

PE1372/E

Friends of the Earth Scotland were keen to know whether if, in light of recent developments in England and Wales and the results of the Gill Review, the Scottish Government continued to consider that Scotland is implementing the Aarhus Convention. We were looking for definitive examples of which case law, rules of court, or legislation ensure fair, equitable and not prohibitively expensive access to justice.

We were asked to comment on responses to the Public Petitions Committee from The Scottish Government, the Scottish Legal Aid Board, the UK Environmental Law Association, and the UNECE.

General compliance with Aarhus

We are disappointed that the Scottish Government do not accept that the findings by the Aarhus Compliance Committee also raise serious questions as to whether Scotland complies with the Convention. The position in Scotland is, in many respects, far worst than the position in England & Wales in three respects:

1. In respect of expenses and costs, only two protective expenses orders have been granted in Scotland. Both involved considerable expense for those obtaining the orders (the McGinty and RoadSense cases). The orders are much higher than what is usually expected in England, and a highly subjective approach appears to have been taken to the issues of resources;
2. Legal aid is not routinely granted to individuals in Scotland for environmental matters, and, under current rules, is very unlikely to be granted for a purely public interest case;
3. the test for title and interest in England (sufficient interest) allows far more environmental claims than the test in Scotland

We also note that the Scottish Government stated that “the requirements of the Aarhus Convention are set out in binding European legislation (Directive 2003/35/EC), which has been transposed into Scots law by a range of SSIs.”

We feel this to be misleading. It is not correct to equate the Aarhus Convention and the Public Participation Directive. The Public Participation Directive only amends into EU law environmental justice requirements on a narrow range of EU environmental issues and disputes. It does not equate to a wider amendment of environmental justice across the board as required by Article 9 (3) of the Convention.

By deliberately referring only to the Directive and not to the Convention, the Scottish Government are failing to acknowledge the case that Pillar III obligations (Art 9(3)) are binding on the Scottish Government and also to Member States.

The Scottish Government has the obligation to ensure Scots law complies with Aarhus by the following route: By the devolved settlement, matters of environmental law and justice are the responsibility of the Scottish Government. The set up of the Scotland Act could be argued to create an enforceable legitimate expectation in law that the Scottish Government will comply with international law.

The Scottish Government should be asked to confirm whether or not they consider whether Scotland complies with its international obligations in respect of Article 9 (3) of the Convention.

Separately, there is an argument that in any event, the Aarhus Convention as a whole is also part of EU law. This matter is currently the subject of a preliminary reference to the European Court of Justice (ECJ) and the court’s decision may not be available for some months. However, the ECJ has indicated in the past that obligations in international law can become part of EU law (the Committee will recall that the EU is also a signatory to the Convention in addition to the UK). It may well be that the ECJ indicate that all member states must as a matter of EU law, ensure compliance to the general environmental justice provision of Article 9(3). However, even if it is not a matter of EU law, Scotland is bound to comply with the Convention as a whole, not just those parts to which EU Directives have been made.

We would suggest the Committee press the Scottish Government on this point, and particularly ask why there is no information in their response on the wider requirements of Article 9 (3) (breaches of domestic law re environmental matters in general).

Case Law

The UKELA position on case law is disappointing. We would suggest that contrary to their conclusion there is definitive case law, and that is the common law position of (1) title and interest to sue (see for example *Forbes v Aberdeenshire Council and anr*), and (2) expenses follow success (on this, see the comments on *Commission v Ireland C-427/07*). In our view, both of these positions breach the requirements of the Aarhus Convention.

It is welcome that the Scottish Government response states, in relation to the 'Port of Tyne' case, "such matters, both from England and Wales and further afield, are routinely considered when developing Scottish solutions, even when not directly applicable to Scotland." The UNECE response usefully summarises a number of cases.

It is our contention that the acknowledged weaknesses in the Scottish system relating to costs and standing (outlined below) indicate that the findings in the cases mentioned in the UKECE response should be considered also to apply in Scotland.

Professor Dr Ludwig Krämer, widely regarded to be among the top experts on environmental law and policy in the EU referred to ECJ Case C-427/07 (the Irish case) at a recent conference organized by Client Earth. He said that it was 'rather similar to the situation in the UK' and noted, 'this is a relevant decision which might have to find some echo in this country.'

Whilst we acknowledge the variations in the legal systems of England and Wales and Scotland, we consider that there are enough direct similarities in the aspects of law under consideration that, as per Professor Kramer's statement, the decisions should give cause for the Scottish Government to take urgent action to ensure Scotland's compliance with the Convention.

Access to justice – costs and standing

It is important to remember that there are two separate elements to the costs involved in raising a court action – the risk of losing and having costs awarded against you, and the costs of your own side's representation.

The UKELA response mentions two cases that have addressed the issue of liability for **costs** and thus only covers the point of liability for costs and doesn't cover the issue of actual costs.

We would suggest the problem with focussing on improved cost orders (Protective Cost Orders or Protected Expenses Orders) which only help NGOs or communities who are better able to fundraise, is that it still discriminates against the poorest and most marginalised communities.

Furthermore, such orders remain discretionary. Generally speaking in matters of EU law member states must implement the Directive in a way that makes rights and obligations clear. In **C-427/07 Commission v Ireland** the European Court of Justice stated "The provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights."

The Supreme Court of the UK has recently made a reference in *R (on the application of Edwards) v Environment Agency* to the European Court of Justice effectively asking whether the test on what is 'prohibitively expensive' is a subjective or an objective test and suggesting that it is an objective test. This throws considerable doubt as to whether the approach being taken by the revised English rules and the draft Scottish rules are taking the wrong approach.

The Scottish Government response fails to deal with this issue of discretion versus precision and states that the issue of Protected Expenses Orders is a matter for the Court of Session. We would suggest that ultimately it is the devolved Scottish Government's responsibility to decide on PEOs, and to take responsibility for the implementation of the Aarhus Convention. The Court of Session Rules Council can only deal with matters within its remit – there are far wider issues in connection with Sheriff Court actions for nuisance for example.

The Committee could ask the Scottish Government to clarify the status of the Court of Session Rules Council with regard to the Scottish Government's obligations under the Aarhus Convention particularly in the light of the reference in Edwards. The Committee could also ask the Scottish Government to advise on what steps it is taking to comply with the Aarhus Convention in environmental actions outwith what is currently being considered by the Court of Session Rules Council.

The response from the Scottish Legal Aid Board (SLAB) we feel does fairly represent the current situation with regard to legal aid in environmental cases. We would draw the Committee's attention to the statement:

At paragraph 3.17 of the guidance it is specifically stated that in terms of regulation 15 we can only grant legal aid to someone who is jointly concerned with or has the same interest in the matter as other people if we are satisfied that

- the applicant would not be seriously prejudiced in their own right if legal aid were not granted; or
- it would not be reasonable and proper for the other people concerned to pay the expenses that would be paid under legal aid if it was granted.

The guidance also states that where there are a number of individuals who all appear to share a broadly similar objective in an action, public funding will not generally be made available to fund a case unless strong evidence is provided to show that an individual will suffer serious prejudice.

Environmental issues are likely to raise questions of joint and common interest because there is more likely to be a number of individuals who may have the same concerns about any issue that would be the subject of court proceedings than would be the case where an individual is litigating in respect of some issue that concerns themselves personally alone.

In practice, Regulation 15 is always applied to legal aid applications for environmental cases. The UK say one of the ways they comply is by the availability of legal aid to assist offset high costs. However, Scotland has this extra hurdle making accessing legal aid difficult, if not impossible particularly in public interest cases.

We would urge the Committee to ask the Scottish Legal Aid Board many environmental legal aid applications have been granted by the Board in the last three years.

We also suggest the Committee question whether both SLAB and the Scottish Government recognise that there is a problem and whether they have a view on the repeal of Regulation 15.

We agree with the Scottish Government response suggesting that the planned introduction of a simpler test of sufficient interest, as recommended in the Report of the Scottish Civil Courts Review, would broaden access to justice generally.

We would suggest the Committee ask the Scottish Government what timescale they are working to for the introduction of the simpler test.

Implementation reporting

The UNECE response contains a link to the reporting guidelines for implementation. It primarily specifies reporting on "The necessary legislative, regulatory or other measures that it (the signatory) has taken to implement the provisions of the Convention"

We are still uncertain as to the status of the Scottish Government's contribution to the Defra implementation report.

We would ask that the Committee seek confirmation from the Scottish Government of their contribution to the UK Implementation Report and whether the Scottish Government is content with the conclusions in the Implementation report.