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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Room 429-2
Palais des Nations
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Switzerland

21st March 2014

Dear Ms Marshall

Re: 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

1. Thank you for the opportunity to comment on the Committee's draft report to the Meeting of the Parties.

2. We are disappointed that the Committee has come to the view that the points identified in decision IV/9i have not yet been fully addressed and that it has decided to recommend that the decision be reaffirmed by the next Meeting of the Parties.

Costs

3. As the Committee will be aware, judgment was given on 13 February 2014 by the Court of Justice of the European Union in the case *Commission* v *United Kingdom*,[1] which concerns the costs of court procedures. The CJEU also gave judgment on the issue of costs in a reference from the United Kingdom in *Edwards and Pallikaropoulos* v *Environment Agency and others*[2] on 11 April 2013. This was then followed by a Supreme Court judgment on 11 December 2013.[3]

[1] Case C-530/11.

[2] Case C-260/11.

[3] *R (Edwards)* v *Environment Agency* (No 2) [2013] UKSC 78.

4. Whilst we will consider the points mentioned by the Committee in its draft report (and without prejudice to our views of its contents), the United Kingdom is, in any event, planning to review the systems in place for allocating costs in court procedures in light of the CJEU and Supreme Court judgments mentioned above.

5. Notwithstanding this position, we set out comments on some specific points below.

Application of the costs-caps in practice

6. At paragraph 49 of its draft report, the Committee suggests that there is a lack of clear guidance as to how the costs-caps will be applied in practice for multiple applicants.

7. With regard to England & Wales and Northern Ireland, we take the view that on the ordinary meaning of the text of the rules, the claimant's cap applies per claimant. This is consistent with the broad policy of ensuring that each claimant has costs capped at an appropriate level, rather than keeping the defendant out of its costs. It is not intended to give any incentive to joining multiple parties just to spread the already very limited costs liability.

8. If claimants have the same interest, it would seem appropriate for them to be represented by a single claimant (or, if they form a group, for the group to represent them, with the "non-individual" cap). If, however, they have separate interests and may argue differently and accordingly cause separate costs for the defendant, it would be appropriate for them to bear liability for the defendant's costs to the level of the cap (which would, as indicated above, be the cap appropriate to each as an individual or not an individual).

9. With respect to Scotland, we consider that it is clear from Rule 58A.2(2)[4] that the applicant must be either an individual or an NGO. The plain wording of the rule excludes the possibility of several individuals being treated as one applicant. The cap in Scotland is £5,000 regardless of whether the applicant is an individual or NGO so the third point in paragraph 49 of the draft report is academic and as each Protective Expenses Order pertains to one individual or NGO the final point does not arise.

Recoverability of costs of third parties

10. At paragraph 51 of the report the Committee comments that the rules in all three jurisdictions are silent as to the recoverability of the costs of any interested third party.

11. With respect to Scotland, we draw the Committee's attention to rule 58A.1(3). This states that references to the respondent's liability in expenses to the applicant or, as the case may be, an applicant's liability to the respondent means that of all of the respondents in the proceeding which includes interested parties.

[4] The Rules are available at: https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/court-of-session-rules.

12. In England & Wales it can be seen that, on the normal meaning of the text, the cap is a cap for all costs liability of the claimant (rule 45.43 states that a party to an Aarhus Convention claim "may not be ordered to pay costs exceeding the amount prescribed in Practice Direction 45").[5] This should therefore include, within the single cap, any liability for costs of an interested party or co-defendant.

13. The position in Northern Ireland is similar to that in England & Wales.

Cross-undertakings for damages in Scotland

14. Paragraph 55 of the draft report states that:

> "With respect to Scotland, the Committee has not been informed of any measures that the Party concerned has taken to ensure that applicants do not face prohibitive expense when seeking interim interdicts in court procedures subject to article 9 due to a requirement to give a cross-undertaking for damages before such an interdict would be granted."

15. Cross-undertakings are not a feature of litigation in Scotland. There is therefore no need for Rules to make any specific provision to this effect. We ask the Committee to use its report to clarify the reason why it has not been informed of such measures in this respect.

Costs in private nuisance claims

16. As the Committee notes in its draft report, the United Kingdom's view is that the scope of the recommendations included in the decision does not extend to private nuisance claims.

17. Of the communications that informed the Meeting of the Parties in adopting decision IV/9i, only communication 23[6] concerned an examination in any detail of private nuisance proceedings. The Committee found at paragraph 52 that "no evidence has been presented to substantiate that the non-compliance in this case was due to a systemic error" and it therefore refrained from presenting any recommendations.

18. The fact that the Committee decided to accept communications 85 and 86,[7] which concern costs in private nuisance claims, and that these are still actively under consideration, means that these issues have not been fully considered. It would therefore be premature for references to be made to the United Kingdom's compliance with the Convention in respect of such proceedings in the Committee's report, even if the recommendations informing decision IV/9i were accepted as including costs in private nuisance claims, which it is not.

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[5] The Rules and Practice Directions are available at: http://www.justice.gov.uk/courts/procedure-rules/civil/rules.

[6] ACCC/C/2008/23 (United Kingdom).

[7] ACCC/C/2013/85, ACCC/C/2013/86 (United Kingdom).

19. Paragraph 44 of the draft report implies that the limitation of the new rules on costs protection to litigation other than private nuisance claims means that insufficient measures have been taken to implement article 9(4). Such language prejudices the outcome of forthcoming discussions on communications 85 and 86 and does not, in the United Kingdom's view, reflect the scope of the decision adopted by the Meeting of the Parties.

20. References to private proceedings in paragraph 44 should therefore be removed. The Committee may wish instead to make a reference to the ongoing discussions regarding private nuisance cases in communications 85 and 86.

Article 9(5)

21. At paragraph 64(b) of the draft report, the Committee states its view that:

> "The system as a whole still remains not such as "to remove or reduce financial […] barrier to access to justice", as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider".

22. We remind the Committee that the text of article 9(5) requires Parties to:

> "consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice".

23. As the Committee acknowledges throughout its draft report in listing the various steps that have been taken, the United Kingdom has, throughout the inter-sessional period, been considering measures that have the effect of removing or reducing financial and other barriers to access to justice. The Committee's draft recommendations (paragraph 65(b)) acknowledge that consideration has already taken place by recommending "further consideration".

24. There can be no serious suggestion that the United Kingdom has not considered such measures, which is what is required under article 9(5) of the Convention.

25. There would appear to be some confusion around the actual obligation under article 9(5) based on the way this has been formulated in paragraph 64(b) of the Committee's report. This language stems from the Committee's findings in communication 33 (at paragraph 142) and implies that article 9(5) imposes a direct requirement to remove or reduce such barriers, rather than consider their removal or reduction.

26. We ask the Committee to use its report to clarify the obligation under article 9(5) by replacing the text at paragraph 64(b) with the following:

> "*The Party has considered the establishment of appropriate assistance mechanisms to "remove or reduce financial […] barriers to access to justice", as article 9, paragraph 5, of the Convention requires*".

27. Together with the removal of the associated text in paragraph 65(b), this would make much clearer what the Committee has already set out elsewhere in its draft report.

Timing for judicial review

28. As the Committee notes in its draft report, the United Kingdom Government did consider whether or not time limits should be clarified as part of its reform of judicial review in England and Wales but chose to define time limits in planning cases and procurement cases only. Its rationale for not taking forward the proposal more widely is set out in its April 2013 response, including that this was a complex area and ill-suited to reform through rule changes.

29. In practice, following the *Uniplex* decision courts will not apply the "promptly" limit and will regard the point at which time starts to run for challenging a decision or action as being the date of the decision or action or its communication, and of a continuing omission or other continuing state of affairs as being when the claimant knew or ought to have known that there were grounds for challenge.

30. As mentioned above, the reference to “promptly” no longer applies in relation to judicial reviews relating to decisions under planning legislation in England & Wales. Changes to rule 54.5 that came into force in July 2013 harmonised the time limits for planning judicial reviews with those for statutory planning appeals (six weeks) and do not include a “promptly” requirement.

31. In Scotland, the Courts Reform Bill introduced into the Scottish Parliament on 6th February 2014[8] introduces a three month time limit in section 85, but includes no additional requirement that a judicial review be lodged “promptly”.

32. The issue of timing for judicial reviews is still being considered in Northern Ireland.

Yours sincerely

Ahmed Azam

Ahmed Azam
United Kingdom National Focal Point to the Aarhus Convention

[8] http://www.scottish.parliament.uk/parliamentarybusiness/Bills/72771.aspx