities which contravene provisions of its national law relating to the environment"* *"where they meet the criteria, if any laid down in its national law"* (Art. 9(3)). It has been held that the phrase *"acts or omission"* includes administrative decisions: see Venn v Secretary of State for Communities and Local Government [2015] 1 W.L.R. 2328 at para. 13.

6. *"The public"* and *"The public concerned"* are defined in Articles 2(4) and (5) of the Convention, respectively:

"4. "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

5. "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."

7. Importantly, under Article 9(4), in relation to all three categories of case, there must be *"adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive"*.

8. By Article 9(5) of the Convention:

"In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."

9. The Convention itself has not been directly incorporated into domestic law. It does not have direct effect: see the CJEU in C-240/09, Lesoochránárske zoskupenie VLK [2012] QB 606. However, as a contracting party, the UK has made a commitment to ensure that the provisions of the Convention are complied with within its territory.

10. In addition, the EU is a signatory to the Convention and it has, at least in part, been incorporated into EU law. In implementing the provisions on access to justice laid down in

Article 9(2) of the Aarhus Convention, Article 3(7) of the PPD inserted Article 10a into the EIA Directive (now Art. 11) and Article 4(4) inserted Article 15a into the Integrated Pollution and Prevention Control Directive (IPPC Directive). These provisions do have direct effect. The wording of these inserted provisions is identical, and mirrors that of Article 9(2) of the Convention for cases falling within the Directives:

“Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

- (a) having a sufficient interest, or alternatively;*
- (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;*

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.”

11. Each new provision also lays down, in identical words, rules on costs: *“Any such procedure shall be fair, equitable, timely and not prohibitively expensive.”*
12. However, the PPD is not intended to implement the Aarhus Convention in full. In particular, the articles inserted into the EIA Directive and the IPPC Directive are intended only to implement Article 9(2) of the Convention. They do not implement Article 9(3). As it was put by the Court of Appeal in Austin v Argent Miller [2014] EWCA Civ 1012, at paragraph 29, in rejecting an argument that these provisions covered a private nuisance claim:

“In our view, the appellant seeks in effect to bring Article 9.3 of the Convention within the scope of Article 11. That is in substance asserting that Article 9.2 and 9.3 cover the same ground. That is an impossible submission. There have indeed been attempts by the European Commission to frame a Directive on access to justice more generally in environmental matters, as Carnwath LJ pointed out in the Morgan and Baker case, but they have come to nothing. This is an indirect, and in our view misconceived, attempt to bring Article 9.3 into the Directive by the backdoor when it has been excluded by the front.”

The current position on costs

13. Until 2013, the decision on whether to grant a protective costs order (“PCO”) was made by the Court on a case by case, applying the criteria set out in R (Corner House) v Secretary of State for Trade and Industry [2005] 1 WLR 2600. In 2013, new fixed costs rules were introduced into Part 45, Section VII of the Civil Procedure Rules (“CPR”) dealing with *“Aarhus Convention claims”* (“the Costs Protection Regime”)

14. An “Aarhus Convention claim” is defined in CPR rule 45.41(2) as:

"a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject."

15. Therefore, as currently drafted, these provisions only apply to claims for judicial review.

16. CPR rule 45.43 provides that *"a party to an Aarhus Convention claim may not be ordered to pay costs exceeding the amount prescribed in Practice Direction 45"*. Practice Direction 45 caps the costs recoverable against the claimant to: (i) £5,000 where the claimant is claiming as an individual and (ii) £10,000 in all other cases. The Practice Direction also provides that where a defendant is ordered to pay costs, the amount specified for the purpose of rule 45.43 is £35,000. Therefore, there is a reciprocal cap on the amount of costs that a claimant can recover if it wins.

17. There are opt-out provisions in rule 45.42 if a claimant does not want the Costs Protection Regime to apply. Under rule 45.44 a defendant can challenge whether a claim is in fact an Aarhus Convention claim within the meaning of rule 45.41(2).

18. Finally, CPR Practice Direction 25A was amended in relation to cross-undertakings in damages for interim relief in “Aarhus Convention Claims”. It states:

"(1) If in an Aarhus Convention claim the court is satisfied that an injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court will, in considering whether to require an undertaking by the applicant to pay any damages which the respondent or any other person may sustain as a result and the terms of any such undertaking

(a) have particular regard to the need for the terms of the order overall not to be such as would make continuing with the claim prohibitively expensive for the applicant; and

(b) make such directions as are necessary to ensure that the case is heard promptly.

(2) Aarhus Convention claim" has the same meaning as in rule 45.41(2)."

The Proposals

19. There are four main changes proposed in the Consultation:

- (1) The Costs Protection Regime will be extended to statutory reviews of “*decisions, acts or omissions*” falling within Article 9(2) of the Convention; but not to “*acts or omissions*” falling within Article 9(3) of the Convention;
- (2) To benefit from the Costs Protection Regime, the claim must be made by “*a member of the public*”;
- (3) The Costs Protection Regime will only apply once permission to apply for judicial review (or statutory review where relevant) has been given;
- (4) A “hybrid” approach will be adopted, where the costs cap would be set at an initial default level, which could be varied upon application by either party.

20. We consider each of these changes below, and whether they comply with the Convention and the PPD.

Scope of claims covered by the Costs Protection Regime

21. The proposed scope of claims covered by the new Costs Protection Regime are set out in proposed CPR rule 45.41(2):

“In this section, “Aarhus Convention Claim” means a claim brought by a member of the public –

- (a) by way of judicial review which challenges the legality of any decision, act or omission of a body exercising public functions and which is within the scope of Article 9(1) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998;*
- (b) by way of judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions and which is within the scope of Article 9(2) of the Convention; or*
- (c) by way of judicial review which challenges the legality of any act or omission of a body exercising public functions and which is within the scope of Article 9(3) of that Convention.”*

22. Two problems are clear:

23. First, the new Costs Protection Regime will not cover private law actions, even if these concern the environment. Only challenges to an “*act or omission*” of a “*body exercising public*

functions” are entitled to automatic costs protection. However, Article 9(3) of the Convention is not limited in this way. It expressly refers to acts or omissions “*by private persons*”. It has been held that private nuisance claims can fall within Article 9(3) of the Convention: see Argent Miller. As such, the new Costs Protection Regime will not cover all claims protected by Article 9(3) of the Convention.

24. Second, the new Costs Protection Regime will not cover challenges by way of statutory review to decisions made by public bodies which fall within the scope of Article 9(3). Only statutory review challenges that fall within Article 9(2), i.e. those that fall within the scope of the PPD, will be entitled to costs protection. The effect is that a wide range of statutory challenges to decisions covered by Article 9(3) will not receive the benefit of the Costs Protection Regime. In Venn, the Court of Appeal held that the scope of environmental law for the purposes of Article 9(3) of the Convention should be given a wide interpretation, which would be “*broad enough to catch most, if not all, planning matters*”. The Aarhus Convention Implementation Guide refers to “*City planning, environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships*” as potentially falling within the scope of Article 9(3). However, where decisions in these areas must be challenged by a statutory review the Costs Protection Regime will not apply.
25. The combined effect is that a wide variety of claims that the Convention states must not be “*prohibitively expensive*” (per Art. 9(4)) are not covered by the new Costs Protection Regime. This is solely on the basis of the identity of the decision maker (i.e. a public body or private individual) and the method of challenge set out in legislation (i.e. a claim under Part 8 of the CPR, or an application for judicial review under CPR r. 54); and not on the nature of the decision, or the legal basis for challenge (the legal principles underlying a claim are often the same in judicial and statutory reviews).
26. Therefore, the current proposals do not address the current failure of the Costs Protection Regime to comply with Article 9(3) of the Convention. As it was put by Sullivan LJ in Venn at para. 34:

“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.”

27. The effect of this non-compliance is that, in cases falling outside the Costs Protection Regime, but within the scope of the Convention, a Court would be under no obligation to grant a protective costs order for a claimant, even if failing to do so would mean that its costs for bringing the claim would be prohibitively expensive. This is because the Court is not able to give direct effect to Article 9(4) when deciding whether to grant a PCO; nor is it inevitably obliged to exercise its discretion to grant a PCO: see Venn at paragraph 35. Instead, the Court will apply the rules set out in Corner House. A breach of the Convention is only a factor in favour of making a costs order in favour of the applicant for a PCO: see Carnwath LJ in Morgan v Hinton Organics (Wessex) Ltd [2009] JPL 1335 at para 44. The Court may still exercise its discretion not to grant a protective costs order, for example, on the basis that the claimant has a private interest in the outcome of the case. As such, for a wide variety of claims there remains no rule of law to ensure that the proceedings are not prohibitively expensive for the claimant and the proposed Costs Protection Regime does not comply with Article 9(4) of the Convention.
28. Further, because the same definition of Aarhus Convention claim is used in proposed Practice Direction 25, the same reasoning set out above applies equally to the proposed rules on cross-undertakings in damages for interim relief.
29. These conclusions are supported by the findings of the Aarhus Compliance Committee (“ACC”). In May 2014, the ACC produced a report on the UK's compliance following the ACC's findings of non-compliance in cases ACCC/C/2008/33, /27 and /23. In the report, the ACC expressed the view that, despite the introduction of the Costs Protection Regime, the UK was still failing to comply with its obligations under the Convention. This was, in part, because the new Costs Protection Regime was limited to judicial review cases:

“In England and Wales, the new cost protection provisions apply to claims for “judicial review of a decision, act or omission all or part of which is subject to the Aarhus Convention”, but do not address statutory review or private law claims. ... Bearing in mind that the requirement in article 9, paragraph 4 for procedures to be not prohibitively expensive applies to all procedures within the scope of paragraphs 1, 2 and 3 of that article, the Committee finds that the Party concerned has taken insufficient measures to fully meet the requirements of article 9, paragraph 4 in this regard.”

30. Therefore, in our opinion, in order to comply with Convention, the Costs Protection Regime should cover any challenge falling within the scope of Article 9 of the Convention, whether by way of judicial review or statutory review.

Eligibility – claim must be made by “a member of the public”

31. Under the proposals, an “Aarhus Convention claim” is defined as a claim “*brought by a member of the public*”: see, e.g., proposed CPR rule 45.41(2).

32. The proposed rules do not explain what is meant by “*a member of the public*”. Taken at face value, it suggests that only an individual is entitled to protection under the regime. This would exclude community groups, Parish Councils and even environmental NGOs from costs protection; notwithstanding the fact that these groups all clearly have rights protected under the Convention. This may not be what is intended. However, there is a risk that the Court may not grant costs protection to qualifying individuals or organisations because of the wording of the Costs Protection Regime, even if this results in a breach of the requirements of the Convention and the PPD (see Venn).

33. Similarly, so far as injunctions are concerned, the requirement for the application to be made by “*a member of the public*” in the proposed Practice Directive 25A, paragraph 5.1B(1) could prevent qualifying organisations from being able to access relief for the same reason.

34. Ultimately, the Convention gives rights to two classes of people:

(1) Members of the “*public concerned*”, either having a sufficient interest or maintaining impairment of a right, who should have standing to review the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 (see Art. 9(2); and

(2) “*Members of the public*”, who should have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment (see Art. 9(3).

35. The terms “*the public concerned*” and “*members of the public*” are defined in Article 2 of the Convention as follows:

“The public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

“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.”

This broad definition is mirrored in the definition of “public concerned” in the PPD. Article 2 of the EIA Directive clearly includes NGOs in its definition of the “public concerned”:

‘public concerned’ means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;

36. In our view, to avoid non-compliance with the Convention (or, at the very least, arguments on this point in the future), the rules should be amended to delete the reference to “a member of the public” and instead state that the Costs Protection Regime applies to “the public” and “the public concerned” as defined in Article 2 of the Convention, Article 2 of the EIA Directive and Directive 96/61/EC.

Costs where permission is not granted

37. In the Consultation, the MoJ has sought views on restricting costs protection to cases which receive permission. As it is put at paragraph 33:

“This would mean that claimants would only receive cost protection once permission to apply for judicial review or statutory review (where relevant) is given. In addition to aligning costs protection in environmental and non-environmental judicial reviews in this regard, it would minimise the grant of costs protection in unmeritorious cases.”

38. In our view, any proposal to make costs protection contingent on obtaining permission to proceed with an application for Judicial Review or statutory review will prevent the UK from complying with the PPD and the Convention.
39. There are three main reasons:

40. First, this proposal will create considerable uncertainty in respect of cost protection. In numerous cases, the CJEU has confirmed that claimants must have prior certainty in relation to costs protection. In case C-530/11, Commission v UK, the CJEU held (at paragraph 34):

“In particular, where the relevant provision is designed to create rights for individuals, the legal situation must be sufficiently precise and clear, and the persons concerned must be put in a position to know the full extent of their rights and, where appropriate, to be able to rely on them before the national courts (see, to this effect, inter alia, Case C-233/00 Commission v France [2003] ECR I-6625, paragraph 76)”

41. In the same case, at paragraph 58, the CJEU emphasised the need for predictability:

“It is also apparent from the foregoing that that regime laid down by case-law does not ensure the claimant reasonable predictability as regards both whether the costs of the judicial proceedings in which he becomes involved are payable by him and their amount, although such predictability appears particularly necessary because, as the United Kingdom acknowledges, judicial proceedings in the United Kingdom entail high lawyers’ fees.”

42. However, under the proposals, a claimant will not know whether it will obtain cost protection or not at the point at which it files a claim. In fact, a prospective claimant will not know whether they will be entitled to costs protection until they have incurred a considerable amount of costs, and are exposed to the other side’s acknowledgment of service costs. In fact, all of the costs incurred till the permission stage are at the claimant’s own risk; and may not be recoverable. This will create a considerable amount of uncertainty, and is likely to dissuade potential claimants from bringing claims, even where the merits are strong. This problem is exacerbated in light of the shortened 6 week time limit for bringing planning judicial review and statutory review claims brought in by CPR r. 54.5. The effect of this time limit is that compliance with the pre-action protocol within the timeframe is often impossible (as shown by the fact that there is no longer an obligation to comply with the protocol). As such, claimants will often be required to file a claim without knowing the basis on which the claim will be defended, and therefore the strength of their claim.

43. Therefore, the proposals fail to provide sufficient predictability to claimants; they are therefore contrary to the Convention and the PPD.

44. Second, the proposed approach will create a blanket restriction on costs protection in cases where permission is not granted – regardless of the actual financial resources of the claimant.

45. The law is now relatively well-established, following the decision of the CJEU in case C-260/11, Edwards and Pallikaropoulos:

- (1) Members of the public, including NGOs and community groups, must not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of the Convention by reason of the financial burden that might arise as a result: see Edwards at paragraph 35.
- (2) In deciding what is “*prohibitively expensive*”, account must be taken both of the interest of the person wishing to defend his/her rights and the public interest in the protection of the environment: see Edwards at paragraph 35.
- (3) The costs of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable: Edwards at paragraph 40.
- (4) There is therefore is a two-stage test. First, the level of costs must be subjectively reasonable – i.e. they must not exceed the financial resources of the person concerned. If the level of costs do exceed the financial resources of the person concerned, then they are prohibitively expensive, regardless of whether they are objectively unreasonable. Second, if the level of costs do not exceed the financial resources of the person concerned, nevertheless, they must not be objectively unreasonable. If they are objectively unreasonable, costs protection may be granted even in cases where the level of costs is not prohibitively expensive to the claimant in question.
- (5) This formulation was summed up by the Advocate General’s opinion in Commission v United Kingdom, at paragraph 55:

“...the correct position is that litigation costs may not exceed the personal financial resources of the person concerned and that, in objective terms, that is to say, regardless of the person’s own financial capacity, they must not be unreasonable.”

- (6) In assessing whether the costs are objectively unreasonable, the factors to consider are those set out by the CJEU in Edwards at paragraph 42. i.e. (i) the situation of the parties concerned, (ii) whether the claimant has a reasonable prospect of success, (iii) the

importance of what is at stake for the claimant and for the protection of the environment (iv) the complexity of the relevant law and procedure and (v) the potentially frivolous nature of the claim at its various stages.

(7) That these are factors to be assessed at the objective stage is clear from the decision of the Supreme Court in Edwards v Environment Agency [2014] 1 W.L.R. 55, where Lord Carnwath considered these matters having first reached a judgment on whether the level of costs were subjectively prohibitive (at para. 29-30).

46. Three important principles emerge: (i) the merits of the claim are only relevant at the second stage, when deciding whether the level of costs are objectively unreasonable (ii) the question of whether costs are objectively unreasonable is only posed once it has been demonstrated that the level of costs are not subjectively unreasonable, i.e. that the level of costs is within the financial means of the proposed claimant (iii) if the costs are subjectively prohibitive, then costs protection should be granted, regardless of whether the level of costs is objectively unreasonable.

47. The effect of the MoJ's proposed change is that, in a case where the merits are weak, a claimant will have to pay his/her pre-permission costs regardless of whether s/he can afford to do so. The claimant may be required to bear costs that could be prohibitively expensive. That is contrary to the position as set out in the Commission v United Kingdom: "*the correct position is that litigation costs may not exceed the personal financial resources of the person concerned...*". The MoJ has erroneously taken one of the factors used to assess whether costs are objectively unreasonable (the merits of the claim) and used it to rule out costs protection even in claims which are prohibitively expensive for the claimant concerned.

48. Third, in any event, the question of whether the proposed claim lacks merit is only one factor to be taken into account in deciding whether public interest favours no costs protection. As set out by the CJEU in Edwards, at paragraph 42, a range of factors need to be considered in reaching a judgment on whether the level of costs payable is reasonable. These include "*the importance of what is at stake for the protection of the environment*". However, none of these factors are taken into account in the proposals, which instead create a blanket restriction on the Protective Costs Regime applying where permission is refused, regardless of the wider public interest in bringing the claim. Indeed, under section 84 of the Criminal

Justice and Courts Act 2015, permission for judicial review can now be refused even if there has been an error of law in the decision-making process, if it is “*highly likely*” that the outcome of the claim would not have been “*substantially different*” if the error of law had not occurred. There may be a public interest in bringing judicial review in such cases, for example to clarify a point of law of public importance, even if permission is ultimately refused. However, this would not be accommodated under the proposals.

49. The range of factors that must be taken into account when deciding whether to grant costs protection at the permission stage is shown by Communication C77, where the ACC took the view that pre-permission costs incurred by Greenpeace were prohibitively expensive. In doing so, the ACC took into account the fact that the case was brought in the public interest and that the only means of doing so was by way of an application for judicial review. Whilst the ACC is not a Court, its decisions “*deserve respect on issues relating to standards of public participation*”: per Lord Carnwath in Walton v Scottish Ministers [2012] UKSC 44, para 100. Under the MoJ’s proposal these wider considerations of what is in the public interest will be disregarded. Instead, the merits of the cases will be (erroneously) elevated above all other considerations.
50. Overall, therefore, in our opinion, in order to comply with the PPD and the Convention, costs protection must apply from the point at which the claimant lodges the claim form (as is currently the case).

Hybrid Caps

51. Finally, under the proposals, a “hybrid” approach is proposed, where the costs cap would be set at an initial default level, which could be varied upon application by either party. The proposal is set out in the Consultation at paragraphs 37-39, as follows:

37. *It is proposed that the current rules be revised in favour of a ‘hybrid’ model. It would be a ‘hybrid’ because, in every case where the regime applied, the costs caps would – at least initially – be set at a default level, but any party could make an application for the court to vary their own – or another party’s – costs cap (proposed rule 45.44 and proposed paragraph 5 of Practice Direction 45, both at Annex A). The court would also be able to vary the caps of its own motion. In varying the caps, the court would be able to increase or decrease them and, in appropriate cases, remove a cap altogether.*

38. *Under the proposed model, in all cases where the court considered whether to vary a costs cap, it would be required to have regard to the principles set out in Edwards in ensuring any variation would not make costs ‘prohibitively expensive’ for the claimant (proposed rules 45.44(3)(a) and 45.44(4) at Annex A).*

39. *The Government takes the view that it would be exceptional for claimants to require more costs protection than is provided by the default costs caps. Before lowering a claimant's costs cap or increasing a defendant's costs cap, the court would have to be satisfied that the case was exceptional because, without the variation, the costs of the proceedings would be 'prohibitively expensive' for the claimant, again having regard to the principles in Edwards (proposed rules 45.44(3)(b) and 45.44(4) at Annex A). This approach is intended to deter claimants from making unmeritorious applications to vary caps, but it would not limit the court's ability to provide more costs protection in the exceptional cases where that would be necessary.*

52. In our view, the proposed hybrid cap regime will prevent the UK from complying with the PPD and the Convention.

53. Allowing defendants to challenge the level of the cap conflicts with the requirement for claimants to have certainty with regard to costs exposure. The effect will be to revert back to the previous costs regime situation (found to be non-compliant with the PPD by the CJEU in Commission v United Kingdom) in which each application for a protective costs order was considered on its own merits.

54. The case-law is set out above. The fact that any party will be able to make an application to the court to increase or even remove the claimant's costs cap - and that the court will also be able to vary the caps of its own motion - removes the requisite element of prior certainty for the claimant. This is likely to significantly deter potential claimants from bringing a claim. This uncertainty is exacerbated by the fact that there is likely to be lengthy and costly satellite litigation just to determine the extent of a claimant's costs liability. This satellite litigation may be prohibitively expensive in its own right. The uncertainty is also exacerbated by the fact that applications to adjust the cap may be made at any stage in the proceedings.

55. This can be demonstrated by two examples:

56. First, under the proposed system claimants will be required to provide a scheme of financial resources at the same time as issuing and serving the claim form (see Consultation, paragraphs 43-45). This information will be scrutinised by the defendant and the Courts (even if the session is held in private – see paragraph 45 of the Consultation). This is likely to act as a significant deterrent to potential claimants, as it did in the previous regime. This aspect of the previous regime was held not to comply with the PPD. As it was put by the Court of Appeal in R (Garner) v Elmbridge Borough Council [2012] P.T.S.R. 250 at 50-53:

50 *There is a further aspect to the purely subjective approach which may well have the effect of deterring members of the public from challenging the lawfulness of environmental decisions contrary to the underlying purposes of the Directive.*

51 *Mr McAully said that he was unwilling to undergo a means test in a public forum. Applicants for public funding from the Legal Services Commission have to disclose details of their means to the commission, but they do so in a private process; they do not have to disclose details of their means and personal affairs, for example who has an interest in the house in which they are living, how much it is worth etc, to the opposing parties or to the court, in documents which are publicly available and which will be discussed, unless the judge orders otherwise, in an open forum. The possibility that the judge might, as an exercise of judicial discretion, order that the public should be excluded while such details were considered would not provide the requisite degree of assurance that an individual's private financial affairs would not be exposed to public gaze if he dared to challenge an environmental decision.*

52 *The more intrusive the investigation into the means of those who seek PCOs and the more detail that is required of them, the more likely it is that there will be a chilling effect on the willingness of ordinary members of the public (who need the protection that a PCO would afford) to challenge the lawfulness of environmental decisions.*

53 *For these reasons, the judge's approach to the prohibitively expensive issue in this case, while it was wholly consistent with Corner House principles, was not consistent with article 10a.* (emphasis added)

57. The proposed changes are likely to have the same effect.

58. Second, one of the factors that can be taken into account by the Courts in deciding whether to reduce the level of costs protection is whether the claimant “has a reasonable prospect of success” (see proposed r. 45.44(4)(b)(ii)). This is to be distinguished from a claim that is “frivolous” (see proposed r. 45.44(4)(b)(vi)). In Edwards, the Supreme Court noted, in considering the judgement of the CJEU in the same case (at paragraph 28(i)) that “*the fact that “frivolity” is mentioned separately, suggests that something more demanding is envisaged than, for example, the threshold test of reasonable arguability.*” This opens up the very real possibility that defendants may seek to lower the costs cap, post permission but pre-substantive hearing, on the basis that the claim does not have a “reasonable prospect of success”. In this event, a potential claimant may have to go through three merits-based assessments during a typical JR: (i) to show that the claim is arguable in order to obtain permission, either on paper or orally at a renewed hearing (ii) to show that the claim has a reasonable prospect of success, in order to maintain costs protection at the default level and (iii) to show that the claim should succeed on the substantive merits.

59. This uncertainty, and the need for satellite hearings, is likely to have a deterrent effect. It is also likely to further increase the claimant's own costs. It is often the case that not all of these costs are recoverable.
60. This is a fundamental problem with the hybrid costs approach, which means that it is non-compliant with the PPD and the Convention.
61. There are two further problems with how the MoJ intend to implement the hybrid costs regime in practice.
62. The first problem relates to the proposed definition of "*prohibitively expensive*" in CPR rule 45.44(4). This is unclear and could lead to confusion. As set out above, the position post-Edwards is litigation costs must not exceed the personal financial resources of the person concerned and, in any event, must not be objectively unreasonable. Costs which are "*objectively reasonable*", for example because the relevant law and procedure is relatively simple, but which, nevertheless, exceed the financial resources of the claimant concerned, are still prohibitively expensive within the meaning of the Convention.
63. The current drafting does not make this clear. It provides that costs will be prohibitively expensive if either (i) they exceed the financial resources of the claimant or (ii) they are objectively unreasonable. There is a risk that, as presently drafted, a defendant could argue that the level of likely costs exceeds the financial resources of the claimant, but is still objectively reasonable and, because of the either/or requirement, they are therefore not prohibitively expensive under the Costs Protection Regime. Until this is clarified, the proposed wording is inconsistent with the "*prohibitively expensive*" test set out by the CJEU in Commission v United Kingdom and in Edwards.
64. Second, the consultation paper suggests that the level of the defendant's costs cap is irrelevant in assessing whether costs exceed the financial resources of the claimant (see paragraph 40). In our opinion, this is incorrect. If this guidance is followed by the Courts, then the new Costs Protection Regime will be non-compliant with the PPD and the Convention.

65. In assessing whether the likely costs of a proceeding will exceed the financial resources of the claimant, it is necessary to take into account the Claimant's total costs liability. The CJEU has confirmed on a number of occasions that costs, for the purposes of Article 9(4) of the Convention, include *all* the costs in a case. As it was put by the CJEU in Commission v United Kingdom, paras 44 and 64:

- (1) Paragraph 44: *"As to the merits of the Commission's arguments, it should be recalled that the requirement that proceedings not be prohibitively expensive does not prevent the national courts from making an order for costs in judicial proceedings provided that they are reasonable in amount and that the costs borne by the party concerned taken as a whole are not prohibitive (see, to this effect, Case C-260/11 Edwards and Pallikaropoulos [2013] ECR, paragraphs 25, 26 and 28)"*
- (2) Paragraph 64: *"As regards the system of cross-undertakings imposed by the court in respect of the grant of interim relief, which, as is apparent from the documents submitted to the Court, principally involves requiring the claimant to undertake to compensate for the damage which could result from interim relief if the right which the relief was intended to protect is not finally recognised as being well founded, it is to be recalled that the prohibitive expense of proceedings, within the meaning of Articles 3(7) and 4(4) of Directive 2003/35, concerns all the financial costs resulting from participation in the judicial proceedings, so that their prohibitiveness must be assessed as a whole, taking into account all the costs borne by the party concerned (see Edwards and Pallikaropoulos, paragraphs 27 and 28), subject to the abuse of rights."*

66. As it was put by the CJEU in Edwards, paras 27 and 28:

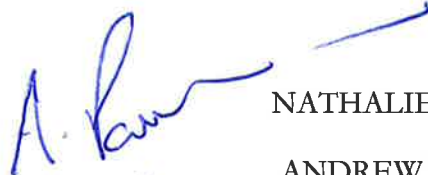

"Next, it must be pointed out that the requirement that litigation should not be prohibitively expensive concerns all the costs arising from participation in the judicial proceedings (see, to that effect, Commission v Ireland, paragraph 92). (28) The prohibitive nature of costs must therefore be assessed as a whole, taking into account all the costs borne by the party concerned."

67. It is clearly the claimant's total costs liability that must not be prohibitively expensive. Therefore, not only must the claimant's likely costs exposure be taken into account (often in the region of £25,000 for a one-day substantive judicial review), but so too must any court fees, including the Administrative Court fee (now just under £1,000, having doubled in the last year). The level of the defendant's costs cap is therefore plainly relevant. If it would not cover the claimant's costs, then even a successful claimant might find that the proceedings are prohibitively expensive. In our view, the Court is entitled to take into account the level of the defendant's costs cap, and whether this will cover the claimant's likely total costs, when reaching a judgment on whether costs are prohibitively expensive.

68. For all of the above reasons, the proposed hybrid costs regime as currently set out in the revised Costs Protection Regime does not comply with the PPD or the Convention.

Conclusion

69. Our conclusions are set out above at paragraph 3.


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