

## **Regulatory Impact Assessment**

### **1. INTRODUCTION**

1.1 This section provides an assessment of the regulatory impact of the Department's revised way forward on changes to the current costs protection scheme for environmental cases that fall within the scope of the Aarhus Convention.

### **2. IDENTIFYING POTENTIAL SECTORS FOR IMPACTS**

2.1. This part describes the sectors which may be affected by the revised policy proposals and the likely nature of the impact.

#### **Sectors**

2.2. The proposed changes will affect the voluntary, business and public sectors.

#### *Third sectors*

2.3. The proposals will have implications for those organisations within the third sector (such as environmental NGOs) that challenge decisions in Northern Ireland in cases which come within the remit of the Aarhus Convention. They will also affect those organisations within this sector that provide legal assistance and representation to members of the public involved in such proceedings.

#### *Business*

2.4. Likewise, the proposals may impact on those in the business sector who take proceedings to challenge decisions subject to the Aarhus Convention. Others in this sector that may be affected include those entities that are engaged by Northern Ireland Departments and public authorities to execute decisions which come within the scope of the Convention (such as third party commercial developers). Legal practitioners who provide representation to members of the public and voluntary sector involved in proceedings under the Convention may also be affected by the proposed changes.

#### *Public Sector*

2.5. The proposals will have implications for those Northern Ireland Departments and other public authorities which make decisions subject to the Aarhus Convention as they will be the respondents to court challenges to these decisions. They may also have an impact on the Northern Ireland Courts and Tribunals Service (an Executive agency of the Department of Justice) which is responsible for supporting the administration of the courts.

#### *Individuals*

2.6. The proposed changes are likely also to be felt by those members of the public who use the legal system to challenge the decisions which fall within the scope of the Aarhus Convention.

### **3. FINDINGS**

3.1 This part describes the revised proposals put forward in section 5 and summarises the impacts arising for the various sectors.

## Eligibility

1. The Regulations should be amended to

- reflect that only an applicant who is a member of the public is entitled to costs protection; and
- define the term ‘the public’ with reference to the definition provided by the Aarhus Convention.

3.2. The purpose of this proposal is to put beyond all doubt that cost capping scheme enshrined in the Regulations is intended to protect members of the public. Anecdotal evidence suggests that in Northern Ireland there have not been any occasions when an applicant who is not a member of the public has been deemed entitled to the costs protections available under the Regulations. It is not envisaged, therefore, that the proposal will have any financial impact on the public sector here. Likewise, no impact on the third or business sectors is anticipated. Defining the term ‘the public’ will make it clear, as was always intended, that eligibility for costs protection is not restricted to individuals only.

## Level of available cost protection

**2. An applicant’s costs cap should be set a default limit of £5,000 where an applicant is an individual and £10,000 in all other cases and a respondent’s cross-cap should be set at a default limit of £35,000;**

**3. An applicant should be able to apply to the court for it’s cap to be lowered and the respondent’s cap to be raised where the default limits would make the proceedings prohibitively expensive for the applicant;**

**4. The court should have regard to the principles set out in Edwards when considering whether the default limits are ‘prohibitively expensive’ for the applicant.**

## *Variations to applicant’s cap*

3.3. The proposed changes would allow scope for the applicant’s current cost caps to be reduced where the court is satisfied that, without variation, the costs of the proceedings would be ‘prohibitively expensive’ for the applicant. The cap is already set at a low level and, as such, it is expected that the number of cases in which a reduction would be ordered is likely to be small. Nonetheless, the proposal should, in some cases, reduce the financial burden on applicants (such as individuals, voluntary organisations or businesses of limited means). As such, the proposal should improve access to justice in these cases.

3.4. Between 1 April 2013 and 31 December 2015, there were only 11 Aarhus Convention cases brought in Northern Ireland. It is not expected that the prospect of potentially lower cost caps for applicants will result in any significant increase in the number of Aarhus cases being brought in this jurisdiction. Most cases here are brought by way of judicial review and, even if there was an increase in the number of applications for leave to apply for judicial review as a result of the prospect of lower cost caps, the court will continue to apply the same criteria in its decisions on granting leave and, thereby, filter out unmeritorious applications at an early stage (just under half of those Aarhus

cases brought between 1 April 2013 and 31 December 2015 were granted leave to proceed). The impact of this proposal on the public sector (in terms of defending proceedings and court resources) and business sector (in respect of resultant delay in the progress of any relevant projects) is expected to be minimal.

3.5. Under the revised proposal, the court will not be able to increase the applicant's cost cap. The proposal will not, therefore, increase the costs exposure of applicants or the revenue recoverable by public sector respondents.

#### *Variations to respondent's cap*

3.6. Under the revised proposal, the courts will also have the power to increase a respondent's costs cap. It is possible that this may alleviate, at least to some extent, the alleged difficulties encountered by applicants in obtaining legal representation. In some complex cases, the costs incurred by applicants may be considerably higher than the cross-cap of £35,000. It is possible that applicant lawyers may be dissuaded from embarking on cases in which they will not be able to recover their full costs even if successful. This proposal could, therefore, have a positive financial impact on those individuals or environmental NGOs taking proceedings under the Aarhus Convention and the legal practitioners who act on their behalf. Providing the court with the power to increase a respondent's costs cap should also act as a deterrent to respondents to expand the scope of a dispute unnecessarily and, thereby, avoid unwieldy litigation. This could impact favourably on court resources. It should be noted, however, that under the proposal the court will only be able to increase the cap which the respondent may not be ordered to pay where it is satisfied that not increasing it would be prohibitively expensive for the applicant.

#### **Cross-undertakings in damages**

**5. The court should apply the Edwards principles when considering whether continuing with proceedings would be prohibitively expensive;**

**6. Provisions in the Regulations relating to cross-undertakings in damages should only apply to an applicant for an interim injunction who is a member of the public.**

3.7. The proposal to direct the court to apply the Edwards principles should ensure greater clarity and transparency for both applicants and respondents regarding the factors which a court is to take into consideration when deciding whether or not to make a cross-undertaking in damages in cases and its terms. However, as the proposal essentially codifies existing practice, it is not anticipated that it would give rise to any financial impact for any sector. Likewise, it is not expected that providing clarification on the application of the cross-undertaking provisions in the Regulations will have any significant impact.

#### **Appeal costs**

**In an onward appeal in an Aarhus case;**

**7. an applicant's costs cap should be set a default limit of £5,000 where an applicant is an individual and £10,000 in all other cases and a respondent's cross-cap should be set at a default limit of £35,000;**

**8. an applicant should be able to apply for its cap to be reduced and the respondent's cap to be increased in cases where the default limits would make the proceedings prohibitively expensive for the applicant;**

**9. the court should be required to have regard to the principles set out in Edwards when considering whether the default limits on appeal are 'prohibitively expensive' for an applicant.**

#### *Introduction of default caps*

3.8. As noted, between 1 April 2013 and 31 December 2015, there were 11 Aarhus Convention cases brought in Northern Ireland, only 5 of these proceeded to judicial review and, to date, none of these cases have been subject to onward appeal. Although it is possible that introducing default caps for appeal cases could increase the number of applications for leave for appeal, it is not expected that the proposal will give rise to any substantial increase in the number of appeals; the court will continue to apply the same criteria in its decisions on granting leave to appeal to weed out appeals without merit. The impact of this proposal on the public sector (in terms of defending appeals and court resources) and business sector (in respect of consequential delay to any relevant projects) is, therefore, expected to be insignificant.

#### *Variations to applicant's cap*

3.9. The proposed changes would allow scope for the applicant's cost cap on appeal to be lowered where the court is satisfied that, without doing so, the costs of the proceedings would be 'prohibitively expensive' for the applicant. As the cap will be set at a low level, it is envisaged that the number of cases in which a reduction would be ordered is likely to be small. Nevertheless, this flexibility should, in some cases, alleviate the financial burden on applicants and, thereby, enhance access to justice in these cases.

#### *Variations to respondents cap*

3.10. Under the revised proposal, the courts will also have the power to raise a respondent's costs cap on appeal. It is envisaged that this could have a favourable financial impact on those individuals or environmental NGOs taking proceedings under the Aarhus Convention and the legal practitioners who act on their behalf. It should be noted that under the proposal the court will only be able to increase the cap which the respondent may not be ordered to pay where it is satisfied that not increasing it would be prohibitively expensive for the applicant. This should reduce the number of cases in which an increase is sought or ordered and minimise any impact on the respondent and court resource.

## **4. Conclusion**

4.1. It is, however, generally envisaged that the proposals will improve access to justice for applicants from the third and business sectors by increasing certainty around potential costs exposure and by providing the flexibility needed to take account of the particular circumstances of individual applicants. The impacts on applicants are, therefore, overall expected to be favourable (albeit limited given the small number of Aarhus Convention cases in Northern Ireland). The Department will, however, keep this matter under review once the amended regulations are in place and as practice develops.