NGOs call for changes to access to justice rules

By Isabella Kaminski, 9 June 2015 14:07 BST

The UK has already been forced to change its costs rules in environmental cases (photograph: Asparuh Stoyanov/123RF)

A coalition of NGOs is calling for changes to environmental legal costs to comply with the Aarhus Convention.

The UK's four umbrella conservation groups – Wildlife and Countryside Link, Scottish Environment Link, Wales Environment Link and Northern Ireland Environment Link – will present a statement to the Aarhus Convention task force on 16 June saying current rules fail to give appropriate access to environmental justice and are inconsistent throughout the country.

The UK has already been forced to make changes to its costs rules following a ruling by the Aarhus compliance committee in 2013.

But the Links say that, despite the welcome improvements, pursuing a judicial review can still be prohibitively expensive for individuals and small organisations.

This has not been helped by repeated attempts by the Ministry of Justice to limit access to judicial review.

The statement calls on Westminster and the devolved governments to publish information on the effectiveness of the new cost regimes and to make changes where they do not comply with the Aarhus Convention's access to justice requirements.

The Links are particularly concerned about the effects of fee caps, which make the risks of losing a case too high for many individuals and organisations. They can even make cases "too expensive to win", because successful parties cannot recover their full costs in more complex cases.

There is also confusion over what and who is eligible for costs protection, even after the Court of Justice criticised this aspect of the law.

They point out that community groups are often small and poorly funded but still attract the £10,000 cap in England, Wales and Northern Ireland. And in Scotland they are not eligible for automatic protection at all.

In England and Wales, the costs rules cover judicial review but not 'statutory reviews' – a discrepancy the Court of Appeal has pointed out.

And in Scotland they are limited to judicial and statutory review falling within the scope of the EU Public Participation Directive, which only includes environmental impact assessment and integrated pollution prevention and control cases. Petitioners in broader Aarhus cases must apply for a protective expenses order under common law, few of which have ever been granted.

Other concerns relate to appeals, with confusion as to whether costs caps encompass subsequent proceedings or whether a completely new assessment is required.

The statement also points out that court fees have risen substantially in recent years. Even though legal aid for environmental judicial review is theoretically available in England and Wales, financial help from the public purse is rarely given.

Carol Day, solicitor and legal consultant at RSPB who will present the statement in Geneva, told ENDS that larger NGOs have benefited from the revised costs rules – for example, RPSB in a case about culling seagulls – but smaller ones are still at a disadvantage.

She said it was important to raise these points at the start of the new parliamentary term. But if the rules are not amended, the Links will seriously consider bringing another case against the UK to the Aarhus compliance committee.

A further concern relates to the recently passed Criminal Justice and Courts Act. This contains a provision to allow the justice secretary (currently Michael Gove) to define what is meant by an environmental case in England and Wales.

Day said the current definition is quite broad, so any attempts to narrow it would be a concern. “If he does use that power we will be straight off to Aarhus.”