

COALITION FOR ACCESS TO JUSTICE FOR THE ENVIRONMENT

Ms Aphrodite Smagadi,
Secretary, Aarhus Convention Compliance Committee,
United Nations Economic Commission for Europe,
Environment, Housing and Land Management Division,
Bureau 348,
Palais des Nations,
CH-1211 Geneva 10,
Switzerland.

9th February 2012

Dear Ms Smagadi,

Re: Follow-up on communications ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33

We write to update the Committee on the UK's progress with regard to the above Communications.

In October 2011, the Ministry of Justice published a consultation paper: "**Costs Protection for Litigants in Environmental Judicial Review Claims: Outline proposals for a costs capping scheme for cases which fall within the Aarhus Convention**", with a deadline for comments of 18th January 2012. We attach a copy of our response.

We were pleased to see the UK pressing ahead with proposals in advance of a hearing in the CJEU in respect of: (i) the EU's infraction proceedings against the UK on this issue; and (ii) a reference from the Supreme Court in respect of *Edwards*, in which several pertinent questions on the subject of prohibitive expense arise. We understand these cases may be heard concurrently in the CJEU later in 2012.

CAJE submitted detailed comments on the proposals to the Ministry of Justice. On first reading, the proposals appeared a significant step forward. However, on closer inspection we were concerned to note that the proposals will not adequately address the problem of prohibitive expense on the basis that:

- the proposed cap on the claimant's liability for adverse costs of £5,000 remains prohibitively expensive for the vast majority of individuals and civil society groups;
- furthermore, when combined with the proposed cross-cap of £30,000 renders an unsuccessful claimant liable for costs totalling £35,000. This sum is clearly prohibitively expensive for all but the wealthiest claimants;
- both figures are subject to challenge on the basis of information in the public domain, thus prohibiting certainty and risking continuing satellite litigation;
- no provision is made for injunctive relief; and
- no provision is made for statutory appeals or private civil law cases.

The Committee may wish to note that consultation papers have also recently been published in Northern Ireland and Scotland.

CAJE is a Coalition of the following organisations



The Department of Justice (Northern Ireland) paper “**Costs Protection for Litigants in Environmental Judicial Review Applications: Outline Proposals to Limit Costs for Judicial Review Applications which fall under the Aarhus Convention**” was issued in December 2011 and closes on 14th March 2012. The Scottish consultation paper “**Legal Challenges to Decisions by Public Authorities under the Public Participation Directive 2003/35/EC: A Consultation**” was issued in January 2012 and closes on 3rd April 2012. Both papers can be accessed via the links below.

www.dojni.gov.uk/index/public-consultations/current-consultations/costs-protection-for-litigants-in-environmental-judicial-review-applications.htm

<http://www.scotland.gov.uk/Publications/2012/01/09123750/0>

The proposals in both papers are broadly similar to those consulted upon by the Ministry of Justice (essentially a £5,000 cap on adverse liability with a £30,000 cross-cap and the ability to challenge the figures on the basis of information in the public domain). However, there are one or two key differences:

- In Northern Ireland, the consultation paper includes proposals in relation to interim relief. The proposals are identical to those consulted on by the Ministry of Justice in late 2010 (but in respect of which no recommendations have subsequently been made in England and Wales); and
- In Scotland, the paper restricts the scope of its proposals to cases falling within the ambit of the PPD and ‘mixed cases’. It will therefore not have the capacity to bring Scotland (and hence the UK) into compliance with the Convention irrespective of any measures subsequently implemented.

CAJE is in the process of preparing responses to these consultation papers and will send them to the Committee in due course.

Against this background, our members are still routinely served with high costs estimates at an early stage in the legal proceedings. Whether such estimates are designed to dissuade claimants from continuing with legal action (or this is simply an unintended consequence) is a moot point. In one recent (and on-going case) Greenpeace reports that the defendant, in this case the Secretary of State for Energy and Climate Change, is pursuing a costs order in the sum of just under £12,000 (to cover the costs of two QC’s and a junior) simply to respond to an Acknowledgement of Service. Greenpeace is arguing that an award in the order of £1,500 would more appropriately reflect the requirements of the Aarhus Convention.

Please do not hesitate to contact us if you require information on any of the points made in this letter or the attached response.

Yours sincerely,



Carol Day
Solicitor
WWF-UK (on behalf of CAJE)