7th Meeting of the Task Force on Access to Justice

Statement on behalf of the Coalition for Access to Justice for the Environment (CAJE[1])

In respect of UK compliance with Article 9

England and Wales

2013 Reforms to Judicial Review

During the Sixth Meeting of the Task Force on Access to Justice in June 2013, CAJE highlighted a number of imminent changes to the procedure for Judicial Review in the UK which had the potential to undermine the UK's compliance with Article 9 of the Convention. These included:

- A reduction in the time limits for bringing a judicial review in planning cases from three months to six weeks (introduced on 1st July 2013);
- The removal of a right to an oral renewal in cases assessed by a judge as "totally without merit" (introduced as above); and
- The introduction of a new fee for oral renewal of a permission hearing (initially £215 but with proposals to ultimately reflect the "full costs of the hearing").

As suspected, these changes are having an adverse effect on the ability of claimants to bring cases. Most specifically, it is proving very difficult for claimants to lodge an application for JR within six weeks in planning matters. There are a variety of reasons for this, including the fact that claimants are not always notified that a decision has been taken and, secondly, difficulties in obtaining legal advice and securing sufficient funding to progress JR within six weeks (particularly if Legal Aid is being applied for).

Proposed further reforms to JR

In September 2013, the Government issued another public consultation on further reforms to the procedure for Judicial Review[2] to "*tackle the burden that the growth in unmeritorious judicial reviews has placed on stretched public services*". Despite a failure to provide any empirical evidence, particular attention was drawn to the potential for the "abuse" of JR (principally by campaigners using JR as a delaying tactic) and the role of JR as a "brake on economic recovery". The consultation invited views on a range of proposals, including the potential to reform the test for standing.

On 4th February 2014, the Ministry of Justice published its response to the 2013 public consultation[3] and **the Criminal Justice and Courts Bill** to give effect to its findings[4]. The provisions of the Bill are primarily concerned with addressing "procedural defects" in the judicial review process, notably via a strong package of financial reforms to "limit the pursuit of weak claims". Other elements in the overall reform package will be taken forward by means of secondary legislation.

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1 CAJE comprises Friends of the Earth, WWF, Royal Society for the Protection of Birds (RSPB), Campaign for the Protection of Rural England (CPRE), Environmental Law Foundation, Greenpeace and the Living Spaces Project. Thus update is also supported by Friends of the Earth Scotland

2 See https://consult.justice.gov.uk/digital-communications/judicial-review

3 *Ibid*

4 Introduced into the House of Commons on 4th February 2013 – see here: http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0169/14169.pdf

Despite consulting on restrictions to the rules on standing, the Government concluded this was not the best mechanism to "limit the potential for mischief". Instead, it proposes to introduce a basket of financial dis-incentives, including:

- The abolition of the existing "*Mount Cook*" principles (whereby a claimant's liability is generally limited to the defendant's costs of preparing the Acknowledgement of Service), thus requiring unsuccessful claimants to pay the full costs of an oral renewal hearing;

- A presumption that interveners will bear their own costs and any costs arising to the parties from their intervention (clause 53 of the Bill), despite an acknowledgement that "interveners can add value, supporting the court to establish context and facts";

- A requirement for applicants to provide information on funding at the outset of the judicial review, and requiring the courts to have regard to this information in order to consider making costs orders against those who are not a party to the judicial review.

In the planning sphere, the Government proposes to establish a Planning Court in the High Court, with a separate list under the supervision of a specialist judge. While the introduction of a dedicated forum has many advantages (such as accumulating expertise and reducing delay) CAJE believes such a forum must demonstrate a broad approach to planning cases, not just the views of one particular judge.

The Civil Procedure Rule Committee (CPRC) will also be invited to include time limits for case progression in the CPR. There will also be the introduction of a permission filter for challenges under s.288 of the TCPA 1990. Finally, there will also be a lower threshold for the "no difference" test. From now on, the court can refuse permission or a remedy in a case where the alleged failure was 'highly unlikely' to have made a difference (see clause 50 of the Criminal Justice and Courts Bill).

CAJE responses to both consultation papers are available on request.

CAJE is concerned and disappointed that the UK is pressing ahead with these proposals. It is of particular concern that they appear to be based on little more than anecdotal evidence submitted by a handful of developers and irrespective of the views expressed by the majority of those responding to public consultation exercises[5]. While these proposals are explicitly designed to make proceeding with JR difficult more generally, they are having adverse implications for environmental cases and undermine improvements to the regime for environmental cases introduced in April 2013 as a result of the findings of the Aarhus Convention Compliance Committee (ACCC) in Communication C33 in 2011 and the infraction proceedings against the UK brought by the European Commission in response to a complaint lodged by CAJE in 2005 (see below).

Supreme Court judgment in Edwards

[5] Note, for example, that: (i) two-thirds (67%) of those consulted did not support the proposal to shorten the time limit for planning cases from three months to six weeks; nearly three quarters (74%) of those consulted did not support the proposal to remove the right to an oral renewal where an application for permission to bring Judicial Review has been assessed as "totally without merit"; and (iii) two-thirds of those consulted did not support the proposal to require applicants to provide information on funding at the outset of judicial review. Nevertheless, the Secretary of State for Justice did not "accept these criticisms", claiming this these reforms will "target the weak, frivolous and unmeritorious cases, which congest the courts and cause delays".

On 11th December 2013, the Supreme Court handed down its judgment in the case of *Edwards and another (Appellant)) v Environment Agency and others (Respondents) (No 2)* ("*Edwards*[6]). The Supreme Court had referred a number of questions on the issue of "prohibitive expense" to the CJEU, which had ruled to that effect on 11th April 2013[7]. Essentially, the CJEU held that domestic courts cannot look exclusively at the financial means of individual claimants but must also carry out an objective analysis of the amount of the costs. In deciding whether a figure would be "objectively unreasonable", the court must take a number of other factors into account, including whether the claimant has reasonable prospects of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and whether public funding or other costs protection schemes are available.

The Supreme Court held that the test for prohibitive expense was not purely subjective. The cost of proceedings must not exceed the financial resources of the person concerned nor appear to be objectively unreasonable, at least in certain cases. The court did not give definitive guidance as to how to assess what is objectively unreasonable but held that it could take into account the merits of the case ("whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages"). The court also held that the fact that the claimant has not in fact been deterred for carrying on the proceedings is not itself determinative. The same criteria are to be applied on appeal as at first instance. In applying these factors, the Court made an order for costs against Mrs Pallikaropoulos of £25,000.

CJEU Judgment – *Commission v UK* (Case C-530/11)

On 13th February 2014, the CJEU delivered its judgment in Case C-530/11[8]. Infraction proceedings against the UK arose from a complaint lodged in 2005 by CAJE for non-compliance with the access to justice provisions (and specifically the requirement that legal proceedings be not "prohibitively expensive") of the EC Public Participation Directive (2003/35/EC).

The European Commission sent the UK a letter of formal notice in December 2007 and issued a Reasoned Opinion in March 2010. The case was referred to the European Court in April 2011 and a Hearing held in 2013. Advocate General Kokott's Opinion was published on 12th September 2013[9].

The CJEU judgment reinforced the factors to be taken into account by the Court when evaluating prohibitive expense as discussed in *Edwards* (see above), thus ensuring the UK's recently introduced costs regime must be upheld. However, it is also arguable that the judgment in Case C-530/11 requires the UK to revisit the current regime and strengthen it in a number of ways. Firstly, while the CJEU reiterated its view in *Edwards* that the assessment of prohibitive expense cannot differ depending on whether the national court is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal – the CJEU explicitly held in this case that national courts are is required to have regard to the costs already incurred by a claimant at earlier levels in the same

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6 Judgment available here: http://www.supremecourt.uk/decided-cases/docs/UKSC_2010_0030_Judgment.pdf

7 Judgment available here: http://curia.europa.eu/juris/document/document.jsf?text=&docid=136149&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=266978

8 Judgment available here: http://curia.europa.eu/juris/document/document.jsf?text=&docid=147843&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=34589

9 Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=140962&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=252337

dispute[10]. Secondly, the need for the courts to exercise discretion as to whether the figures of 5k and 10k (for individuals and groups respectively) are both objectively reasonable and do not exceed the financial resources of the person concerned requires a mechanism for those figures to be reduced (but not increased) when a claimant is patently of limited means (and conversely for the cross-cap of 35k to be increased). Given the need for certainty as to the claimant's financial liability[11], it is questionable whether these considerations can be left to the discretion of the Courts alone, or whether further amendments to the legislative regime will be required.

Scotland[12]

Legal Aid Cost Limitation

The long-term difficulties in obtaining legal aid for environmental cases in Scotland[13] has been exacerbated by the Scottish Legal Aid Board's introduction last year of a system whereby all the expenses of a judicial review to be covered by legal aid (including Counsel's fees, solicitors fees and outlays) will be capped at £7,000. This is a wholly unrealistic figure to run a complex environmental judicial review. While applications can be made to increase the cap, this system is likely to further lessen the number of solicitors willing to act in this area as they run the risk of incurring liability for counsel's fees and outlays which are not covered by the level of the cap - particularly in a fast moving litigation when it can be difficult to anticipate all costs in advance.

Civil Court Reform

In February 2014, the Scottish Government introduced the Civil Court Reform (Scotland) Bill. While broadly welcoming the Bill (which implements many of the recommendations of Lord Gill's Review of the Scottish Civil Courts), NGOs in Scotland are concerned about the introduction of a three-month time limit for Petitioners, where no time limit has previously been in place. Introducing such a time limit may help provide certainty for developers, but it will cause problems for petitioners in complex cases - particularly where there is uncertainty in funding. Scottish groups believe that finding a solicitor able to act on a *pro bono*, reduced fee or legally aided basis, combined with the introduction of a presumptive three-month time limit, will exacerbate existing problems. It will also create a particular barrier for community groups who will find it extremely difficult to organise, develop collective understanding, agree a course of action and raise the necessary funds to go to court if that is their decision.

Moreover, there is often a considerable grey area as to when exactly the time limit starts from in respect of the exact decision to be challenged. Although there is a degree of flexibility in the Bill (with the possibility for granting of extensions) a presumptive three-month limit is likely to deter potential litigants (a further 'chilling effect')[14]. While groups are broadly supportive of the

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10 See paragraph 49 of the judgment

11 See paragraph 35 of the judgment

12 Many thanks to Friends of the Earth Scotland for providing this update

13 As a result of Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, see CAJE letter to the Aarhus Compliance Committee re Decision IV/9i of 28 Feb 2013 for a fuller examination of the barrier this poses available at: http://www.slab.org.uk/common/documents/profession/mailshots/2013/Cost_Limitations_Mailshot_-_27_February_2013.pdf

14 See for example *Bova and Christie v The Highland Council and others* [2013] CSIH 41http://www.scotcourts.gov.uk/opinions/2013CSIH41.html and also *R (on the application of Maria Stella Nash) v Barnet London Borough Council & (1) Capita Plc (2) EC Harris LLP (3) Capita Symonds (Interested Parties)* [2013] EWHC 1067 (Admin)

introduction of a leave to proceed stage for judicial review under the Bill, there is a risk that combined with a three month time limit, a leave stage could actually hinder access to justice as petitioners struggle to access funds and lawyers to martial the necessary legal arguments to satisfy the Court in order to gain leave to proceed.

Furthermore, the introduction of a statutory appeal process for Marine Licenses under the Regulatory Reform Bill will largely benefit developers - but where third parties wish, and are able to, appeal in this process they will be deterred by the extremely short time limit of 6 weeks. The proposed appeal and existing appeals under Roads and Planning legislation are broadly similar to judicial reviews, thus rendering it inappropriate to apply different time limits. As above, a time limit of 3 months will prove difficult for individuals, communities and NGOs to raise the necessary finances, seek legal advice and prepare for any challenge - but a time limit of 6 weeks will prove near impossible, particularly in instances involving legal aid.

Civil Appeals from Court of Session

The Scottish Government also plans to replace the current procedures for appeals to the UK Supreme Court under section 40 of the Court of Session Act with a leave stage. While it seems reasonable to bring provisions for appeal to the Supreme Court from the Court of Session in line with provision from courts in England, Wales and Northern Ireland, we would highlight the importance of the role of the Supreme Court in the development of public law in Scotland in recent years, and consider that the introduction of a leave stage has the potential to act as an additional barrier to access to justice in Scotland.

The rulings of the Supreme Court, notably in *AXA vs Lord Advocate*, have criticised the impact of years of judge made law on the development of public law in Scotland and changed the restrictive Scots Law test of title and interest, therefore emphasising the vital role that the Supreme Court plays in developing access to justice in Scotland. Furthermore, in *Walton vs Scottish Ministers*, the Supreme Court was forced to re-iterate the comments it made in *AXA* due to the Court of Session's reluctance to apply the new test.

Standing

We are disappointed to note that the Scottish Courts appear reluctant to apply the new test of sufficient interest, as introduced in the landmark 2011 ruling in *Axa v Lord Advocate and others*[15], nor do they seem keen to apply it as fulsomely as is the practice in England and Wales.

In *Walton v Scottish Ministers,*[16] the Court of Session's Inner House questioned not only the Petitioner's standing as a person aggrieved under statutory provisions in the Roads (Scotland) Act 1984, but expressed the view that he would not have had sufficient interest to take a judicial review on the same matter. On appeal the UK Supreme Court robustly criticised these comments. [17]

In September 2013 the Inner House overturned a ruling from the Outer House in *McGinty vs Scottish Ministers*, which had found against the petitioner on standing.[18] While taking *AXA* into account, the

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15 http://www.supremecourt.gov.uk/decided-cases/index.html

16 http://www.scotcourts.gov.uk/opinions/2012CSIH19.html

17 www.supremecourt.gov.uk/docs/uksc-2012-0098-judgment.pdf

18 See http://www.scotcourts.gov.uk/opinions/2011CSOH163.html and http://www.scotcourts.gov.uk/opinions/2013CSIH78.html

Inner House indicated that it considered that petitioners ought to demonstrate sufficient interest on each individual argument in a case, rather than adopting the more expansive interpretation of the English and Welsh courts where legal standing is granted on grounds of public interest and is looked at more generally.

Taylor Review

The Taylor Review reported in September 2013.[19] The Scottish Government has frequently indicated that the Review would "mop up" any outstanding issues regarding prohibitive expense in Aarhus cases[20]. However, Friends of the Earth Scotland met with the Secretary to the Taylor Review in February 2012 as part of its consultation process, who confirmed that the Review remit does not specifically extend to examining the obligations of the Scottish Government regarding expenses and funding of environmental litigation under the PPD or the Aarhus Convention[21]. The Review does recommend extending PEOs to all public interest cases, which of course could in theory cover many Aarhus cases not within the remit of the PPD and therefore not eligible under the new rules of court on PEOs. However, Taylor strongly implies that EU law consider Aarhus cases to be defined by the PPD, and also his recommendation makes it clear that granting of PEOs and the level of cap is to be left to judicial discretion where not governed by specific rules of court[22].

19 http://scotland.gov.uk/About/Review/taylor-review/Report

20 Scottish Government consultation on Legal Challenges, 25-29 'The [Taylor] review…will look among other things at the cost and funding of public interest litigation, including environmental actions' http://www.scotland.gov.uk/Publications/2012/01/09123750/2

21 Confirmed in email correspondence with Kay McCorquodale, Secretary Taylor Review, 15 March 2013

22 Taylor Review Chapter 5, paras 29 and 33