

COALITION FOR ACCESS TO JUSTICE FOR THE ENVIRONMENT

Ms Clare Symonds
Planning Democracy
2nd November 2011

Dear Ms Symonds,

Re: *Marco McGinty v The Scottish Ministers* [2011] CSOH 163 (Hunterston Judicial Review)

We write on behalf of the Coalition for Access to Justice for the Environment (CAJE) following the judgment of the Outer House, Court of Session in the above case on 4th October 2011.

As you may be aware, CAJE includes a number of leading environmental NGOs in the UK including WWF, Friends of the Earth, Environmental Law Foundation, Greenpeace, Capacity Global and the Royal Society for the Protection of Birds. CAJE's goal is ensure that access to justice in environmental matters is fair, equitable and not prohibitively expensive; that it is genuinely accessible to all; and that the justice system, so far as possible, works to protect the environment in accordance with the law.

CAJE was therefore concerned to learn that Mr McGinty's case was dismissed on two preliminary issues - 'title and interest to sue' and '*mora*, taciturnity and acquiescence' (or 'delay'), both of which are covered by the access to justice provisions of the UNECE Aarhus Convention. We also remain concerned about the terms of the protective and restrictive expenses order granted by Lady Dorrian in 2010 in respect of these proceedings, which caps Mr McGinty's liability for the legal costs of the Scottish Ministers to £30,000. We outline these concerns below.

In relation to title and interest, Lord Brailsford concluded that although Mr McGinty may be able to establish a title to sue, he could not establish an interest to sue (i.e. he did not have a "real and legitimate" or "real and practical" interest to bring the proceedings).

We note, with regret, that Lord Brailsford's Opinion was delivered just over a week before the judgment of the UK Supreme Court in *AXA General Insurance Limited and others v The Lord Advocate and others* [2011] UKSC 46. In this case, the Supreme Court essentially held that the private law rule of 'title and interest' has no place in judicial review procedures in the field of public law. Both Lord Hope and Lord Reed were of the view that the appropriate approach to 'standing' or the right to bring proceedings before the court must not be based on the concept of rights, but on the concept of interests, thus bringing the test in line with that applied by the courts in England and Wales - which enables representative organizations, such as community, campaigning or welfare groups to take proceedings in the public or wider interest. Such an approach also respects the requirements of Article 9(2) of the Aarhus Convention, which recognizes that NGOs promoting environmental protection, in particular, have a crucial role in challenging the substantive and procedural legality of decisions, acts or omissions that may affect the environment in certain circumstances.

With respect to *mora*, Lord Brailsford was of the view that the Scottish Ministers had taken the necessary steps to make Mr McGinty aware of the National Planning Framework for Scotland 2 ("NPF2"), which made reference to a "national development at Hunterston". As such, Mr McGinty had filed his petition too late. Lord Brailsford's Opinion raises two inter-linking concerns – firstly, that the time limits within which a petition must be lodged are not always clear to those seeking to rely on review procedures and secondly, that the Opinion reflects a strikingly narrow interpretation of consultation and provisions of the Aarhus Convention concerned with the public's engagement in decision-making processes affecting the environment.

CAJE is a Coalition of the following organisations



With reference to the former, we would draw your attention to the findings of the Aarhus Convention Compliance Committee in respect of the UK (adopted in February 2011). In Communication C33¹, the Committee concluded that in the interests of fairness and legal certainty it is necessary to: (i) set a clear minimum time limit within which a claim should be brought; and (ii) time limits should start to run from the date on which the claimant knew, or ought to have known, of the act, or omission, at stake. In this case, we understand that Mr McGinty was not aware of the existence of the NPF2 until July 2009 when he attended a meeting in his home-town of Largs. As soon as he was aware of it, and the implications of a 'national development at Hunterston' included within it, Mr McGinty applied for judicial review. In light of the findings of the Aarhus Convention Compliance Committee, we are therefore concerned that Lord Brailsford held that Mr McGinty had delayed in submitting his petition for judicial review.

Secondly, given the strategic importance of the NPF2 and the ongoing and high-profile debate about Hunterston, CAJE would have hoped the government would have embarked on a serious consultation process with ample opportunity for public engagement at all levels and via a range of media. Instead, it would appear that it simply chose to advertise the start of the consultation process for the NPF2 on the website of the Edinburgh Gazette. Such a decision is surprising in light of the UK's ratification of the Aarhus Convention in 2005.

Finally, CAJE is also aware that in 2009 Mr McGinty also applied for a protective and restricted expenses order limiting the amount of the respondents' expenses for which he could be found liable in the event that the petition was unsuccessful. Following the hearing on 28th January 2010, Lady Dorrian made an order restricting Mr McGinty's potential liability in expenses to £30,000 on the basis that the issues raised in the petition were of general public importance, that the public interest required determination of the matters at issue, that the applicant had no private interest in the outcome of the case and that the resolution of the proceedings should not be prevented 'by reason of lack of funds on the part of the petitioner'.

Even by UK standards, this sum is extraordinarily high. The respondents were the Scottish Ministers. At the time, Mr McGinty, was unemployed and in receipt of jobseekers allowance. He was refused Legal Aid (which was also refused on appeal). The litigation was therefore funded by donated funds, raising little short of £15,000 of which only a small balance remained following the conclusion of the hearing regarding the protective and restrictive expenses order.

At the hearing in January 2010, the respondents' legal costs were estimated to be approximately £90,000 and Mr McGinty's legal costs were thought to be in the region of £80,000. On these figures, it would take the petitioner approximately ten years to repay his capped liability, assuming that he spends nothing on food or subsistence during that decade - and that is before he has even considered the question of his own legal costs.

CAJE brought these concerns to the attention of the Aarhus Convention Compliance Committee in a letter dated 20th May 2010². The Committee's findings concluded, on the basis of a wealth of information before it including this case, that the UK has not adequately implemented its obligation in Article 9(4) to ensure that review procedures subject to Article 9 are not prohibitively expensive³. The UK has acknowledged the Committee's findings and has (in England and Wales at least) embarked on a series of consultation exercises to invite views on potential measures for bringing it into compliance with the provisions of the Convention. Whether these proposals will be sufficient to address the concerns of the Compliance

¹ Available on the UNECE website at <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html>

² Available on the UNECE website at <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html>

³ See paragraph 136 of the Committee's adopted findings at <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece.mp.pp.c.1.2010.6.add.3.edited.ae.clean.pdf>

Committee - or indeed, the European Commission, which referred the UK to the Court of Justice of the European Union on 6th April 2011 regarding the lack of clear rules for granting Protective Costs Orders (PCOs) and their discretionary nature – remains to be seen. However, the proposals outlined in the current consultation in England and Wales regarding Protective Costs Orders suggest that the terms of the protective and restrictive expenses order granted in respect of Mr McGinty would unquestionably breach the requirement of Article 9(4) of the Aarhus Convention for costs to be ‘not prohibitively expensive’.

As you may be aware, WWF, Friends of the Earth and the Royal Society for the Protection of Birds have already made financial contributions to the legal challenge. We believe that this case raises issues of wide public interest and, in light of the findings of the Aarhus Convention Compliance Committee and the Supreme Court in *Axa*, it is most unfortunate that Mr McGinty now bears the brunt of the financial liability for the legal costs of the Scottish Ministers. As such, we give our express permission for this letter to be used for the purpose of explaining our view of the decision including Mr McGinty’s liability for the legal costs in bringing this challenge and wish Planning Democracy every success in their ongoing activities on this issue.

Yours sincerely,

Carol Day, Solicitor, **WWF-UK**

Rosie Sutherland, Legal Adviser, the **RSPB**

Kate Harrison, Solicitor, **Greenpeace**

Tom Brenan, Legal & Policy Officer, the **Environmental Law Foundation**

Gita Parihar, Solicitor and Head of the Rights and Justice Centre, **Friends of the Earth**