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Dear Ms Morgan

Subject: Draft Aarhus National Implementation Report for the UK

I write on behalf of ClientEarth in response to the draft Aarhus National Implementation Report (the "Report"). ClientEarth is a not-for-profit organisation of environmental lawyers and the communicant in Communication ACCC/C/2008/33.

We are concerned that the Report does not give a full and accurate account of the current state of the UK's implementation of the Aarhus Convention because it fails to address several aspects of the current system which continue to breach Article 9. Further, it inexplicably fails to mention the Government's most recent proposals to reform judicial review. If adopted, these proposals would increase the costs risk borne by claimants in environmental cases, apply more restrictive rules on standing and undermine the procedural rights guaranteed by the Aarhus Convention.

Our comments focus principally on the UK's on-going failure to implement Article 9 of the Convention, as this was the subject of our communication and the subsequent finding of non-compliance against the UK. However, we fully endorse the comments submitted by the Wildlife and Countryside LINK in relation to other aspects of the Report. In particular, we share the concerns highlighted in their response with regard to the high number of consultations. The sheer number of consultations, coupled with an alarming trend towards shortened consultation periods, is preventing effective public participation taking place. The Report should assess the overall impact of these factors on the UK's implementation of the second pillar of the Convention.

A. Current implementation of Article 9 of the Aarhus Convention

Standing

The Report correctly describes the wide interpretation to the test of "sufficient interest" that is currently applied by courts in England and Wales and Northern Ireland.[1] However, it fails to mention the current proposals to tighten the rules on standing on judicial review.

While the proposals recognise that EU law and the Aarhus Convention mean that environmental cases would need to be approached differently, they suggest that standing for individuals might be limited to where the individual can demonstrate that they have both a

[1] Paras 93-95.

genuine interest in the environmental matter at issue and that they have sufficient knowledge to be able to act on behalf of the public. This would mark a significant shift in the approach to standing in the UK and it is therefore important that the Compliance Committee is informed of these proposals.

Please therefore amend the Report to include a description of the proposed reforms to the rules on standing together with an explanation of how they would ensure compliance with the Aarhus Convention, including the requirement that rules on standing must be consistent with the objective of giving the public concerned wide access to justice.

Discrimination

The Report states that "the UK treats any member of the public equally, regardless of nationality, citizenship and domicile. Any legal person has equal access to the courts."[2] However, in the next sentence it 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 is blatantly self-contradictory. Further, the proposed residency test 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…"

Please amend the Report by including a full explanation of how the proposed residency test would comply with Article 3(4).

Fees

The Report contains details of the court fees for bringing first instance judicial review proceedings.[3]

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.[4] Fees payable in the Supreme Court are particularly high, with a £1,000 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 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.

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[2] Para 96.
[3] Paras 97-99.
[4] Case C-260/11 *R (Edwards and Pallikaropoulos) v Environment Agency and others* [2013] ECR I-0000.

Please update the Report to reflect the recent and proposed increases in fees.

Protective costs orders

The Report sets out details of the codification of the case law on Protective Costs Orders (PCOs) in England and Wales and Scotland.[5] While this has improved clarity and transparency, the rules do not ensure that access to the courts is not prohibitively expensive in the UK.

The codification of PCOs in England and Wales only applies to environmental judicial reviews. The Report states that "PCOs based on the case law continue to be available for other types of environmental challenge within the scope of the Convention." However, the award of PCOs in such cases will continue to be at the discretion of the judge in each case, so does not provide claimants with sufficient certainty at the outset of the claim that they will be protected from adverse costs. This lack of uncertainty was the main reason for the Compliance Committee's finding of non-compliance against the UK, which related to "all court procedures subject to Article 9", not just judicial review claims.

In Scotland, the PCO regime is even more restrictive as it only applies to cases which engage the EU Public Participation Directive. Similarly, this is not compliant with the Aarhus Convention.

In a 2012 consultation, the Ministry of Justice indicated that proposals for codifying PCOs for non-judicial review were being considered: "The Government is therefore looking into these issues and, where necessary, will bring forward proposals separately, so as not to delay establishment of the scheme for environmental judicial review cases." However, no such proposals have been forthcoming.

Please update the Report to explain how the Government proposes to address these issues and indicate when any proposals will be published for public consultation.

The CJEU has now considered the question of prohibitive cost in the *Edwards* case.[6] The CJEU ruled that the test of what was "prohibitively expensive" was both an objective and subjective one, requiring the national court to ensure on a case by case basis that the costs of legal proceedings were not prohibitively expensive. It follows that the automatic caps of £5,000 and £10,000 prescribed by the PCO rules will need to be revised downwards in some cases.

Please update the Report to include an assessment of the implications of the Edwards judgment for the PCO rules and an explanation of how the UK will ensure that the allocation of costs in environmental cases complies with this judgment.

Another major problem with the PCO rules for environmental judicial reviews is that they set a reciprocal cap of £35,000 on the defendant's liability for costs. This makes it difficult to fund environmental claims using conditional fee arrangements, as the reciprocal cap has the potential to prevent the recovery of legal fees, particularly in more complex cases. It also

[5] Para 113.
[6] Note 4 above.

discourages claimants from instructing senior lawyers, so fails to ensure an equality of arms between claimant and defendant.

The Report refers to *Commission v UK* (Case C-530/11), the European Commission's infringement case against the UK in respect of its failure to implement the Public Participation Directive in respect of costs. The use of reciprocal cost caps is one of the issues being considered by the CJEU in this case. The Attorney General's opinion in *Commission v UK*, which was delivered on 12 September 2013, found that the UK was in breach of its obligations deriving from the Aarhus Convention because courts may impose reciprocal caps which prevent the costs of a reasonable success fee being recovered from the defendant if the action is successful.[7] While the fixed costs regimes was not considered (as it was introduced after the cut off period), this opinion nevertheless casts considerable doubt over the legality of the reciprocal cap. The reciprocal cap of £35,000 will often prevent even normal fees being recovered from the defendant, let alone success fees.

Please update the Report to include a reference to the AG's opinion in Commission v UK and an assessment of what implications it would have for the PCO rules, in particular the £35,000 cross cap, if the CJEU follows the AG's recommendations.

LASPO Act 2012

The Report mentions the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012. However, it does not explain two significant provisions of that act that have had a profoundly negative impact on access to environmental justice. The LASPO Act prevents successful parties in litigation from recovering either success fees under conditional fee arrangements or "After the Event" (ATE) insurance premiums from the unsuccessful party.

Please include details of these reforms in the Report, explaining their implications for access to justice in environmental cases, and assessing their lawfulness in light of the Attorney General's opinion in Commission v UK.

Substantive review

The Report mentions the findings of the Compliance Committee in ACCC/C/2008/33 in relation to failing to ensure that costs of court procedures were not prohibitively expensive and ensuring clear time limits.

However, the Report fails to mention that the Compliance Committee had concerns about the availability of judicial review to challenge the substantive legality of decisions, acts or omissions within the scope of the Convention. Despite repeated requests by the Compliance Committee, the Government has not made any meaningful attempt to address these concerns.

Please update the Report to reflect the Compliance Committee's concerns and explain how the Government proposes to address them.

[7] Para 80.

B. Proposals for further reform

In September 2013 the Ministry of Justice published proposals for further reform of judicial review. While these are only proposals at this stage, they mark a clear intention on the part of the Government to severely restrict access to justice. While the Aarhus Convention has evidently shielded environmental cases from the worst of these proposals, they still have major implications for the UK's future compliance with the Convention. It is therefore totally unacceptable that the Report does not mention these proposals. We will provide more detailed analysis of the proposals in our response to that consultation, but we have the following general comments:

Procedural defects

The proposals seek to limit the scope for judicial review for procedural defects so that it will be easier for judges to dismiss claims where the procedural flaw being challenged would have made no difference to the outcome. The proposals do not make an exception for cases covered by the Aarhus Convention. This demonstrates a fundamental disregard for the importance of procedural rights in environmental matters.

These proposals 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.

Rebalancing financial incentives

The overall aim of the proposals is to reduce the number of judicial reviews. One of the main methods of achieving this aim will be to further increase the financial risk borne by the claimant and their lawyers. For example, lawyers will only be paid by the legal aid scheme where an application for judicial review is successful. Lawyers will be unable or unwilling to bear this risk, so claimants will be unable to obtain legal advice in order to challenge decisions affecting the environment.

Please amend the Report so that it includes details of the latest proposals for reforming judicial review together with a full analysis of how they will impact on the UK's compliance with the Aarhus Convention.

Conclusion

While some progress has been made in the past year, 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 most recent proposals seek to make access to justice even more expensive and impose new stricter rules on standing which would

further curtail access rights and undermine the procedural guarantees enshrined in the Convention.

As it is currently drafted, the Report gives the Compliance Committee an incomplete and inaccurate picture of both the current state of implementation, and the likely impact of proposals which signal a clear intention to move even further from compliance with the Convention. We look forward to receiving the final version of the Report and trust that it will fully address our concerns. We will of course raise any outstanding concerns directly with the Compliance Committee.

Yours sincerely,

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