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Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
Palais des Nations, Room 429-2
CH-1211 GENEVA 10

By email to: aarhus.compliance@unece.org

21 March 2014

Dear Ms Marshall

Draft report of the Aarhus Convention Compliance Committee on the implementation of decision IV/9i of the Meeting of the Parties concerning compliance by the United Kingdom

I write on behalf of ClientEarth, the communicant in communication ACCC/C/2008/33.

Thank you for your letter of 28 February 2014 enclosing the above draft report (the "Report").

We welcome and fully agree with the Committee's findings that despite some progress, the UK has not yet taken sufficient steps to ensure compliance with Article 9 of the Convention.

However, we are deeply concerned that the Committee appears to be unaware of current proposals to reform the laws governing judicial review in the UK which will have a major negative effect on access to justice in public interest cases, including environmental cases falling within the scope of the Convention.

The Ministry of Justice's draft proposals for further reforms to judicial review were published for consultation in September 2013.[1] The final proposals[2] are now being implemented through the Criminal Justice and Courts Bill (the "Bill"), which was presented to Parliament on 5 February 2014.[3] We were therefore surprised that the UK's 2014 National Implementation Report, which was submitted in December 2013,[4] contains very little information about these proposed reforms. This is despite the fact that ClientEarth highlighted these omissions in its response to the draft National Implementation Report and specifically requested that this be remedied. I attach ClientEarth's consultation response for the Committee's benefit.

We trust that the UK authorities have since provided the Committee with a full explanation of the reforms included in the Bill but assume that this was provided too late to be incorporated into the Report. However, given that the reforms mark a drastic curtailment of rights of access to justice that will take the UK even further away from compliance with the Convention, we would urge the Committee to give full consideration to the Bill within the final Report.

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264091/8703.pdf
[2] https://www.gov.uk/government/publications/judicial-review-proposals-for-further-reform-the-government-response
[3] http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0169/14169.pdf
[4] http://www.unece.org/env/pp/reports_trc_implementation_2014.html

For the purpose of clarity, we present our comments on the UK's current implementation of the Convention in section A, before addressing the impact of the Bill on future compliance in Section B.

A. Current implementation of Article 9 of the Aarhus Convention

The Report provides an excellent and accurate summary of the UK's current non-compliance with Article 9 of the Convention (notwithstanding our comments on the effects of the Bill set out in Section B).

We also have two additional points which are relevant to the UK's non-compliance with Article 9.

Discrimination

The UK's National Implementation Report describes current proposals to limit access to legal aid to those who are able to satisfy a residency test, which if adopted, would clearly discriminate against non-residents. This would in our view clearly breach the UK's obligations under Article 3, paragraph 4 of the Convention, which provides that "the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile…"

Increases to court fees

The UK's 2014 National Implementation Report contains details of the court fees for bringing first instance judicial review proceedings. However it does not give details of the fees payable in the Court of Appeal and Supreme Court. The requirement that judicial proceedings must not be prohibitively expensive applies equally to first instance proceedings and appeals.[5] Fees payable in the Supreme Court are particularly high, with a £1,000 fee for applying for permission to appeal, a further £800 on filing intention to proceed, and £4,820 for filing statement of facts and essential documents. While these fees can be waived in certain cases, this is at the discretion of the Court and therefore does not give parties sufficient certainty at the outset.

Further, the National Implementation Report fails to give details of recently proposed increases to fees, namely the increase in the fee for applying for permission from £60 to £235, the increase in the continuation fee from £215 to £235 and the introduction of a new fee for an oral renewal hearing.

Commission v UK (Case C-530/11)

The Report should be amended in light of the European Court of Justice's judgment in the above case, which was delivered on 13 February 2014.[6] In particular, the judgment supports the

[5] See Case C-260/11 *R (Edwards and Pallikaropoulos) v Environment Agency and others* [2013] ECR I-0000.

[6] http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=147843&occ=first&dir=&cid=33384

Committee's finding that reliance on judicial discretion to ensure that cross-undertakings in damages are not prohibitively expensive does not provide sufficient legal certainty.[7]

By the same logic, the reliance on judicial discretion for ensuring that costs in appeals are not prohibitively expensive does not provide sufficient legal certainty. The current system whereby the current fixed costs regime only applies to first instance proceedings should be amended accordingly.

The judgment also supports the Committee's findings that the imposition of cross-caps has the potential to make access to justice prohibitively expensive in complex cases. While the Court ruled that the Commission had not provided sufficient evidence to substantiate this claim , it found that the Commission's case in this regard was nonetheless "essentially well-founded."[8]

B. Proposals for further reform

Procedural defects

The reforms aim to restrict the availability of judicial review for procedural defects. Clause 50 of the Bill provides that relief must be refused if it *"appears to the court highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred"*.

No exception is made for cases covered by the Aarhus Convention. This is in clear breach of the requirement under Article 9(4) that procedures shall provide adequate and effective remedies and demonstrates a fundamental disregard for the importance of procedural rights such as the right to access environmental information and participate in decisions affecting the environment. Not only does the Bill deny the claimant an effective remedy, but it denies them any remedy at all.

Further, clause 50(2) would impose a requirement that the issue of whether the outcome would have been substantially different must be considered by the court when determining whether to grant permission for the claim to proceed to judicial review. This would mean that not only could claimants be denied an effective remedy even where they had proved that the public authority had failed to give effect to procedural rights, but that they might even be denied access to the courts in the first place. This is also likely to lead to longer, more complex and expensive permission hearings, as the claimant will need to prevent evidence to the permission judge as to the substantive effects of procedural defects.

These provisions are particularly worrying given the limited scope for substantive review in environmental cases, as was highlighted in communication ACCC/C/2008/33. The majority of environmental judicial reviews are therefore by necessity mainly of a procedural nature and therefore vulnerable to being struck out under a "no difference" rule.

[7] At 69-71.
[8] At 63.

Financial incentives

The main thrust of the Government's reforms is to limit access to the courts by increasing the financial risk borne by claimants in judicial review cases. A full analysis of the impacts of these reforms on access to justice in environmental matters will be necessary, but the following is a very brief summary of our main concerns:

Legal aid

The Bill will prevent the Legal Aid service from paying claimant's lawyers where permission is refused. This will make it very difficult for lawyers to represent legally aided claimants and specialist environmental and public interest firms could even go out of business as a result.

Costs at oral permission hearings

As the law currently stands, a claimant who is refused permission for judicial review on a written application is entitled to renew the application at a short oral hearing. The defendant's lawyers are not required to appear at this hearing and if they do, are not entitled to recover their costs. The Bill will change this position so that the defendant's legal costs are recoverable if the oral renewal is unsuccessful. This places even greater financial risks on claimants at the permission stage, where PCOs are unavailable other than for environmental judicial reviews (see below).

Protective costs orders (PCOs)

Clauses 54 and 55 of the Bill codify current case law on the use of PCOs in non-environmental cases. It is clear from the Government's final proposals that the intention is that these reforms only apply to non-environmental cases. However:

- Clause 56 provides that *"The Lord Chancellor may by regulations provide that sections 54 and 55 do not apply in relation to judicial review proceedings which, in the Lord Chancellor's opinion, have as their subject an issue relating entirely or partly to the environment."* This provision would seem to prevent courts awarding PCOs in environmental cases unless and until such regulations are adopted. No clear indication has been given as to if and when they will.

- As the Committee correctly stated in the Report, the current PCO rules only apply to environmental judicial review claims. It is clear from Clause 56 of the Bill that this will continue to be the case. Non judicial review cases such as statutory review and private law environmental claims will therefore be affected by the provisions of Clause 54 and 55.

- As drafted, the Bill would prevent courts from making a PCO covering the permission stage. Pre-permission costs can be significant, particularly in claims involving private parties.

- Further, the Bill will make it harder to prove that a case is being brought in the public interest. This is particularly difficult for private law claims, which by their nature will apply to a limited class of people.

- These reforms must be considered alongside previous rule changes which prohibit claimants from recovering success fees or insurance premiums from the defendant, thus removing the main method of financing such claims.

- The cumulative effect of these changes will be that only very wealthy individuals or private companies will be able to bring challenges to bring private environmental cases.

- Finally, the Government's final proposals contain a worrying suggestion that the UK is considering further narrowing the scope of the rules on PCOs by limiting their scope to those cases governed by the Public Participation Directive.[9]

C. Conclusion

While some progress has been made in certain areas in the past twelve months, this has not gone nearly far enough and has been offset by other reforms which have worsened access to justice conditions. As such the UK remains in breach of Article 9 of the Aarhus Convention, over three years after the Compliance Committee's finding of non-compliance.

Rather than seeking to correct these problems and ensure that access to the courts in environmental cases is affordable, the Bill seeks to make access to justice even more expensive and undermine the procedural guarantees enshrined in the Convention. We would therefore urge the Commission to give full consideration to the Bill in its final report. We would be happy to meet with the Committee to discuss our concerns in more detail should this be of assistance.

Yours sincerely,

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[9] See Government response at paras 59 and 85.