

Secretary to the Aarhus Convention Compliance Committee
UNECE
Bureau 348
Palais de Nations
CH-1211 Geneva 10
Switzerland

Attn: Josephine Toop

Your ref: Decision V/9n
Our ref. PS

By e-mail

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Dear Sirs

Decision V/9n- Continuing non-compliance by the UK

We write further to the UK's update of 29 December 2014 in relation to the above.

UK costs rules, April 2013

The UK accepts that the amendments to the costs rules introduced in April 2013 were and remain inadequate. Recently this was confirmed in *Secretary of State for Communities & Local Government v Sarah Louise Venn* [2014] EWCA Civ 1539. There, the UK Government appealed against the High Court order granting costs protection in a case where the Judge had found that the Aarhus Convention applied and that costs protection should be afforded to the Claimant. Indeed, the UK Government relied upon the argument that the costs rules were limited to a narrowly defined form of 'judicial review' to support the position that costs protection should not be permitted. In its judgment of 27.11.14 (Annex 1 attached) the Court of Appeal found that article 9(3) of the Convention applied to the particular type of statutory challenge under review (§18, of the judgment). It also found the UK Government's new costs rules (CPR 45.41) were non-compliant with the Convention. The Court of Appeal, however, felt bound by the fact that:

... [o]nce it is accepted that the exclusion of statutory appeals and applications from CPR 45.41 was not an oversight, but was a deliberate expression of a legislative intent, it necessarily follows that it would not be appropriate to exercise a judicial discretion so as to side-step the limitation (to applications for judicial review) that has been deliberately imposed by secondary legislation. (§33, judgment)

Partners: Richard Buxton* MA (Cantab) MES (Yale), Susan Ring* LL.M Env (London), Adrienne Copithorne* BA (Cantab) MA (UC Berkeley),
Lisa Foster Juris D MSc (UEA) MA (York)

Associates: Caroline Chilvers BA (Hons), Carolyn Beckwith BA (Hons) LL.M

Consultant: Paul Stookes* PhD MSc LL.B
Practice Manager: Sheryl Taylor

London office: 419 Richmond Road, East Twickenham TW1 2EX Tel: 020 8296 1881

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* Solicitor-advocate

Bearing in mind the wide scope of the Convention, what the UK government should properly have done in the case of *Venn* was to accept its commitment to reviewing the legislation and that CPR 45.41 was unduly narrow its application and simply acknowledge the judicial order granting costs protection. This indeed, was consistent with other judicial orders on costs protection that did not fall expressly within CPR 45.41 see e.g. *Howell v Secretary of State* (CO/2189/14) (27.6.14) (Annex 2).

The consequence of the Court of Appeal decision in *Venn* is further restrict access to justice in environmental matters and to limit rather than enhance and broaden the scope of environmental rights.

The Committee will also be aware of Communication ACCC/C/2013/85 & 86 which raises concern about the decision of the UK Government to remove a mechanism for securing costs protection in environmental nuisance proceedings by the removal of insurance provisions to protect against adverse costs risks and further to maintain that private nuisance proceedings such as those within C-86 should not be covered by the Convention notwithstanding that, on the facts, it is what may be regarded as paradigm environmental pollution of a community.

We have another case where the non-application of the Aarhus Convention in nuisance cases is likely to lead to extraordinarily serious consequences for the claimants. In this further case the claimants were actually successful in their claim and in view of the fact that the case has not finally concluded we consider it is best left as the subject of a separate communication to the Compliance Committee.

2. Legal aid

In April 2013, the time limited costs protection was provided by CPR 45.41, the UK restricted the availability of legal aid for many individuals bringing environmental proceedings by (a) restricting the financial eligibility requirements and (b) by limiting the scope of proceedings that may be covered by legal aid. This has meant that, in our experience, very few people are now eligible for legal aid in bringing cases.

3. Departmental review in England & Wales

It is surprising that the UK relies on a departmental review to see whether the costs rules of 2013 and to see what changes could be made. The UK was informed as early as 2003 where the costs concerns in the UK were seen, for instance, the reports: *Civil Law Aspects of Environmental Justice* (2003, ELF) and *Environmental Justice Report* (2004, WWF & others) both commissioned by Defra (the UK department responsible for implementing the Convention).

The Compliance Committee will be aware that the UK ratified the Aarhus Convention in February 2005 and will note that nearly 10 years after the Convention was ratified by the UK there remains systemic non-compliance with the Convention. Since ratification, the question of costs and prohibitive expense have been an acute problem in the UK. It is of no surprise that the UK is likely to receive a very high number of communications from members of the UK public.

4. Implications of UK approach to rights conferred by the Aarhus Convention

Our experience of the UK's approach to the Convention rights is one of uncertainty and prohibitive expense in bringing environmental claims. There is, save, for the limited provisions of CPR 45.41 which applies in judicial review claims in the High Court only no certainty in relation to costs.

In any event the limited provisions of CPR 45.41 are often such that the costs limits of £5,000 and £10,000 are simply too expensive for many litigants. In addition they have to face spiralling court fees which are likely to amount close to £1,000 in themselves for a simple case. This leaves Claimants having to head into litigation with the risk that they may have adverse costs risk plus court fees totalling of over £5,000: see e.g. Annex 3, the order in *Sail v South Hams DC*, CO/5372/14 of 23.12.14. In this regard, the current provisions are contrary to the European Court of Justice findings in Case C-530/11, *Commission v UK* [2014]; and that is on the basis that their own lawyers will work for free, which is not sustainable.

The practice of the Court of Appeal in relation to costs protection and the need (per CJEU jurisprudence that this be “predictable”: see C-530/11 *Commission v UK* at §58) is far from predictable. It had been the practice for costs liability (correctly) not to increase at the Court of Appeal stage. However the Court of Appeal has recently been increasing the costs liability, apparently regarding this as equivalent to fresh proceedings.

Thus in *San Vicente v Secretary of State for Communities & Local Government*, in which the claimants – two residents of very modest means and who after many procedural difficulties won their case in the High Court – had costs protection of £10,000 in the High Court (which in itself was twice the “normal” £5,000) but in the Court of Appeal, where the Secretary of State won the appeal, the costs liability was increased by a further £10,000 to a total of £20,000 (Annex 4).

Similarly in *R (Powell) v Brighton Marina and others* the Court of Appeal increased the costs liability by a further £5,000 when granting permission to appeal, and in *No Adastral New Town Ltd. v Suffolk Coastal District Council* the original PCO limit was raised from £10,000 to £20,000.

Not only is costs exposure increased, but part of the problem is that a lot of time and effort is expended arguing about it. There are no written rules or practice directions which lay down predictable results in the Court of Appeal.

In the Supreme Court the position is even more unpredictable. Thus in *R (Champion) v. North Norfolk District Council* protection limited to £5,000 was kept at that level in the Court of Appeal. However despite limited means to the effect that we will have to cover the high court costs in the Supreme Court ourselves, the Court required additional adverse costs exposure of £5,000 (and a reciprocal cap such that it may be uneconomic to instruct counsel).

In a Scottish case, *Cairngorms Campaign v. Cairngorms National Park Authority*, despite costs protection in the courts below, costs protection was refused completely (and thus the future of that case is unknown) even though involving an important EU law issue concerning protection of habitats under the Habitats Directive).

Obtaining costs protection is certainly facilitated both so far as the courts are concerned and also in relation to claimants' budgets if the lawyers work on a conditional fee agreement (CFA) (ie. no fee or reduced fee if no win, and often reduced fees even if winning due to so-called “reciprocal caps” imposed for granting costs protection). This was said to be an unlawful approach by the Advocate General in Case C-530/11 *Commission v UK* although the CJEU did not rule on the point for lack of evidence. We could provide plenty of evidence as to why this practice causes unfairness in environmental claims.

Also in this context that in the Courts and Criminal Justice Bill which is about to receive Royal Assent following debates in Parliament the UK government is putting financial constraints on judicial review in all sectors. A specific provision (clause 88(1)(d)) is to the

effect that working in the expectation of being paid anything (ie. paid if you win on a conditional fee arrangement) will expressly not be permitted to be a consideration in awarding costs protection. The Bill is worded such that the UK government may make regulations such that this and other “chilling” provisions would not apply to environmental claims; but as matters stand, they do.

Conclusion

In our view, the UK’s response to the continuing non-compliance is wholly inadequate and fails to address the continuing concerns about costs and prohibitive expense facing the majority of communities and individuals in the UK.

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

Yours faithfully

Richard Buxton

Richard Buxton Environmental & Public Law