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Compliance Committee
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Attn: Fiona Marshall

Your ref: Decision IV/9i of the Meeting of the Parties
Our ref. PS/ACCC 23

By e-mail

21 March 2014

Dear Sirs

Draft report on implementation of decision IV/9i by the UK

Thank you for your letter of 28 February 2014 in relation to the above.

We agree with the contents of the draft report and support the conclusions and recommendations. We make the following specific comments.

1) Review of substantive legality
In the light of the Court of Appeal decision in *Evans v Secretary of State* [2013] and no further development of the procedural rules, the UK still appears to be failing to provide judicial procedures to challenge the substantive legality of decisions, acts or omissions subject to the provisions of Article 6 of the Convention. We note that this concern is raised at para. 30 of the report.

2) Failure to ensure that private nuisance provisions fall within the Convention
There is continuing concern that that the UK is in non-compliance with the Convention by failing to ensure that private nuisance proceedings are within the scope of the Convention. This is of particular concern when the UK had previously acknowledged in relation to ACCC/23 that private nuisance was a procedure capable of being so. Further, we are concerned that since Decision IV/9i, the UK has implemented legislative contrary to Article 9(5) placing additional barriers to access to justice by the enactment of s. 46 of LASPO Act 2012 to prevent the recoverability of insurance premiums that gave financial protection to claimants that could otherwise not afford the risk of pursuing proceedings in private nuisance proceedings by application of the 'loser pays' rule. In effect, it appears to have now excluded private nuisance from the scope of the Convention without any justification.

In the circumstances, we welcome the early consideration of ACCC C-85 & C-86 which raises this point as a concern and we ask that any conclusions and recommendations on C-85 and C-86 may be determined to inform the next Meeting of the Parties in June 2014.

3) Costs incurred in pre-permission and satellite proceedings at first instance
We note the concerns expressed at para. 46 of the draft report about uncertainty prior to the determination of any protective costs order (the mechanism that the UK relies upon to seek to comply with the Convention. This concern is very real and we cite three recent court orders on costs below where there appears to be a complete failure by the court to have any regard whatsoever to the application of the Convention, notwithstanding that this has been expressly drawn to the attention of the court by the claimant seeking costs protection. Our concern is that judges either ignore or fail to understand the wide scope and application of the Convention and that urgent training and awareness-raising of the Convention is necessary.

1) *R (Bernard) v East Sussex County Council,* CO/560/13)
In this case the claimant challenged the unlawful construction of a road on a valued landscape area close to the Battle of Hastings. The site was recognised as having considerable environmental harm, caused harm to a likely internationally important heritage site and was noted as having low to medium value for money by the Ministry for Transport. The claimant properly withdrew a challenge to the decision following a series of post-judgment decisions by the defendant and a review of its position on non-material amendments. The claimant had sought a PCO limiting his liability to £2,000. The conclusion of the claim the defendant council claimed over £27,000 costs.

In an order of 31.1.14, the Court awarded the defendant its costs, although in error calculated these to be £17,198. The costs order is subject to appeal on the grounds that the judge failed to have regard to the Aarhus Convention and/or the EIA Directive 2011/92/EU.

2) *Eley v Secretary of State,* CO/4097/10
The claimant challenged a planning permission to develop a 2nd phase of a housing development in Watford, Hertfordshire to the rear of her home. She was concerned about the adverse environmental effects of the proposal. The Claimant had applied for a PCO with a costs limit of nil. At hearing on 14.12.10, the Court granted a PCO limiting the claimant's liability to £10,000. This sum was prohibitively expensive for the claimant and she reasonably withdrew the claim.

In a costs order of 17.2.14, the court ordered that the Claimant pay the Defendant's costs of £8,597. This sum, comparable to the PCO, is prohibitively expensive. The costs order is subject to appeal.

3) *Thornhill v Cambridge City Council,* CO/4097/10
In *Thornhill* the claimant challenged a permission to change the use of land associated with a scrap-yard for car hire purposes, the claimant's concern being that the operations were increase the noise emanating from the site particularly at week-ends. The Court dismissed an application for permission in December 2013 and the claimant renewed her application to an oral hearing.

The Court failed to renew the matter because the renewal application had not recorded the correct claim no. on the renewal application. The court then assessed the claim for costs for a summary grounds of defence at £7,474. The claimant has applied to re-open the claim and renew the application to an oral hearing and has recorded with the court that, in any event, the Master considering the question of costs failed to have regard to the Convention.

In summary, in each of the above cases the UK has failed to ensure that the legal proceedings were not prohibitively expense at the outset of the claim and pre-permission costs have resulted in being prohibitively expensive. The cases show in clear terms why a discretionary basis for costs protection relying upon PCOs is inadequate for compliance with the Convention, notwithstanding the proposed purpose of CPR 45.41-44.

4) Level of costs cap

We support the Committee's view at para. 47 that the maximum liability of £5,000 and £10,000 for claimant's costs liability is likely to be prohibitively expensive for many claimants. As a matter of course we seek a PCO costs cap that is affordable see e.g. the case studies above. There is some recognition of this, although the provisions remain wholly uncertain and at the discretion of the judge considering the PCO application.

5) Reliance upon legal aid

We support the Committee's view that reliance upon legal aid as a mechanism for compliance with the Aarhus Convention does not satisfy the obligation to provide procedures that are not prohibitively expensive. The recent revisions to the financial test and the limitation of cases that can be covered (e.g. borderline cases) results in the legal aid system being not fit for purpose. It often provides little support to those who need this.

Finally, we refer to the recent ruling by the European Court of Justice in Case C-530/11 *Commission v UK* [2014] in which the UK has been found to be non-compliant with the Public Participation Directive 2003/35/EC in relation to prohibitive expense and cross-undertakings. *Commission v UK* adopted many of the findings of the earlier case of Case C-260/11 *Edwards v Environment Agency* [2013]. In summary, the CJEU held that the UK could rely upon PCOs in environmental cases providing they are certain from the outset adding that the current UK costs regime was not certain or reasonably predictable (para 44). It added that any system provided must not be prohibitively expensive whether the assessment of what was prohibitive was on either an individual's circumstances or on an objective basis (para 47).

The CJEU also noted that whether a claim is prohibitively expensive should take into account all the costs liability relating to a claim including a claimant's own costs (para 44). We attach a copy of *Commission v UK* for your reference.

We trust that the above assists and look forward to hearing from the Committee in due course.

Yours faithfully

Richard Buxton

cc Defra (Ahmed Azam)