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Aphrodite Smagadi
Secretary to the Aarhus Convention Compliance Committee
Economic Commission for Europe
Environment, Housing and Land Management Division
Bureau 348
Palais des Nations
CH-1211 Geneva 10
Switzerland

Dear Ms Smagadi

Re: Decision IV/9i on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention, as adopted by the Meeting of Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters at its fourth session

Thank you for your letter of 8th August requesting a further update on the steps the UK is taking in relation to Decision IV/9i.

As mentioned by the NGOs at the recent meeting of the Working Group of the Parties, an official response to our consultation on amending the Civil Procedure Rules to codify existing case law on protective costs orders (PCOs) in environmental judicial review cases was published on 28 August (see: https://consult.justice.gov.uk/digital-communications/cost_protection_litigants). This sets out the background to the consultation, a summary of the responses received, responses to the specific questions raised in the consultation and the next steps.

The proposals, which are summarised below, will be put to the Civil Procedure Rule Committee for consideration at the earliest opportunity with the intention that, if possible, the rules should be included in the body of rule amendments planned for making in December 2012.

The proposals include:

- A fixed recoverable costs regime to apply in all judicial review cases where the claimant states in the claim form that the case is an Aarhus case and the reasons why this is so, subject only to the court determining that the case is not in fact an Aarhus case at all. It will not be dependent on permission having been granted.
- Recoverable costs fixed as follows: the liability of the claimant to pay the costs of the defendant to be capped at £5,000 if the claimant is an individual and at £10,000 where the claimant is an organisation; the liability of the defendant to pay the costs of the claimant to be capped at £35,000 (including VAT).
- The fixed recoverable costs for both the claimant and the defendant cannot be challenged, but the fixed costs regime will not apply if the claim is not within the scope of the Convention.
- The judge considering whether to give permission to appeal will, at the same time, determine the appropriate cost limit or limits, having regard to the decisions in the lower court.

This approach reflects the balance of responses received from all stakeholders. It should be noted, however, that the Government intends to review on a regular basis the impact and application of these changes, including the level at which the caps have been set and whether, in the light of experience, any other changes to the procedure for such cases should be made.

In your letter of 8th August, you state that we do not appear to have taken into account some of the concerns expressed by the Committee in its findings in communication ACCC/C/2008/33, e.g. in relation to 'substantive review'. We note that the Committee did not in fact find the UK not to be in compliance with Articles 9(2) and 9(3) of the Convention. The Committee stated (paragraph 125) that it was 'not convinced that the Party concerned meets the standards for review required by the Convention as regards substantive legality', suggesting we might make greater use of the proportionality principle, and expressed concern (paragraph 127) 'regarding the availability of appropriate judicial or administrative procedures, as required by article 9, paragraphs 2 and 3, of the Convention, in which the substantive legality of decisions, acts or omissions within the scope of the Convention can be subjected to review under the law of England and Wales'.

In England, Judicial Review allows applicants to challenge the legality of decisions on a variety of grounds including, but not limited to, Wednesbury unreasonableness. An applicant in a Judicial Review can challenge a decision on the grounds that it is either substantively illegal or procedurally illegal. Substantive illegality includes the concepts of 'irrationality' or 'unreasonableness' as originally formulated in the Wednesbury case, and also more recently the idea of proportionality in relation to EU and human rights issues.

Finally, in relation to time limits for bringing a challenge, applications for judicial review are governed by the Civil Procedure Rules and consideration is being given as to whether these need to be amended to reflect current court practice. In relation to the ruling in Uniplex(C-206/08), the Administrative Court in England and Wales is aware of and has

applied the ruling. For example in R (Buglife) v. Medway Council [2011] EWHC 746, a judicial review was brought against a decision to grant outline permission on the basis that the applicant's environmental statement was flawed. The claim was brought two days before the end of the three month time limit, and the Council argued that it had not been brought "promptly". It was submitted that Uniplex was limited to challenges under the PPD. The court found that the Uniplex decision applied generally to all European directives, and that the time limit for challenges engaging European law will be three months. This decision has subsequently been followed and reinforced by the courts (see R (U & Partners (East Anglia) Ltd) v. Broads Authority [2011] EWHC 1824, R (on the application of Berky) v Newport City Council and others [2012] EWCA Civ 378. The courts in Northern Ireland have also applied the ruling and consideration is being given to including an amendment in the work programme of the Northern Ireland Court of Judicature Rules committee.

Regards

David Hamson DAVID HAMSON

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