

COALITION FOR ACCESS TO JUSTICE FOR THE ENVIRONMENT

Ms Aphrodite Smagadi,
Secretary to the Aarhus Convention Compliance Committee,
United Nations Economic Commission for Europe,
Environment and Human Settlement Division,
Room 332, Palais de Nations,
CH-1211 Geneva 10,
Switzerland

19th June 2012

Dear Ms Smagadi,

Re: Decision IV/9i on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Aarhus Convention, as adopted by the Meeting of the Parties to the Aarhus Convention at its Fourth Session

Thank you for sending CAJE a copy of the letter from Ms Barbara Anning (Aarhus Focal Point at Defra) dated 15th June 2012 updating the Compliance Committee on the UK's progress in addressing the aforementioned Decision of the Committee.

We note that Defra's letter refers to the consultation paper issued in England and Wales in November 2011 (*Cost protection for Litigants in Environmental Judicial Review Claims*). As you will recall, CAJE forwarded responses to this consultation paper (and parallel consultations in Northern Ireland and Scotland) to the Compliance Committee in emails dated 9th February and 3rd April 2012 respectively. These responses confirmed that while CAJE welcomes the UK's efforts to address the findings of the Compliance Committee, we still have a number of serious concerns about the proposals. These include the following:

- (1) Although in England, Wales and Northern Ireland the proposed rules would apply to cases falling under the Aarhus Convention, in Scotland the proposals are confined to matters falling within the ambit of the EC Public Participation Directive (PPD);
- (2) While the Protective Costs Order (PCO) would limit the liability of the claimant to pay the defendant's costs to £5,000, this figure remains too high for many individuals and civil society groups (this concern is particularly acute in Scotland). Furthermore, the £5,000 adverse costs liability should not be viewed alone – it operates *in addition* to the requirement to cover one's own legal costs, which are estimated by the Ministry of Justice to be in the region of £30,000 for an average case. This makes the total costs liability in the region of £35,000. which remains a prohibitively expensive sum for the vast majority of citizens and environmental groups;

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- (3) The PCO would also limit the liability of the defendant to pay the claimant's costs up to £30,000. A cap on the costs recoverable by the defendant has no basis on the Convention, which serves to limit costs from being prohibitively expensive from the point of view of the *claimant*, not the defendant;
- (4) The £5,000 cap and the £30,000 cross cap are subject to challenge on the basis of publicly available information. This eliminates certainty and increases the likelihood of disproportionate satellite litigation; and
- (5) The proposals say nothing about the need to address the requirement to provide a cross-undertaking in damages in order to obtain interim relief.

CAJE remains of the view that the simplest and clearest way to comply with the requirements of Article 9(4) of the Aarhus Convention would be to introduce a system of Qualified One-Way Costs Shifting (QuOCS) as advocated by Lord Justice Jackson in his civil litigation review. However, if the UK government remains committed to pursuing a codification of the PCO regime, the following amendments are required as a minimum to ensure the UK is Aarhus-compliant:

- (1) The proposals should apply to all cases falling within the scope of the Convention, not simply those falling within the scope of the PPD. Furthermore, the proposals should also be extended beyond judicial review to include environmental s.288 (and other statutory) challenges. As the Convention also encompasses private law environmental cases the government must make separate provision for them;
- (2) The claimant's liability for adverse costs should be reduced to just above the maximum contribution an individual is required to make when publicly funded (i.e. between £2,000-3,000). This would ensure access to justice for the 'ordinary' individual/group on an objective basis;
- (3) There should be no explicit cross-cap. Instead, successful claimant lawyers should be entitled to recover their fees at ordinary commercial rates on assessment;
- (4) Neither the cap nor the cross cap (if the latter is retained) should be subject to challenge on the basis of publicly available information. The corollary of points (2) and (3) is that the costs regime would be simple and certain;
- (5) A decision as to whether a PCO will be granted must be made at the earliest opportunity, i.e. pre-permission. There should be no costs in favour of third parties and an absolute limit (lower than or equal to the proposed cap) on what the defendant can recover;
- (6) The level of the cap should not be increased if there is one (or even two) appeal(s). If there is a cross-cap (aimed to represent a reasonable level for the claimant's costs), this would need to increase accordingly to cover the work involved in the appeal(s);

- (7) The PCO should include a provision to the effect that there will be no order for costs in favour of an interested party; and
- (8) The 'chilling effect' of the requirement to provide a cross-undertaking in damages in order to obtain interim relief is linked to the question of prohibitive expense. The two must be viewed together when considering compliance with the Aarhus Convention.

We would respectfully ask the Committee to bear these comments in mind when considering the UK's response in due course.

Finally, as mentioned during the Fifth Meeting of the Access to Justice Task Force in Geneva last week, the Committee may wish to note that the *Edwards* reference from the UK Supreme Court will be heard in the CJEU on 13th September 2012. We understand the UK infraction proceedings will not be heard on the same day as Ireland and Denmark have intervened in the proceedings and this has delayed matters somewhat. I will be attending the hearing on behalf of CAJE and would be very happy to update the Committee before the September meeting if that would be of interest.

With best wishes.

Yours sincerely,

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