Access to justice on the environment, and whether Scotland is providing it

Introduction

The Environmental Rights Centre for Scotland (ERCS) aims to increase people's awareness of their rights relating to the environment. We also aim to ensure that people can effectively exercise their environmental rights in Scotland.

This information sheet looks in detail at one of the rights guaranteed in the Aarhus Convention – the right of access to justice on the environment – and describes how the failure to incorporate it properly in Scots law makes this right so much harder for people to exercise in Scotland.

The key points are that, in Scotland:

- Following Brexit, the only way of challenging breaches of environmental laws by public bodies is by raising judicial review proceedings in the Court of Session, which is very expensive.
- The introduction of a system of Protective Expenses Orders has gone some way to make judicial review more affordable.
- Access to environmental justice is 'prohibitively expensive', according to the body set up to monitor compliance with the Aarhus Convention. This contravenes international law.

The Aarhus Convention

The overall objective of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters is set out in its first Article:

> ***"In order to contribute to the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public***

participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

The right of access to justice in environmental matters – sometimes referred to as 'access to environmental justice' – is provided for by Article 9 of the Convention, which spells out what is meant by the term 'access to justice'.

Article 9 of the Convention

Articles 9(1) and (2) require "access to a review procedure before a court of law or another independent and impartial body established by law", for breaches of the rights of access to information and participation in decision-making.

Article 9(3) requires "access to administrative or judicial procedures" to challenge breaches by private and public bodies of national environmental laws.

Article 9(4) requires that all these procedures, including those for challenging breaches of environmental laws, must be "fair, equitable, timely and not prohibitively expensive".

It is the last of these requirements that has caused most difficulty in Scotland, due to the costs of going to court over breaches of environmental laws.

The cost of going to court over the environment in Scotland

When the UK left the European Union (EU), UK citizens lost the right to complain to the European Commission about poor enforcement of EU laws in the UK. The only remaining way of challenging breaches of most environmental laws in Scotland is through judicial review proceedings in the Court of Session in Edinburgh. Judicial review is a very expensive process.

A person seeking a judicial review (the 'petitioner') has to pay their own legal expenses if they lose. These can be particularly high as judicial review requires the involvement of both solicitors and advocates. In a judicial review, a petitioner's expenses alone can

range from £20,000 to £100,000, depending on the complexity of the case and the willingness of lawyers to limit their fees.

A petitioner also faces having to pay their opponent's expenses (and the expenses of any 'third party interveners'), if they lose – known as the 'loser pays' rule. The John Muir Trust's unsuccessful attempt to challenge a windfarm development led to it facing a £539,000 bill to the Scottish Government and the energy company SSE in 2017, albeit this was eventually negotiated down to £125,000. A petitioner also pays court fees, which can amount to several thousands of pounds.

Protective Expenses Orders

A system of 'Protective Expenses Orders' (PEOs) has been developed in Scotland to soften the loser pays rule. PEOs limit or 'cap' a petitioner's liability to pay their opponent's expenses if their case is unsuccessful. The main driver for the development of PEOs has been the Aarhus Convention.

Under the current PEO rules, a petitioner can apply for a PEO at the start of their case. The application is to be made in writing and must include certain specified information. The person/organisation defending the judicial review proceedings (the 'respondent') can oppose the application for a PEO. If the judge decides that the proceedings would be prohibitively expensive for the petitioner, they must make a PEO.

A PEO must cap the petitioner's liability to pay the respondent's expenses at £5,000, unless either party can persuade the judge that a higher or lower amount is necessary. But it must also limit the respondent's liability in expenses to the petitioner, if the claim succeeds, to the sum of £30,000. This 'cross-cap' may also be raised or lowered "on cause shown".

The Aarhus Convention Compliance Committee and the Meeting of the Parties

The Aarhus Convention Compliance Committee (ACCC) is the body tasked with ensuring that parties to the Convention are held to account for meeting their legal commitments. It was established at the first Meeting of the Parties (MOP) to the Convention in 2002. The MOP – which is composed of representatives of Parties to the Convention and observers such as NGOs – has the function of directing and supervising the implementation and development of the Convention.

Members of the public can send a 'communication' to the ACCC when they think that a party is not meeting its obligations under the Convention. Where a communication is considered admissible by the ACCC, it then takes evidence from both sides, deliberates and then produces written findings on whether there has been non-compliance, as well as recommendations on how to remedy non-compliance. The ACCC reports its findings to the next session of the MOP – usually held every three years.

The ACCC has reviewed the PEO rules regularly since they were introduced. Nine consecutive decisions of the ACCC and the MOP have found that the Scottish civil justice system does not meet the Convention's 'not prohibitively expensive' requirement.

After the ACCC made its first finding of non-compliance (in 2014), the MOP issued a formal decision that Scotland was failing to comply with Article 9(4) of the Convention. The PEO rules were amended in 2016. Following a further report by the ACCC, the MOP decided in 2017 that Scotland was still failing to comply. Further amendments were made to the rules in 2018.

The Scottish Government's view on Scotland's compliance with Article 9

The Scottish Government's position on Scotland's compliance is set out in a letter to the Scottish Parliament's Equalities and Human Rights Committee from Humza Yousaf MSP, Cabinet Secretary for Justice, dated 26 June 2019, as follows:

"The Scottish Government is confident that it is compliant with the requirement of the Aarhus Convention in respect of maintaining access to justice in environmental cases. … In saying that I acknowledge that although the UN's Aarhus Convention Compliance Committee has recognised 'significant progress to date' it is still of the opinion that there are further issues to be addressed. We will continue to engage with the committee to reassure them of Scotland's continued compliance."

The ACCC's view of Scotland's compliance with Article 9 of the Convention

The most recent ACCC report, from August 2021, contained some praise for certain features of the 2018 PEO rules, such as the introduction of a written application procedure and a cap on liability for the other side's expenses in an unsuccessful PEO application to £500.

However, the ACCC's findings contained extensive criticisms of the latest rules, as follows:

- PEOs are not available for private law claims (e.g. nuisance).
- The £5,000 cap on the petitioner's liability can now not only be lowered (as was permitted by the previous version of the PEO rules), but also raised. Raising the cap increases a petitioner's exposure to financial risk. According to the ACCC, this "introduces legal uncertainty and could have a chilling effect", and moves "the Party concerned further away" from compliance.
- Where a petitioner with a PEO for proceedings in the Outer House of the Court of Session appeals against its decision to the Inner House, they must reapply for a PEO to obtain further protection from costs. The ACCC commented in a 2017 report, that this situation "*leads to uncertainty and additional satellite litigation, which itself adds further cost*".

- PEO applications must explain the terms on which the applicant is represented. The ACCC did "not see why this information should be required in order to apply for a PEO. This could require disclosure concerning pro bono representation and threaten the economic viability of environmental lawyers representing clients in public interest cases in the mid to long-term."
- PEO applications must provide an estimate of the expenses of each other party for which the applicant may be liable in relation to the proceedings. The ACCC's view was that "preparing such an estimate entails additional work (and thus cost) for the applicant. The Committee notes that neither England and Wales or Northern Ireland have such a requirement and it is difficult to see what value it adds, since the party concerned would surely be better placed to provide its own estimate".
- PEO applications are made in writing and decided on the papers by default. However, there may be circumstances where a hearing is required for a judge to make a decision on whether to award a PEO. Sensitive financial details are provided as part of an application. The ACCC's view was that that, "for those cases in which a public PEO hearing is held, the Committee is concerned that the absence of confidentiality of financial information may have a deterrent effect on applicants".
- Third parties can intervene in judicial review cases (e.g. developers with an interest in the decision which is being challenged). A PEO offers no protection against adverse expenses to such interested third parties. The ACCC noted its concern that "that claimants may be exposed to additional costs of interveners" as a result.
- Court fees can run to thousands of pounds in judicial review. The ACCC noted that it was reported that the "the Scottish Government 'expects' the costs cap will cover all stages of the procedure and that court fees would be included in the

costs regime". It underlined that an expectation is an insufficient guarantee to ensure compliance with the Convention, and that concrete evidence is required instead.

The ACCC found that most of the problems identified in earlier findings have not yet been adequately addressed, and therefore that the requirements of the Convention are still not being met in Scotland. The ACCC has recommended that the MOP should request the UK to submit a plan of action with a time schedule to the ACCC on the implementation of its recommendations by 1 July 2022 to resolve the non-compliance, and provide detailed progress reports to the ACCC in 2023 and 2024.

What next?

The ACCC's latest findings will be considered by the MOP when it meets later in 2021, and the MOP will decide whether or not it agrees with those findings. ERCS is not aware of any plans to address the ACCC's findings before then. It is very likely that the MOP will decide for the third time that Scotland is failing to comply with the Convention's requirement that access to environmental justice must not be prohibitively expensive.

The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 commits the Scottish Government to publish a report and carry out a consultation on whether establishing an environmental court would enhance access to justice in environmental matters and environmental governance following Brexit. The consultation is required to take place within six months after Environmental Standards Scotland (ESS - Scotland's new environmental watchdog) publishes its first strategy on how it intends to exercise its functions (that strategy has to be laid before the Scottish Parliament within one year of ESS' establishment).

We anticipate that consultation will take place in early 2023. This is a significant opportunity for addressing the longstanding problem of the lack of access to environmental justice in Scotland.

For further information contact info@ercs.scot.

Web addresses of useful resources:

Background documents relating to recent ACCC reports:

https://unece.org/env/pp/cc/decision-vi8k-concerning-united-kingdom

UNECE information about the Aarhus Convention:

https://www.unece.org/env/pp/introduction.html.