

EXPLANATORY MEMORANDUM TO
THE CIVIL PROCEDURE (AMENDMENT) RULES 2018

2018 No. 239

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument amends the Civil Procedure Rules 1998 (S.I. 1998/3132) (“the CPR”), which apply to civil proceedings in the Civil Division of the Court of Appeal, the High Court and the County Court. The amendments made by this instrument relate to a variety of changes including rules relating to costs in “Aarhus Convention claims” (which are “environmental” judicial review and statutory appeal proceedings to which the 1998 Aarhus Convention applies). Those rules limit the costs that the losing party has to pay to the other side at the end of a case. The amendments are intended to clarify the way in which these rules operate, in response to a judgment given in the Administrative Court on 15 September 2017.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The Civil Procedure Act 1997 established the CPR Committee and gave it power to make Civil Procedure Rules, governing practice and procedure in proceedings in the County Court, High Court and Court of Appeal (Civil Division). The power to make Civil Procedure Rules includes power to make rules about costs in civil proceedings (by virtue of section 51 of the Senior Courts Act 1981). The first CPR were made in 1998. The intention behind the CPR was to create a single procedural code for matters in the Civil Division of the Court of Appeal, the High Court and the County Court, replacing the old County Court Rules (CCR) and Rules of the Supreme Court (RSC). The CPR had a number of policy objectives, two of the more prominent being to improve access to justice through transparent straightforward procedures and reduce, or at least control, the cost of civil litigation in England and Wales. The changes were made, and continue to be made, in response to the report ‘Access to Justice’ (1996) by Lord Woolf.
- 4.2 The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, commonly referred to as the ‘Aarhus Convention’, requires

parties to the Convention to guarantee rights for their citizens of access to information, public participation in decision making and access to justice in environmental matters.

- 4.3 The Aarhus Convention requires those countries to make sure that the public has access to legal procedures to challenge relevant decisions taken by the countries' public authorities and specifies that those legal procedures should, among other things, not be 'prohibitively expensive'. Both the UK and European Union are signatories to the Convention, which has been largely incorporated in EU law (in particular by Council Directives 85/337/EEC and 96/61/EC, as amended by Directive 2003/35/EC of the European Parliament and of the Council¹), including the requirement that the legal costs of relevant environmental claims must not be 'prohibitively expensive'.

5. Extent and Territorial Application

- 5.1 This instrument extends to England and Wales only.
5.2 This instrument applies to England and Wales only.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 In April 2013, the CPR were amended, for the purpose of giving effect to the requirement of the Aarhus Convention and the EU Directives referred to in paragraph 4.3 above that environmental proceedings be "not prohibitively expensive". Those amendments established (in Section VII of Part 45 of the CPR) a scheme which placed a fixed cap on the costs that unsuccessful claimants had to pay to other parties (£5,000 for individuals and £10,000 for organisations; defendants' liability for claimants' costs was similarly capped, at £35,000).
- 7.2 In February 2014, the Court of Justice of the European Union (CJEU)² determined that the UK had failed to implement the EU law requirement (in the relevant Directives) that proceedings be "not prohibitively expensive". That decision related, however, to the position prior to the April 2013 changes, and had been preceded by the CJEU's decision on a reference to it by the UK Supreme Court³, which set out the requirements which a costs scheme in environmental proceedings should meet in order to comply with the "not prohibitively expensive" requirement.
- 7.3 In the light of these developments, the last government launched a consultation on revising the costs protection rules for environmental proceedings in September 2015. The response was published in November 2016, and a new set of rules replacing the

¹ Official Journal L 156, 25/06/2003 P. 0017 - 0025

² Case C 530/11 *European Commission v United Kingdom of Great Britain and Northern Ireland*

³ Case C 260/11 *R (on the application of Edwards and another) v. Environment Agency*, subsequently applied in the Supreme Court in *Edwards v. Environment Agency* [2013] UKSC 78

previous scheme came into effect from 28 February 2017 under the Civil Procedure (Amendment) Rules 2017 (S.I. 2017/95)⁴.

- 7.4 The February 2017 amendments introduced several new provisions, including the following—
- (i) The court is enabled to vary the level of the (previously fixed) costs caps. When a claimant begins proceedings, there is a default cap (£5,000 for an individual or £10,000 for a group or organisation), but the court may vary that cap, downwards or upwards, in the light of the schedule of means provided by the claimant. This principle applies similarly to defendants, for whom the default cap is set at £35,000. A claimant and/or defendant may accordingly, if the court so decides, be liable for less or more in adverse costs than under the previous fixed caps regime, depending on their means. The court may also, in an appropriate case, remove the limit rather than vary the cap upwards (and references to varying costs caps include reference to removing a limit). The court may, however, only make a variation if doing so will not render the cost of proceedings prohibitively expensive for the claimant (or, as the case may be, is required to make a variation if the cost would be prohibitively expensive for the claimant without it);
 - (ii) The scope of the costs protection provisions is extended beyond judicial reviews to include statutory reviews (in particular, planning challenges);
 - (iii) The court is required, when assessing whether proceedings would be prohibitively expensive if a variation to a costs cap is or is not made, to take into account a list of factors which mirrors those set out by the CJEU in the *Edwards* case;
 - (iv) The court is required, when considering an application to vary a costs cap, to take into account the amount of court fees payable by the claimant in determining whether the variation (or a failure to make it) would render the proceedings prohibitively expensive for the claimant; and
 - (v) Specific provision is made for appeals, requiring the court to apply the same principles on appeal as at first instance.
- 7.5 The February 2017 changes were challenged by way of judicial review by a group of environmental charities, which argued that they were not compliant with EU law. Judgment was given by the High Court on 15 September 2017⁵.
- 7.6 In summary, the judgment concluded that the costs protection regime as amended in February 2017 is compliant with EU law, save in one respect (explained in paragraph 7.7 below), but that the rules would also benefit from clarification in other respects (explained in paragraph 7.8 below).
- 7.7 The judgment concluded that the February 2017 scheme fell short of compliance in that it did not provide for any hearing of an application to vary costs caps in an Aarhus Convention claim to be held in private unless the court otherwise directs (the February 2017 scheme operated under the usual rule that hearings are held in public

⁴ <http://www.legislation.gov.uk/ukSI/2017/95/made>

⁵ *CO/1011/2017 The Royal Society for the Protection of Birds, Friends of the Earth Limited and Client Earth v Secretary of State for Justice and Lord Chancellor* [2017] EWHC 2309 (Admin).

unless the court directs a hearing in private in accordance with the rules in Part 39 of the CPR). This change, which would require a minor amendment to the relevant Practice Direction, is not being taken forward immediately, because the CPRC are presently undertaking a comprehensive open justice review, including examination of the provisions in the CPR governing when hearings must be held in private, and will consider this issue as part of that review. Pending the outcome of the review, however, arrangements have been put in place by the Administrative Court (including the Planning Court), so that litigants, lawyers and court staff are aware that any hearing of an application for variation of costs cap will be heard in private until further notice. This arrangement was published on the judiciary website on 13 December 2017⁶.

7.8 The judgment also concluded that the costs protection rules would benefit from clarification to reflect the agreed understanding of how they are intended to operate, thereby providing certainty and minimising any possible “chilling effect” which might be caused by this uncertainty. The rule amendments now included in this instrument make provision to that end, namely:

- (i) clarifying the financial information that a claimant has to provide in order to have the benefit of the costs cap – the provision (inserted in rule 45.42(1)(b) by rule 3(a) of this instrument) mirrors that for applications for costs capping orders in judicial review claims which are not Aarhus Convention claims (in paragraph 10.1 of Practice Direction 46 supplementing the CPR), and in particular makes it clear that in relation to any financial support provided by third parties, it is only the aggregate amount that must be provided, rather than a breakdown of individuals’ donations;
- (ii) clarifying that the court may vary a costs cap only on an application made by the claimant or the defendant (provision in rule 45.44(2) inserted by rule 3(b)(i) of this instrument); and
- (iii) clarifying (through provision inserted at the end of rule 45.44 by rule 3(b)(ii) of this instrument) that an application to vary the costs cap must be made at the outset, either in the claim form (if made by a claimant) or in the acknowledgment of service (if made by a defendant), and must be determined by the court at the earliest opportunity; and that an application may only be made at a later stage in the process if there has been a significant change in circumstances.

Consolidation

7.9 No further consolidation of the rules is planned at present.

8. Consultation outcome

8.1 The CPR Committee is required, before making Civil Procedure Rules, to consult such persons as it considers appropriate (section 2(6)(a) of the Civil Procedure Act 1997). In view of the nature of the changes as representing agreed clarification of the operation of the February 2017 rule amendments, following considerable discussion

⁶ <https://www.judiciary.gov.uk/publications/aarhus-convention-costs-capping-arrangements/>

in the context of the judicial review proceedings and detailed exposition in the judgment of the Administrative Court, and that the draft amendments had been made available to the claimants in those proceedings after the meetings of the Committee at which they were discussed, the Committee did not consider that the proposals for rules before it forming the present instrument required separate formal consultation by the Committee.

9. Guidance

- 9.1 The rules will be published in a consolidated version and will be available on the Ministry of Justice website when the statutory instrument is laid, but no specific guidance is considered necessary on their operation.

10. Impact

- 10.1 There is a minimal impact on business, charities or voluntary bodies.
- 10.2 In relation to the costs protection regime in Aarhus Convention claims, the amendments are technical in nature and clarify how the costs protection provisions are to operate rather than making any substantive change. There is minimal impact on the public sector, where it is a defendant in such cases and is not able to recover from the unsuccessful claimant its legal costs in full, due to the costs cap that will have been agreed at the start of the litigation process.
- 10.3 An Impact Assessment has therefore not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 These rules will form part of the CPR 1998 that are kept under review by the CPR Committee. In addition, the Ministry of Justice is committed to keeping the costs protection regime in Aarhus Convention claims under review, and will review it formally when it has sufficient data to do so. This is likely to be within 24 months of implementation.

13. Contact

- 13.1 Tajinder Bhamra at the Ministry of Justice, tajinder.bhamra1@justice.gov.uk, direct telephone line 020 3334 3161, can answer any queries regarding the instrument.