PROPOSALS FOR REFORM OF CIVIL LITIGATION FUNDING AND COSTS IN ENGLAND AND WALES

UKELA's RESPONSE TO THE MINISTRY OF JUSTICE'S CONSULTATION OF NOVEMBER 2010 ON IMPLEMENTING LORD JUSTIC JACKSON'S RECOMMENDATIONS

SUMMARY

1. This consultation response is directed to Q 28 -35 as to QOCS in respect of judicial review and environmental claims in particular. UKELA considers that there is merit in the extension of QOCS to judicial review for individuals, and possibly non-commercial organisations. That view is not to exclude modest variations to that approach in order to avoid undesirable outcomes. In particular, UKELA sees no real objection to a fixed default sum or sums to be payable by an unsuccessful claimant.

2. The issue in this regard is whether to have:
   (i) simplicity, certainty and no satellite litigation, but no flexibility and the potential to have some counterintuitive outcomes on costs in limited categories of case, or;
   (ii) sophistication, uncertainty, satellite litigation, but no counterintuitive outcomes in limited categories of case.

3. The issue arises because the Government is concerned that Sir Rupert's proposals and that of the Working Group on Access to Environmental Justice in their Update Report would give a costs protection to a commercial organisation bringing judicial review proceedings in its own interest against a public body. The Government is also concerned that an entirely unmeritorious claimant would also enjoy such protection, again to the financial detriment of a public body.

4. UKELA considers that Consultation proposals would fail to address the UK's obligations in European law and would be significantly less efficient that either Sir Rupert's proposals or those in the Update Report for the following summary reasons:

(i) the concern in respect of judicial review brought by a commercial organisation is remediable by use of the proposal in the Update Report with with simple reference to the commercial case, i.e "that an unsuccessful non-commercial claimant should not be ordered to pay the costs of any other party, save where the claimant has acted unreasonably in bringing or conducting the proceedings."

(ii) This approach addresses the requirement that proceedings are not prohibitively expensive, as required by Art 10A of the EIA Directive, under which a significant number of environmental judicial reviews are brought. An EIA challenge is, by definition, a public interest challenge (see Garner) hence non-commercial organisations and individuals ought to have access to judicial review without a public interest test or the need to apply for a PCO (cf para 167 of the ConDoc)

(iii) The concern as to the cost burden of unmeritorious cases is not well founded in that: (a) the costs to permission stage are generally not a significant burden for a public body, but in the limited instances in which they are, that could be mitigated by a fixed, default costs liability for unsuccessful claimants; (b) consideration on the papers provides for a judge expressly to find that a claim is entirely without merit; (c) if a claimant persists to oral renewal with a claim which is entirely without merit so much is plainly unreasonable and costs rules could incorporate a presumption that an unsuccessful renewal application would result in costs being ordered against the claimant; (d) the number of claims in the category is a modest proportion of the Administrative Court's work and, save perhaps for the Environment Agency, no one public body is likely to encounter a high rate of claims.

5. UKELA welcomes the codification of PCO rules.

INTRODUCTION

6. This is the response of the United Kingdom Environmental Law Association to the Ministry of Justice's consultation on proposals for reform of civil litigation funding and costs in England and Wales.

7. UKELA is a registered charity the principal objects of which include the promotion, for the benefit of the public generally, of the enhancement and conservation of the environment in the UK, and, in particular, the advancement of the education of the public in all matters relating to the development, teaching, application and practice of law relating to the environment.

8. The Rt Hon Lord Justice Carnwath is UKELA's current President, having taken over the role in 2006 from the late Rt Hon Lord Slynn of Hadley. In addition to Lord Justice Carnwath, the Association's patrons are Baroness Young of Old Scone (former Chief Executive, the Environment Agency), Professor Sir Francis Jacobs KCMG, QC (Kings College London), Professor Richard Macrory (University College London) and Tom Burke CBE (Visiting Professor, Imperial and University Colleges, London), Maria Adebowale (Director, Capacity Global), Sir Crispin Agnew of Lochnaw QC, Professor Malcolm Grant (President and Provost, UCL) and Lord Woolf of Barnes.

9. Current membership (lawyers and non-lawyers) is in excess of 1,200.

COSTS IN JUDICIAL REVIEW CASES

10. UKELA's interest in this consultation centres on the costs proposals for judicial review cases. Our concern is that costs rules should meet the requirements of the Aarhus Convention, in particular that access to justice in environmental cases is 'not prohibitively expensive' (Article 9(4)). The issue has recently been the subject of considerable scrutiny, in particular:

- the judgment in Commission v Ireland[1], in which discretionary judicial approaches to ensuring compliance with the Aarhus Convention were held to be insufficiently certain;
- the Jackson Review of Costs in Civil Litigation. UKELA attended and contribute to Lord Justice Jackson's seminar on costs in judicial review, and contributed in writing;
- criticism of the UK position by the European Commission[2];
- draft finding from the Aarhus Compliance Committee which are adverse to the UK position in this regard[3];
- the September 2010 Update Report of the Working Committee on Access to Environmental Justice;
- the Court of Appeal's consideration of what is and is not prohibitively expensive in the PCO regime;[4]
- the Supreme Court's's reference to the European Court of Justice seeking a ruling on the proper approach to the question of what is 'prohibitively expensive'.[5]

[1] Case C-427/07
[2] See the press release of the Environment Minister dated 18 March 2010
[3] The final recommendations made by the Aarhus Compliance Committee have since been published on 18 October 2010 with minimal changes to the earlier draft recommendations referred to in the Update Report (Findings and Recommendations of the Aarhus Compliance Committee with regard to Communication ACCC/C/2008/33 brought by ClientEarth, the Marine Conservation Society and Mr Robert Latimer concerning compliance by the United Kingdom).
[4] R (oao) Garner v Elmbridge Borough Council [2010] EWCA Civ 1006
[5] R (oao) Edwards & Pallikaropoulos v Defra [2011] 1 WLR 79 (SC)

11. In light of these developments, many of which have occurred since publication of Lord Justice Jackson's report, UKELA considers that it has now been established that a clear and effective costs system for public law litigants is needed. The requirements of the Aarhus Convention, as now incorporated in both the EIA Directive and the IPPC Directive, are matters of European law which must be properly transposed to the domestic situation. It is quite obvious that adaption of the Corner House[6] principles is inadequate, having regard to:

- the PCO regime's lacks certainty;
- the difficulty that the PCO regime answers the question as to potential liabilities at a point in the proceedings which is too late;
- the costs or costs risks associated with the PCO regime themselves restrict access to justice and increase costs for all parties;
- the findings of the Jackson Review;
- the final findings and recommendations of the Aarhus Compliance Committee;
- the absence of a requirement of a 'public interest' issue in EIA cases (see Garner).

12. For these reasons, UKELA considers that there is substantial evidence of a failure to comply with both the Convention and European law. The approaches which are presently available to parties and the courts now require a clean break and clear resolution.

UKELA's preferred approach

13. UKELA favours the one-way cost shifting rule proposed by the Working Group on Access to Environmental Justice or a variant which is close to it. That rule proposes that: 'an unsuccessful claimant in a claim for judicial review shall not be ordered to

[6] R (oao) Corner House Research v Secretary of State for Trade and Industry [2005] EWCA 192

pay the costs of any other party other than where the Claimant has acted unreasonably in bringing or conducting the proceedings.' UKELA considers that commercially driven claimants could be excluded from the rule by simply inserting the term 'non commerical' (ie 'an unsuccessful non-commercial claimant…'). UKELA considers that the commercial claimant is easily identifiable and distinguishable from those whose interest is not commercial. In many cases it would be self evident that a claimant was a developer.

14. UKELA considers this rule would provide a clear and effective means of complying with the UK's obligations. That view is not to exclude modest variations to that approach in order to avoid undesirable outcomes. In particular, UKELA sees no real objection to a fixed default sum or sums to be payable by an unsuccessful claimant. The court has the ability to filter out unmeritorious cases, which could be strengthened, and penalise those who do not conduct their litigation reasonably. In taking this view, we have regard to the following factors:

- the use of the permission stage to filter claims[7]
- a need to provide for a permission stage in statutory review, principally via s288 Town and Country Planning Act 1990. We made this suggestion during the Jackson Review. It is supported by the Working Committee on Access to Environmental Justice in the Update Report[8].
- the existence of an effective means of addressing alleged unlawfulness, namely the pre-action protocol procedure. In UKELA's view, this is an important balancing factor in JR in England and Wales in addressing:
    - the question of conduct of the parties;
    - a means of resolving cases without prohibitive expense.

[7] Referred to at para 37 of the Working Party's Update Report.
[8] ibid, paras 38-40

Comments on the proposals

15. The government proposes a different approach at paragraphs 143-146 of the consultation document, namely that the claimant should remain liable for a 'fixed amount' of the defendant's costs until a judge declares that:

a) the claimant

i) is behaving unreasonably in relation to the claim – either in bringing the claim or in relation to applications (including as to costs) during the course of the claim or

ii) is so wealthy, that there should be no limit on the claimant's costs; or

b) the defendant is of such modest means relative to the resources of the claimant and the costs of the case that there should be no liability or a capped limit on the claimant's costs liability.[9]

16. The government's preferred approach is to confine the rule to individual claimants in judicial review cases, with organisations such as residents associations able to apply for Protective Costs Orders under rules that will shortly be codified. The government invites views on whether the QOCS rule should apply to non-commercial organisations bringing judicial review claims, as well as to individuals.

17. We do not consider that the proposals in their present form would address the Aarhus compliance problems referred to above. They could give rise to considerable difficulties in practice. In particular:

- the proposed modified QOCS rule does not provide claimants a sufficient degree of certainty. The proposal would perpetuate all that is most undesirable about the PCO regime: unpredictability; cost; delay etc. The 'fixed amount' would not in fact be a fixed amount at all, as the exceptions could operate to

[9] We have quoted from paragraph 146 but we wonder whether MOJ meant to say 'the claimant is of such modest means relative to the defendant…'

raise or lower the amount payable. Moreover, the questions of whether a claimant is 'so wealthy' or the defendant of 'such modest means relative to the claimant' raise difficult issues of assessment, interpretation and judgment. We share the concerns of the Working Party on Access to Environmental Justice about the undesirability of requiring judges to carry out time consuming, detailed assessments of the means of the parties.[10] Unless these matters were invariably determined at the outset, the uncertainty would prevail throughout proceedings. The consultation document appears to accept at paragraph 166 that the rule provides less certainty than PCOs.

- without knowing the fixed amounts that would be generally applicable, it is difficult to comment on whether they would meet the Article 9(4) requirement that access to the courts is 'not prohibitively expensive'. However, a simple modification of the Jackson proposal to accommodate a low, fixed default sum as a cap on the costs to be paid by an unsuccessful claimant is not objectionable in Art 9(4) terms, though it may be administratively untidy given that it would only apply to this narrow topic areas of judicial review. Under this modified rule, the court would have a discretion to require the Claimant to pay a lower amount than the fixed sum, for example where the Defendant's costs in fact were lower than the sum, or where this is reasonable in all the circumstances (as suggested at paragraph 145 of the consultation document).

- retaining the PCO regime on current principles would not address the problems inherent in that regime, identified above.

14th February 2011

[10] Para 31(1), Working Party's Update Report.