Aarhus: Uncertain times, uncertain measures

Recent changes to the CPR lack clarity with regard to the cost of bringing an environmental claim, writes **Caroline Daly**

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Aarhus, the second largest city in Denmark, is having its moment in the spotlight as the European Capital of Culture 2017.

For public lawyers though, the location is synonymous with an altogether different matter, namely the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. The convention has been hitting the (legal) headlines in recent weeks due to changes to the Civil Procedure Rules on Aarhus Convention claims.

The convention requires that access to justice in environmental matters should be 'fair, equitable, timely, and not prohibitively expensive'. Back in 2013, the government introduced a mutual costs capping regime for judicial review claims concerning 'environmental matters' in order to give effect to the principle that access to environmental justice should not be prohibitively expensive.

A notable feature of the previous regime was the fixed nature of the costs cap. If a claimant, acting as an individual, failed in their challenge, the costs exposure would be capped at £5,000. For any other type of claimant, the costs cap was fixed at £10,000. The reciprocity of the cap meant that successful claimants that opted for the cap were only entitled to £35,000 in costs from the defendant. The rigidity of the system brought certainty to those seeking to bring environmental challenges.

A number of changes have now been made to that regime by the Civil Procedure (Amendment) Rules 2017, which came into force on 28 February 2017.

One of the most significant alterations is the move away from the fixed costs cap model to a hybrid approach, which would allow for both upwards and downwards variation. The new model requires claimants to file statements containing information regarding their 'financial resources' with the claim form. Default starting points for the costs caps have been set at the previous levels, which will remain in place unless the court considers, either on application by the defendant or of its own accord, that they should be varied or removed altogether.

The court may vary or remove the costs cap only if satisfied that to do so would not make the costs of the proceedings prohibitively expensive for the claimant, and, in the case of a variation that would reduce the claimant's maximum costs liability or increase that of a defendant, that without the variation the costs of the proceedings would be prohibitively expensive for the claimant.

CPR 45.44(3) now sets out a process to be followed by the court when considering whether proceedings are prohibitively expensive. It states that this will be the case if the likely costs (including any court fees which are payable by the claimant): '(a) exceed the financial resources of the claimant; or (b) are objectively unreasonable having regard to – (i) the situation of the parties; (ii) whether the claimant has a reasonable prospect of success; (iii) the importance of what is at stake for the claimant; (iv) the importance of what is at stake for the environment; (v) the complexity of the relevant law and procedure; and (vi) whether the claim is frivolous.'

The principles are designed to mirror those set out by the Court of Justice of the European Union in C-260/11 *Edwards v Environment Agency*, as reiterated by the Supreme Court in *R (Edwards) v Environment Agency (No. 2)* [2014] 1 WLR 55.

A further change of note is that the CPR now makes clear that where there are multiple claimants, the caps apply to each individual claimant rather than being apportioned between them. Also, whereas the regime previously only applied to first instance cases, it has now been extended to the Court of Appeal, albeit in something of an opaque manner.

The Court of Appeal is now directed to 'consider whether the costs of the proceedings will be prohibitively expensive for a party who was a claimant' and 'if they will be, make an order limiting the recoverable costs to the extent necessary to prevent this' (CPR 52.19A). There is no guidance given on how this is expected to operate in practice.

The principal criticism of the new regime is that it introduces considerable uncertainty for potential claimants with regard to the cost of bringing an environmental claim, not least because of the lack of clarity surrounding the term 'financial resources'. Indeed, in darkly comedic timing for the government, some four days prior to the coming into force of the amended rules the Aarhus Convention Compliance Committee published a report which expressed concern about the operation of the costs capping regime and the proposed changes that were consulted on in 2015. The committee indicated that the proposed amendments would likely 'increase rather than decrease uncertainty and risk of prohibitive costs for claimants'.

Three NGOs – ClientEarth, Friends of the Earth, and the RSPB – are seeking to challenge the new rules by judicial review. **SJ**