

ERCS representation to ESS - Access to justice in environmental matters

Paper apart – Sections 1(5) and 1(6)

Thursday 4 August 2022

Introduction

1. This paper apart sets out the background to the representation which ERCS is submitting to ESS on access to justice in environmental matters and explains the outcomes which are sought as a result of this representation.
2. The purpose of this representation is to request that ESS carries out an investigation into access to justice in environmental matters with a view to preparing an improvement report with comprehensive recommendations to resolve this issue.

Background to this representation

3. Access to justice is broadly defined as the ability of a person to effectively access a court (or other independent judicial body) to have their civil rights and claims determined. Access to justice in environmental matters concerns the ability of a person to effectively access a court to have their environmental rights determined or environmental law enforced.
4. It is impossible (or at least financially hazardous) for most members of the public to take legal action to protect the environment in Scotland. This is a longstanding problem.¹ The financial barriers are such that litigation over the environment is not a realistic option for most individuals and civil society organisations in Scotland.
5. This problem is most starkly seen in environmental litigation in the Court of Session (albeit it is a problem which is not exclusive to litigation in the Court of Session),² which includes petitions for judicial review and statutory planning appeals. A person who initiates a legal action in the Court of Session faces liability for:
 - a. Their own legal costs (which can be particularly expensive because litigation in the Court of Session requires the involvement of both ‘counsel’ (advocates or solicitor advocates) and solicitors); and

¹ Mary Church, [‘Tipping the Scales: Complying with the Aarhus Convention on Access to Environmental Justice’](#) (Friends of the Earth Scotland, 2011).

² There are significant financial barriers to litigating in the sheriff courts also. See for example the case of George Niblock, whose attempt to obtain a litter abatement order against a local authority was unsuccessful. The local authority was awarded £9,000 in legal expenses, which led to the closure of Mr Niblock’s environmental charity the Aberdeenshire Environmental Forum. See Mr Niblock’s [observer statement](#) dated 9 November 2020 and submitted to the ACCC in relation to communication ACCC/C/2016/142 United Kingdom.

- b. The expenses of their opponent if they lose.
 - c. They may also face liability for the expenses of any intervening third party litigants - such as developers.
6. The ordinary rule in litigation is that the 'loser pays', which means that the unsuccessful party is liable to pay their own legal costs plus judicial expenses to their opponent. The consequence of this rule in litigation in the Court of Session that a person whose litigation is unsuccessful can face a total financial liability amounting to tens or hundreds of thousands of pounds.
7. 'Protective expenses orders' (PEOs) have been developed in Scotland to make the loser pays rule less of a barrier to accessing justice. A litigant who successfully applies for a PEO has their liability to their opponent capped in the event that they are unsuccessful. A PEO can reduce the fear of open-ended liability for expenses.
8. However, the PEO rules are ineffective in providing access to justice. There a number of deficiencies with the PEO rules which are discussed in detail elsewhere.³ Even where a PEO has been granted, a PEO-holder is still liable to pay their own legal costs if their case is unsuccessful, and such costs can be unaffordable of themselves.
9. The rules on civil legal aid limit the availability of legal aid in environmental litigation.⁴ Legal aid is only available to 'persons', which makes environmental NGOs and community groups ineligible.⁵ The legal aid rules limit the grant of legal aid where an applicant has a 'joint interest' in the matter with others.⁶ Most environmental litigation will involve a number of individuals with similar concerns about the issue in dispute.

Effectiveness of environmental law

10. ESS' remit vis-à-vis the 'effectiveness of environmental law' is set out in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ('the 2021 Act'). The effectiveness of environmental law includes reference to its contribution, "to the implementation of any international obligation of the United Kingdom relating to environmental protection".⁷

³ See ERCS, '[Access to justice on the environment, and whether Scotland is providing it](#)' (2021).

⁴ See Scottish Environment LINK Legal Governance Subgroup, '[Legal Aid Review Consultation response](#)' (2017).

⁵ See the [Scottish Legal Aid Board's guidance on this subject](#) and the definition of 'person' at S41 of the Legal Aid (Scotland) Act 1986.

⁶ Civil Legal Aid (Scotland) Regulations 2002, Regulation 15.

⁷ S44(7)(b).

11. 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') sets out minimum standards on access to justice in environmental matters. The UK ratified the Aarhus Convention in 2005.
12. As a result of the access to justice problems detailed above, there have been repeated findings of the governing bodies of the Aarhus Convention (both the Aarhus Convention Compliance Committee and the Meeting of the Parties to the effect that the Scottish civil justice system is not compliant with the requirements of Articles 9(4), 9(5) and 3(1) of the Convention.⁸ The main source of non-compliance is the failure to meet the Article 9(4) requirement, which broadly requires that access to justice in environmental matters must be "not prohibitively expensive".
13. Scots law on access to justice in environmental matters is not effective environmental law, because it fails to meet the minimum standards set out in the Aarhus Convention.

Correspondence with the Scottish Government

14. ERCS, along with other environmental NGOs in Scotland such as Friends of the Earth Scotland and RSPB Scotland, have repeatedly raised this problem with the Scottish Government. This has been done both directly in meetings with and in correspondence to officials and office holders within the Scottish Government, and indirectly in the form of correspondence to the Aarhus Convention Compliance Committee as it carries out ongoing monitoring of non-compliance.
15. Copies of recent correspondence are enclosed and are listed in the annex to this paper apart below.

⁸ ACCC, 'Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention' (ECE/MP.PP/2014/23), Meeting of the Parties, 'Decision V/9n on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention' (ECE/MP.PP/2014/2/Add.1), ACCC, 'First progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention' (2015), ACCC, 'Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention' (2017), ACCC, 'Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention' (ECE/MP.PP/2017/46), Meeting of the Parties, 'Decision VI/8k, Compliance by United Kingdom with its obligations under the Convention' (ECE/MP.PP/2017/2/Add.1), ACCC, 'First progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention' (2019), ACCC, 'Second progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention' (2020), ACCC, 'Committee's report to the Meeting of the Parties on decision VI/8k' (Parts I & 2) (2021), Meeting of the Parties, 'Decision VII/8s of the Meeting of the Parties on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention' (2021).

16. To date, our engagement with the Scottish Government has failed to obtain significant reforms which have resulted in the provision of access to justice in environmental matters.

Outcomes sought from this representation

17. We respectfully request that ESS carries out an investigation into the matters raised in this representation, with a view to issuing an improvement report which includes comprehensive, specific and time-limited recommendations to ensure access to justice in environmental matters and full compliance with the Aarhus Convention.

18. In terms of our view on the reforms which are required to Scots law to ensure compliance, we enclose our 2021 reports 'Why Scotland needs an environmental court or tribunal' and 'Recommendations for a plan of action on judicial expenses'.

19. Our recommendations on the reforms which are needed are twofold. First, and most importantly, fundamental change is needed to the judicial fora in which environmental disputes are heard to ensure that they are affordable and accessible. Continuing to have environmental litigation heard in the Court of Session is contrary to the requirement for affordability. A new specialist environmental court or tribunal should be designed and established to ensure affordability.

20. Second, until such date as a new environmental court or tribunal is established, some changes can be made to the status quo. The legal aid rules should be changed to make legal aid readily available in environmental litigation and to widen its scope to include civil society organisations including community groups and NGOs. The rule that expenses follow success and the PEO system should be replaced with a simpler system of qualified one-way costs shifting in environmental litigation.⁹

21. ERCS would be glad to discuss this representation directly with ESS and to provide further information as necessary to support this representation.

⁹ Qualified one-way costs shifting has recently been introduced in personal injury litigation in Scotland, in recognition of the asymmetry which exists in disputes often between individuals and large insurance companies. Such asymmetry exists in most public interest environmental litigation also, as such disputes often involve individuals or NGOs with limited funds challenging large public bodies.

Annex 1 – documents enclosed with this representation

1. Correspondence regarding matters raised in this representation:
 - 1.1 Response to Draft UK National Implementation Report to the Seventh Meeting of the Parties to the Aarhus Convention (26 November 2020).
 - 1.2 Letter to Ash Regan MSP (26 October 2021).
 - 1.3 Letter from Ash Regan MSP (5 November 2021).
 - 1.4 Letter to Scottish Civil Justice Council (18 November 2021).
 - 1.5 Letter to UK Government Aarhus ‘Focal Point’ (24 March 2022).
 - 1.6 Letter to Scottish Civil Justice Council (26 May 2022).
 - 1.7 Letter to Aarhus Convention Compliance Committee (29 July 2022).
2. ERCS, ‘Why Scotland needs and environmental court or tribunal’ (2021).
3. ERCS, ‘Recommendations for a plan of action on judicial expenses’ (2021).
4. ERCS, ‘Evaluation of Scotland’s action plan on access to environmental justice’ (2022).