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Case Summary posted by the Task Force on Access to Justice

Country: UK - *RSPB, Friends of the Earth & Client Earth v. Secretary of State for Justice*

1. Key issue	Costs – art. 9, para. 4, of the Aarhus Convention and prohibitive expense
2. Country/Region	United Kingdom
3. Court/body	High Court
4. Date of judgment /decision	2017-09-15
5. Internal reference	[2017] EWHC 2309 (admin); case N CO/1011/2017
6. Articles of the Aarhus Convention	Art. 9, para. 4
7. Key words	Aarhus Convention, access to justice, prohibitive expense, costs, article 9, para. 4, Concept of 'not prohibitively expensive' judicial proceedings

8. Case summary

On 28 February 2017, the Civil Procedure Rules (Amendment) Rules 2017 (the "Amendment Rules") came into force in England and Wales. The Amendment Rules introduced a number of changes to the existing fixed costs cap regime for environmental (Aarhus) cases introduced in 2013 to address the findings of the Aarhus Convention Compliance Committee in Communication C33(UK) and preliminary findings by the Court of Justice of the European Union (CJEU) in two cases – the first arising from ongoing infringement proceedings by the European Commission in respect of the high cost of legal action in the UK (Case C-530/11 *Commission v UK*) and the second involving a reference to the CJEU by the UK Supreme Court (*Edwards*, Case C-260/11).

In 2014, the CJEU delivered final judgment in both the infringement proceedings and *Edwards*. The key point arising from *Edwards* was the basis upon which the evaluation of what is "not prohibitively expensive" for the claimant (under EU law in the form of the EC Public Participation Directive) should be determined. The CJEU held that the evaluation of prohibitive expense is essentially a two stage test, involving both a subjective and objective limb as to what sum is prohibitive expense for the claimant. The Ministry of Justice in England and Wales sought to make changes to the fixed costs cap regime for environmental cases on the basis of the *Edwards* judgment and the need to include a subjective element to the prohibitive expense test. These changes included:

- **Schedule of financial resources** - claimants are now required to submit a schedule of financial resources identifying any actual or potential third party support when lodging proceedings in court. This appears to cover information required in respect of Judicial Review Costs Capping orders including significant assets, liabilities, income and expenditure. When introduced, there was no guarantee that any hearing to consider such information would be held in private. This was criticised by the eNGO community as unfair and likely - in itself - to act as a deterrent to those contemplating legal proceedings (and thus perverse in the context of a scheme intended to facilitate access to environmental justice).

- **Hybrid caps** - the Amendment Rules give the court the power to vary the default caps at first instance of £5,000 and £10,000 (and indeed to remove altogether the limits on the maximum costs liability) on the basis of financial information provided to the court when applying for judicial review. As such, hybrid caps failed to provide early certainty to claimants as to their costs exposure because that limit could change at any stage in the proceedings (including right up until the hearing). It opened up the possibility that a claimant would embark on litigation willing to take a particular cost risk only to discover that risk later changed. That possibility was likely to have a chilling effect on claims being commenced in the first place, because most claimants cannot afford – in financial terms – to take on an unquantifiable and large costs risk.

On 24 February 2017, the RSPB, Friends of the Earth and ClientEarth applied for a Judicial Review of the Amendment Rules. There were three main grounds of challenge:

- **Ground 1**- variation in costs caps limits- CPR 45.44 fails to provide claimants with early certainty as to their likely costs exposure because the Amendment Rules allow for the default cap to be varied at any point in the proceedings;

- **Ground 2** - the failure to provide for mandatory private hearings when considering an individual's finances. The claimants argued that individuals and NGOs will be deterred from bringing claims if there is a risk that their personal financial information, or that of their third party donors, will be discussed in open court; and

- **Ground 3** – the Government's response to the public consultation confirmed that claimants' own costs should be excluded for the purpose of determining what level of costs would be prohibitively expensive for them.

Dove J held that:

- **Ground 1** –the rules varying the default costs caps are consistent with EU law when considered in the context of the surrounding rules and practice. This means that a defendant must make an application for a variation to the claimant's costs cap at the earliest opportunity – this will in almost all cases be when the defendant provides its first written response to the claim (the "Acknowledgement of Service"). Later applications to vary the cap may only be considered if the claimant has lied or misled the court over his finances or if his means substantially change. As long as the Amendment Rules operate in this way in practice they do not offend against EU law and the requirements of early certainty and reasonable predictability;

- **Ground 2** - the possibility that a claimant's financial affairs will be discussed in public could deter meritorious claims, and therefore should in the first instance be in private. The rules need to be amended accordingly. Dove J also thought it would be beneficial for a specific definition to be provided as to the nature and content of the financial information a claimant must file with the court (including with respect to third parties); and

- **Ground 3** – it was not necessary to grant the claimants a declaratory relief with regard to the claimants own costs as the Government had conceded that these may be taken into account when determining prohibitive expense.

The judgment therefore clarified that while claimants cannot benefit from absolute certainty as to the extent of their financial exposure before they go to court, they can be reassured that the cap will not increase post-permission save the above exceptional, clearly defined, circumstances. They must disclose

personal financial information when applying for judicial review but can at least be confident that such information will be considered in private and they are entitled to have their own legal costs taken into account when the Court is evaluating what is prohibitive expense for them. The issues of remedies and costs are still to be determined. **Note:** In November 2016, the Lord Chief Justice and the Master of the Rolls commissioned Lord Justice Jackson to develop proposals for extending Fixed Costs Rules in England and Wales.[1] While Jackson LJ's final report maintains strong support for a system of qualified one-way costs shifting in Judicial Review, the report concedes that the evident lack of Governmental support for such a model following his original report in 2009 is likely still to apply. As a fall-back, the report recommends that an amended form of the present Aarhus costs rules be extended to all judicial review claims in order to increase access to justice and to promote the public interest. This judgment should help to ensure that the revised Civil Procedure (Amendment) Rules 2017 align with Lord Justice Jackson's proposals for costs caps in Judicial Reviews generally.	
9. Link to judgement/ decision	*RSPB, Friends of the Earth & Client Earth v. Secretary of State for Justice* [2017] EWHC 2309 (Admin)) – judgment here http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/UNITED_KINGDOM/RSBP_other/UK_RSPB_others_judgment_costs.pdf

[1] https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf