

EXPLANATORY MEMORANDUM TO
THE CRIMINAL JUSTICE AND COURTS ACT 2015 (DISAPPLICATION OF
SECTIONS 88 AND 89) REGULATIONS 2017

2017 No. 100

1. Introduction

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

2. Purpose of the instrument

- 2.1 These Regulations, made under section 90 of the Criminal Justice and Courts Act 2015 (“the 2015 Act”), provide that sections 88 and 89 of the 2015 Act (which provide for a regime for costs capping orders in judicial review proceedings generally) do not apply to judicial review proceedings to which the separate costs protection regime for Aarhus Convention claims apply.

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 Sections 88 and 89 of the 2015 Act provide for a codified set of rules to govern the ability of the High Court and the Court of the Appeal to make costs capping orders in judicial review proceedings. A costs capping order is an order that removes or limits the liability of a party to the proceedings (whether the applicant or the defendant or both) to pay another party’s costs incurred in bringing or defending a judicial review. Section 90 of the 2015 Act enables the Lord Chancellor by regulations to provide that sections 88 and 89 do not apply to proceedings, which, in the Lord Chancellor’s opinion, have as their subject an issue relating entirely or partly to the environment.

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 Sections 88 and 89 of the 2015 Act. Parliament legislated in sections 88 and 89 of the 2015 Act to codify the powers of the courts to make protective costs orders in judicial review proceedings (derived principally from the principles in *R (Corner House Research) v. Secretary of State for Trade and Industry* [2005] EWCA Civ 192) as powers to make ‘costs capping orders’. Costs capping orders limit or extinguish an applicant’s liability to pay another party’s costs irrespective of the outcome of the case in non-environmental claims in the High Court and Court of Appeal. Where a court makes a costs capping order limiting or removing the applicant’s liability to pay costs, the order will include a ‘cross-cap’ limiting or extinguishing the other party’s liability to pay the applicant’s costs should they lose. The court will consider the financial resources of the parties when determining whether to make a costs capping order and, if one is appropriate, what the terms of that order should be. These provisions came into force on 8 August 2016.
- 7.2 Parliament also legislated, in section 90 of the 2015 Act, to give the Lord Chancellor power to except from the new codified scheme judicial review proceedings which in the Lord Chancellor’s opinion relate to the environment, and this instrument is made under that power. The proceedings which are excepted are judicial review proceedings which are “Aarhus Convention claims”, and appeals against decisions in such claims, for which new rules in the Civil Procedure Rules provide a separate regime, outlined below. The regime which the new rules replace did not entail the making by the court of any order falling within the definition of a costs capping order, and so it was not previously necessary to exercise the power under section 90; but orders which do fall within that definition will be possible under the new regime outlined below, and so provision under section 90 to except cases falling within that new regime from the sections 88 and 89 regime is now necessary.
- 7.3 Costs Protection regime in Aarhus Convention claims The Aarhus Convention (implemented in EU law by a series of Directives) requires Contracting States to make sure that the costs of bringing certain environmental challenges are not prohibitively expensive. Section VII of Part 45 of the Civil Procedure Rules 1998 (as amended) makes provision for a special costs protection regime for such “Aarhus Convention claims”, and the Civil Procedure (Amendment) Rules 2017 replace it with a new Section VII, together with new provision in Part 52 covering appeals in such cases. The new provisions have been drafted with particular regard to the principles set out by the Court of Justice of the EU (CJEU) in its decisions in cases C-530/11 *Commission v. United Kingdom* and C260/11 *Edwards*. The new provisions, like those they replace, start with a cap on the liability of an unsuccessful claimant in such a case to pay the defendant’s costs of £5,000 or £10,000 (depending on whether the claimant is an individual or not), and cross-cap on an unsuccessful defendant’s liability to pay the claimant’s costs of £35,000; but they differ in the following main respects—
- a) extending beyond judicial reviews to include statutory reviews (in particular planning challenges);
 - b) allowing the court to vary the cap and cross-cap either up or down, provided always that any change does not render the cost of proceedings prohibitively

expensive for the claimant (and requiring the change if the cost would be prohibitively expensive for the claimant without it);

- c) requiring the court, when assessing whether proceedings would be prohibitively expensive if the change 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;
- d) making specific provision for appeals requiring the court to apply the same principles on appeal as at first instance (as required by the Commission v. United Kingdom case).

Consolidation

7.4 No further consolidation of the instrument is planned at present.

8. Consultation outcome

8.1 The Ministry of Justice consulted on changes in respect of environmental claims. The consultation ‘Costs Protection in Environmental Claims: proposals to revise the costs capping scheme for eligible environmental cases’ was published on 17 September and closed on 10 December 2015. The Ministry of Justice received 289 responses and published its response on 17 November 2016 (the consultation document and the Government response, together with an impact assessment, are at <https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/>).

8.2 The Ministry of Justice consulted on proposals on the financial information which applicants would have to provide when making an application for a costs capping order. These proposals were included in the consultation ‘Reform of Judicial Review: proposals for the provision and use of financial information’ was published on 21 July 2015 and closed on 15 September 2015. The Ministry of Justice received 39 responses and published its response on 7 July 2016 (the consultation and the Government response, together with an impact assessment, are at <https://consult.justice.gov.uk/digital-communications/reform-of-judicial-review-proposals-for-the-provis/>).

9. Guidance

9.1 The instrument will be available on the legislation.gov.uk but no specific guidance is consider necessary on their operation.

10. Impact

10.1 There is a minimal impact on business, charities or voluntary bodies.

10.2 There is minimal impact on the public sector.

10.3 A separate Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 The Ministry of Justice intends to review the impact and application of the costs protection regime in Aarhus Convention claims within 24 months of implementation when sufficient data should be available.

13. Contact

- 13.1 Tajinder Bhamra at the Ministry of Justice, Telephone: 020 3334 3161 or email: tajinder.bhamra@justice.gsi.gov.uk can answer any queries regarding the instrument.