September 2014

Dear Margaret,

Petition 1372 (access to justice in environmental matters)

On 28 July 2014, you wrote to the Scottish Government requesting an up to date statement from the Scottish Government in relation to petition 1372. Our response is below.

General remarks

Before turning to the specific points raised by the Committee, I must stress that the Scottish Government takes seriously its compliance with European and other international obligations. The requirements of the Aarhus Convention so far as set out in binding European legislation have been transposed into Scots law by a range of SSIs.

Whether the Scottish Government considers that it complies with the Aarhus Convention in the area of Access to Justice in Environmental Matters

The Scottish Government complies with the Aarhus Convention. The Scottish Government is committed to a comprehensive programme of civil courts reform. The implementation of Lord Gill's Scottish Civil Courts Review (SCCR) through the Courts Reform (Scotland) Bill (the Bill) currently before Parliament, will pave the way for swifter handling and disposal of cases, including public interest cases such as environmental cases.

In particular, section 85 of the Bill makes provision that will speed up judicial review by introducing a time limit of 3 months which may be extended at the Court’s discretion. This time limit will replace mora, taciturnity, and acquiescence which currently applies bringing more certainty to the process and lessening the scope for prolonged legal argument. In addition, this section introduces a permission stage which will filter out unarguable cases, thus saving the petitioner the expense of continuing a case that has no prospect of success.
Evidence to support the view that the Scottish Government complies with the Aarhus Convention in the area of Access to Justice in Environmental Matters

The access to justice obligations under the Aarhus Convention are met by the availability of judicial review proceedings, which may be brought in the Court of Session. Since 25 March 2013, the Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 has been in force. Individuals or environmental pressure groups bringing an environmental case against a public body have been able to apply for a protective expenses order, limiting their liability for the other side's costs to £5,000. The order will also cap the public body's liability for the applicant's expenses to £30,000. The court "must" grant the order if it is satisfied that it would be "prohibitively expensive" for the applicant to bring the case without one. It will only be able to refuse to grant the order if the applicant does not have "sufficient interest" in the case, or there is "no real prospect of success".

Civil legal aid is available in relation to environmental issues, provided that statutory eligibility criteria are met.

The petition raises the issue of "title and interest". When the petition was lodged in 2010, a petitioner for judicial review was required to demonstrate both title and interest to sue. The SCCR considered that the law on standing was too restrictive and that the separate tests of title and interest should be replaced by a single test—whether the petitioner has demonstrated a sufficient interest in the subject matter of the proceedings. Since the Supreme Court ruling in Axa General Insurance Limited and others v Lord Advocate and others in 2011, this sufficient interest test has applied to petitions for judicial review.

Furthermore, no legal challenge against the Scottish Government made on the grounds of non-compliance with the Aarhus Convention has been successful.

I hope this is of assistance but I will of course be happy to provide the Committee with further details if so requested.

Kenny MacAskill