Legal Aid Review - Scottish Environment Link, Legal Governance Subgroup Response (May 2017)

1 Introduction

Scottish Environment LINK is the forum for Scotland's voluntary environment organisations. Its over 35 member bodies represent a wide range of environmental interests with the common goal of contributing to a more environmentally sustainable society. LINK assists communication between member bodies, government and its agencies and other sectors within civic society. Acting at local, national and international levels, LINK aims to ensure that the environment is fully recognised in the development of policy and legislation affecting Scotland.

This response is on behalf of the SE LINK Legal Governance Subgroup. It concerns the availability of legal aid for environmental litigation in Scotland, and focuses on Scotland's obligations under the Aarhus Convention in relation to the costs of environmental litigation.

In summary it is our view that:

- Article 9 of the Aarhus Convention creates the following obligations of relevance to the legal aid review:
    - 9(3) requires that members of the public have access to procedures to challenge acts and omissions by private persons and public authorities which contravene environmental law.
    - 9(4) requires that such procedures are 'not prohibitively expensive'.
    - 9(5) requires that Parties 'shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice'.
- The Aarhus Convention Compliance Committee has recently found that Scotland does not comply with Article 9(4) and 9(5).
- This follows several reviews of Scotland's compliance record, which establish that Scotland is in a longstanding position of non-compliance with Article 9(4) and 9(5).
- Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 presents a real barrier to applications for legal aid for environmental litigation – contributing to Scotland's non-compliance with the Aarhus Convention.
- The long term barrier represented by Regulation 15 is exacerbated by the introduction of caps on legal aid for judicial review.

- In order for Scotland to meet its Aarhus obligations, the Legal Aid Review should:
    - Consider Scotland's obligations under the Aarhus Convention in general, when carrying out its review;
    - More specifically, it should consider making the following recommendations:
        - Repeal regulation 15 to facilitate applications in public interest cases more broadly; or
        - As a minimum, add an exception to Regulation 15 for cases falling within the ambit of the Aarhus Convention; and
        - Enable community groups to apply jointly for legal aid; and
        - Remove the system of caps on legal aid for judicial review in environmental cases.

2 The Aarhus Convention

2.1 Aarhus Convention Background

The UK and the EU ratified the Aarhus Convention[1] in 2005. The first two 'pillars' of Aarhus enshrine rights to access information and participate in decision making that impacts on the environment. EU Directives[2] are in place to implement many of these provisions. In Scotland these are translated into freedom of information[3] and environmental assessment[4] legislation. The third 'pillar' of Aarhus - Article 9 - provides members of the public and NGOs with rights in relation to access to justice in environmental matters[5] (see the Convention's 'Implementation Guide' for further information on its interpretation).[6]

While the third pillar of Aarhus has not been wholly transposed into EU law, Article 9(3) has been incorporated into EU law to a limited extent, into two of the many directives that deal with environmental protection. The EU Public Participation Directive 2003/35[7] (PPD) amended the EIA and IPPC Directives[8] respectively to require that the public has access to a review procedure before a court (or another independent/impartial body established by law) to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the PPD.[9] These amendments were transposed into Scots law, to the same limited extent, via amendments to the relevant secondary legislation. Further, decisions of the CJEU have made it clear that Article 9 provisions for access to justice are of indirect effect.[10]

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[1] 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.

[2] For Pillar 1, Directive 2003/4/EC on public access to environmental information (repealing Council Directive 90/313/EEC); for Pillar 2 Directive 2003/35/EC providing for public participation in planning, which amended Directives 85/337/EEC (Environmental Assessment) and 96/61/EC (Integrated Pollution Prevention and Control) in relation to public participation and access to justice.

[3] Environmental Information (Scotland) Regulations 2004 http://www.hmso.gov.uk/legislation/scotland/ssi2004/20040520.htm.

[4] Environmental Assessment (Scotland) Act 2005 http://www.legislation.gov.uk/asp/2005/15/contents and Environmental Impact Assessment (Scotland) Regulations 2011 http://www.legislation.gov.uk/ssi/2011/139/signature/made.

[5] Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 9 http://www.unece.org/env/pp/documents/cep43e.pdf.

[6] Jonas Ebbesson et al, 'The Aarhus Convention: An Implementation Guide' (2014, 2nd Edn, UNECE). p190-207.

[7] 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 programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

[8] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment ('Environmental Impact Assessment Directive'), and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.

[9] Articles 3(7) and 4(4) of the PPD.

[10] Reference for a preliminary ruling under Article 234 EC from the Najvyšší súd Slovenskej republiky (Slovakia), in the proceedings *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* in Case C-240/09.

Article 9 provides several obligations of relevance to this legal aid review.

Article 9(3) requires that members of the public shall have access to:

> *...procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*

Article 9(4) requires that such procedures shall not be 'prohibitively expensive'.

This 'not prohibitively expensive' requirement was incorporated into EU law and Scots law to the same extent as Article 9(3).

Article 9(5) creates the following positive obligation on Parties:

> *In order to further the effectiveness of the provisions of this article, each Party shall... consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.*

2.2 Scotland's compliance record

Environmental litigation in Scotland is carried out mainly by judicial review, which is very expensive. Expenses often run into six figures.[11] Expenses follow success, and whilst environmental litigants can apply for a 'Protective Expenses Order' (PEO), very few of these have been granted under the statutory regime which was created in 2014 and extended in 2016.[12]

Furthermore, there are a number of structural problems with the PEO system which limit their ability to meet Scotland's obligations under the Aarhus Convention: they require an application and hearing which is costly to prepare for and contest, and any appeals require a repeat PEO application because PEOs cover only one stage in the proceedings. Most critically however – PEOs are designed to reduce the uncertainty of open-ended costs liability to the other side by capping costs liability in the event that the litigation is unsuccessful - they offer no assistance to a litigant for their own legal expenses in the event that his/her case is unsuccessful.

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[11] E.g. in *McGinty and Another* [2010] CSOH 5, the petitioner's potential liability was stated as £80,000 for his own legal expenses, and a potential £90,000 liability for the expenses of the respondent were he to be unsuccessful (para 4 of the judgement). McGinty was unemployed and in receipt of jobseekers allowance. More recently, the John Muir Trust had to pay expenses of £120,000 to the Scottish Government and SSE following judicial review in the Outer House (where the John Muir Trust was successful), and an appeal to the Inner House (in addition to two unsuccessful PEO applications) – *The John Muir Trust v The Scottish Ministers and SSE Generation Limited and SSE Renewables Developments (UK) Limited* [2016] CSIH 61. See http://thirdforcenews.org.uk/tfn-news/huge-legal-costs-could-cripple-campaigning-charities.

[12] Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 (SSI 2013/81), as amended by Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015 (SSI 2015/408).

The Aarhus Convention Compliance Committee – the body established under the Convention for reviewing Parties' compliance – found in February 2017 that Scotland does not comply with the Article 9(4) requirement that environmental litigation is 'not prohibitively expensive', or the Article 9(5) obligation to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.[13]

The Committee's 2017 finding was a 'second progress review', following decision V/9n of the meeting of the parties in 2014, and the first progress review in 2015.

Decision V/9n found that Scotland was not compliant with Article 9(4) and 9(5).[14] It recommended that the Party "take urgent action" to:

> *(a) Further review its system for allocating costs in all court procedures subject to article 9, and undertake practical and legislative measures to ensure that the allocation of costs in all such cases is fair and equitable and not prohibitively expensive;*
>
> *(b) Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;*[15]

The Compliance Committee's first progress review in 2015 came to the same conclusion on Scotland's failure to comply with Article 9(4) and 9(5) as the second progress review.[16]

The 2017 finding is therefore the latest in a series of reviews of Scotland's compliance with the Aarhus Convention, all of which have found Scotland to be non-compliant with Article 9(4) and 9(5).

Scotland does not comply with its access to justice obligations under the Aarhus Convention – and it has not complied since the UK ratified the Convention in 2005. Environmental litigation in Scotland is prohibitively expensive. This ongoing, systemic failure to meet international legal obligations is a strong argument for change.

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[13] Aarhus Convention Compliance Committee, 'Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention' (2017), para 107.

[14] Decision V/9n of the Meeting of the Parties on compliance by the United Kingdom with its obligations under the Convention (ECE/MP.PP/2014/2/Add.1), para 2(a-b).

[15] Ibid, para 8.

[16] Aarhus Convention Compliance Committee, 'First progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention' (2015), para 33.

2.3 Relevance of the Aarhus Convention to the Scottish Legal Aid Review

The Scottish Legal Aid Review's remit is to:

> *To consider the legal aid system in 21st century Scotland and how best to respond to the changing justice, social, economic, business and technological landscape within which a modern and flexible legal aid system should operate.*

The Aarhus Convention forms part of the 'changing justice landscape' in which the Scottish legal aid system operates. The civil legal aid rules were designed in a period before the Convention was ratified by the UK, and amendments are now needed to update the civil legal aid rules to comply with new international legal obligations.

It is incumbent on Scotland to ensure that the rules on the expenses of environmental litigation are changed such that the situation of non-compliance is remedied. Amending the legal aid rules is one important way in which Scotland could address non-compliance.

3 Civil Legal Aid and Environmental Litigation

3.1 Regulation 15

The Civil Legal Aid (Scotland) Regulations 2002, Regulation 15, provides as follows:

> *Applicant having joint interest, etc. with other persons*
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> *15. Where it appears to the Board that a person making an application for legal aid is jointly concerned with or has the same interest in the matter in connection with which the application is made as other persons, whether receiving legal aid or not, the Board shall not grant legal aid if it is satisfied that –*
>
> *(a) the person making the application would not be seriously prejudiced in his or her own right if legal aid were not granted; or*
>
> *(b) it would be reasonable and proper for the other persons concerned with or having the same interest in the matter as the applicant to defray so much of the expenses as would be payable from the Fund in respect of the proceedings if legal aid was granted*

Regulation 15 makes the granting of legal aid conditional where a person applying has a joint interest in the matter with others. In these circumstances, legal aid is not granted if SLAB is satisfied that (a) the applicant would not be seriously prejudiced; or (b) it would be reasonable for the other persons concerned to pay the expenses being sought.

3.2 Regulation 15 and environmental litigation

Lord Hope noted in *Walton* that environmental law,

> *...proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone.*[17]

The Aarhus Convention also recognises the fundamental nature of environmental protection as, "essential to human well-being and the enjoyment of basic human rights".[18]

There is a shared public interest in the enforcement of environmental law to protect the environment. It is likely that in almost all environmental litigation there will be a number of individuals with similar same concerns about the issue in dispute (e.g. a large development in a conservation area, or air pollution in a city) that could be the subject of court proceedings. For the purposes of Regulation 15, a legal aid applicant seeking to undertake environmental litigation is therefore likely to have a 'joint interest' with others.

This means that environmental litigants can only be granted legal aid if SLAB is satisfied that there is either 'serious prejudice' (Regulation 15(a)); or that it would not be reasonable and proper for the other persons who are jointly interested to pay the expenses that would otherwise be paid by SLAB (Regulation 15(b)). The difficulty of meeting these tests imposes a real barrier for those seeking legal aid in environmental litigation.

3.2.1 Regulation 15(a) – serious prejudice

The legal aid guidance on the application of Regulation 15 explains 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 the case unless strong evidence is provided to show that an individual will suffer serious prejudice.*[19]

The guidance provides limited direction as to what constitutes 'serious prejudice' for Regulation 15(a). It provides two examples to help assess 'serious prejudice':

> *An example of "serious prejudice" would be an owner of a flat in a tenement faced with litigation over a bill for common repairs.*

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[17] *Walton (Appellant) v The Scottish Ministers (Respondent) (Scotland)* [2012] UKSC 44, para 152.
[18] Preamble, para 6.
[19] Para 3.17 of Part IV – Civil Legal Aid Guidance.

Examples of cases where an applicant will not suffer serious prejudice include closure of a school, community centre, swimming pool, or other cultural or leisure institution.[20]

Whilst the exact criteria used to establish 'serious prejudice' are not made explicit, these examples suggest that an applicant must have a particular private interest in the claim, which is threatened by the legal dispute in question (e.g. as a property owner) – whereas a public interest which does not particularly affect the applicant as an individual is insufficient.

Given that environmental litigation often concerns diffuse public interests in environmental protection and enforcing environmental law, in most cases it would be impossible for a litigant to demonstrate a particular private interest in a claim which will suffer if (s)he is not granted legal aid.

SLAB's guidance on cases with a 'wider public interest' suggests that a lower test of reasonableness will be applied where cases demonstrate a wider public interest. Yet in contradiction to the serious prejudice test, it states that, 'the criteria for a wider public interest will not be met ... where we consider the interest is, in fact, a private interest'.[21]

For public interest litigants, this amounts to,

...an impossible argument to win. If the individual does not have a substantial impact from the issue then reg 15 is not satisfied and legal aid is refused. On the other hand, if the interest and connection to the individual is real, then the first hurdle of serious prejudice can be satisfied, only then to be told that the interest is in fact a private interest and no wider public benefit can be taken into account.[22]

3.2.2 Regulation 15(b)

Regulation 15(b) requires an applicant to fund litigation with others who share a joint interest in the matter. SLAB will not grant legal aid where it would be reasonable and proper for the other people who are jointly interested in the case to pay the expenses that would be paid under legal aid if it was granted. However, no guidance is offered as to the steps that an applicant should take to find similarly interested parties, nor what constitutes 'reasonable and proper'.

There are two key practical difficulties to 15(b).

First, even if an applicant is able to find other parties, there may be problems in obtaining financial information from other parties, establishing what legal tactics are to be used and there may be differences between them such that other interested parties may not wish to litigate.

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[20] Para 3.17 of Part IV – Civil Legal Aid Guidance.
[21] Para 4.78 of Part IV – Civil Legal Aid Guidance.
[22] Frances McCartney, 'Public interest and legal aid' (2011) 37 Scots Law Times 201-204, p202.

Second, environmental litigation occurs largely through judicial review – where applicants face a strict three month time limit for raising an action.[23] This severely restricts the ability of litigants to find others with a joint interest, agree on a course of action and raise funding for a case.

3.3 Awards of Legal Aid in cases with 'an environmental aspect'

Data collection on awards of Legal Aid in environmental cases is in our view poor. A letter from the Scottish Legal Aid Board to the Scottish Parliament's Equal Opportunities Committee in June 2015, contains a break down of numbers of Legal Aid applications and awards in environmental cases.[24]

The data indicates that in a four year period, 7 out of 33 applications for legal aid that were identified as having 'an environmental aspect' were granted. Six of these had declared a joint interest. On this basis, the Scottish Legal Aid Board considered that regulation 15 was not having "an overbearing influence on the ability of applicants to receive legal aid in cases with an environmental aspect".

However the data is highly problematic in terms of getting the full picture of awards in Aarhus cases. For example, it is unclear how 'an environmental aspect' is defined, which has a hugely important bearing on these statistics given that certain kinds of environmental cases tend will have a stronger private interest than others. Nor is it clear whether the joint interest was necessarily indicative of a broader public interest issue. It is our understanding that it is likely that the cases awarded legal aid in these instances had a strong private interest aspect.

Further, it is entirely possible that Regulation 15 has a 'chilling effect', meaning that potential applications for Aarhus cases do not come before the Scottish Legal Aid Board.

3.4 Legal Aid Caps in Judicial Review

These long-term difficulties in accessing legal aid were exacerbated in 2013 by the introduction of a cap on the expenses of a judicial review to be covered by legal aid (including Counsel's fees, solicitors' fees and outlays) of £7,000.

This is an entirely unrealistic figure to run a complex environmental judicial review. While applications can be made to increase the figure, the cap is likely to reduce 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 cap. Due to the low levels of payment for legal aid compared with market rates, and the complexities of judicial review cases, individuals can struggle to find a lawyer willing to represent them on this basis.

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[23] Court of Session Act 1988, S27A.

[24] See http://www.scottish.parliament.uk/S4_EqualOpportunitiesCommittee/General%20Documents/Letter_to_Margaret_McCulloch_MSP_-_4_6_15_%28pdf%29.pdf

4 Recommendations

4.1 Summary of response

To recap the above:

- The Aarhus Convention creates the following obligations which should be considered as part of the legal aid review:
    - Article 9(3) requires that members of the public have access to procedures to challenge acts and omissions by private persons and public authorities which contravene environmental law.
    - Article 9(4) requires that such procedures are 'not prohibitively expensive'.
    - Article 9(5) requires that Parties 'shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice'.
- Scotland is in a longstanding position of non-compliance with Article 9(4) and 9(5) of the Aarhus Convention. This has been confirmed by a number of reviews of Scotland's compliance record.
- Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 presents a real barrier to applications for legal aid for environmental litigation - contributing to Scotland's non-compliance with the Aarhus Convention.
- The long term barrier represented by Regulation 15 is exacerbated by the introduction of caps on legal aid for judicial review.

4.2 Recommendations

We invite the Scottish Legal Aid Review to consider:

(a) Scotland's obligations under the Aarhus Convention when carrying out its review;

(b) The suitability of the Civil Legal Aid (Scotland) Regulations 2002, Regulation 15 - in light of Scotland's obligations under the Aarhus Convention;

In particular, we recommend that the Review makes the following recommendations:

- Repeal regulation 15 in order to facilitate applications in public interest cases more broadly; or
- As a minimum, add an exception to Regulation 15 for cases falling within the ambit of the Aarhus Convention; and

- Enable community groups to apply jointly for legal aid; and
- Remove the system of caps on legal aid for judicial review in environmental cases.

5 Additional documents provided

We enclose a copy of the following, as it is not freely available online, like the other documents referred to in footnotes:

- Frances McCartney, 'Public interest and legal aid' (2011) 37 Scots Law Times 201-204 (an article which examines the effect of Regulation 15 on public interest litigation).