From: "Christine Metcalfe"
To: "aarhus compliance" <aarhus.compliance@unece.org>,
Cc: [Emails redacted]
Date: 22/01/2015 16:08
Subject: Re. Decision V/9n - progress report from the Party concerned

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Dear Ms Toop,

Thank you for the invitation to comment upon the UK's first progress report of the 29th. December which also appeared as a response to the letter of the Compliance Committee dated 28th.November 2014.

It is appreciated that only matters relevant to the proceedings and related to Decision V/9n and the compliance of the UK with that decision since the July 2014 Meeting of the Parties, would normally be under consideration. However, that the UK courts don't provide effective access to justice due to the costs, is part of the on-going compliance efforts by the Compliance Committee in their decision in relation to the UK. So related issues would appear to be valid to raise in this response.

It is rare for those at the 'grass roots' of the democratic process to be able to report to decision makers on the situation as it exists now, and why the UK response can be seen to be inadequate. It is therefore hoped that also addressing a slightly wider picture can be accepted as relevant, and that all the following points will be taken as important in respect of UK statements:

1. The response letter and report contains a clear admission that there has been no compliance with the legal requirement in the first place.

2. The text of the UK letter is drawn straight from the preamble to the recent Courts Reform legislation, and admirably demonstrates Government's resistance to any possibility that people should be able to litigate free of unaffordable risk.

3. Attached is a response for the Aarhus Convention Implementation Consultation. Its contents serve to outline those areas where the UK response remains flawed. Assurances made in respect of intentions, and reviews underway, take a great deal of time to come to fruition – if at all. As progress reports will still be coming in to the Compliance Committee up until 2016, in the interim, speculative applications and consents being granted for wind farm applications are continuing apace (despite admissions that targets have been achieved) at levels which are environmentally and economically untenable. The resultant escalating strain on resources is being ignored, which is especially true in Scotland where due to the complete lack of monitoring of adverse effects from the technology, the potential for harm is unavoidable.

4. The UNECE Meeting of the Parties adopted the below:

Draft decision V/9g concerning compliance by the European Union with its obligations under the ConventionECE/MP.PP/2014/L.16
http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Category_I_documents/ECE.MP.PP.2014.L.16_e.pdf
Draft decision V/9o concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention ECE/MP.PP/2014/L.24
http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Category_I_documents/ECE_MP.PP_2014_L.24_ENG.pdf
Page 3 of the EU's first National Implementation Report to UNECE helps put this into context:

- http://ec.europa.eu/environment/aarhus/pdf/sec_2008_556_en.pdf

- *According to Article 300(7) of the Treaty establishing the European Community ("EC Treaty"), international agreements concluded by the European Community are binding on the institutions of the Community and on Member States. In accordance with the European Court of Justice's case-law, those agreements prevail over provisions of secondary Community legislation. The primacy of international agreements concluded by the Community over provisions of secondary Community legislation also means that such provisions must, so far as is possible, be interpreted and applied in a manner that is consistent with those agreements.*
- *In addition, according also to settled case-law, a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. Such provisions constitute rules of Community law directly applicable in the internal legal order of the Member States, which can be relied on by individuals before national courts against public authorities.*

That (a) the UK NREAP didn't comply is now both established in International Law and admitted by the UK Administration. (b) That the public have to be provided with effective public participation when all options are open is both part of the Convention, European Law and jurisprudence in the European Court: http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-01/cp130001en.pdf So this is important in respect of both on the NREAP issues (EU decision) and access to justice ('not prohibitively expensive' - UK decision). It also brings into relevance that Aarhus law is being applied differently in two of the constituent parts of the State Party (the UK). ***There is a the further anomaly of Scotland having no provision for Class Actions or Group Actions***. This is extremely important in respect of the public's access to justice.

Applications for Protective Expenses Orders are being withdrawn in Scotland (although more freely available south of the border) for fear of the very high fees which could be incurred upon loss of cases e.g. The Biosphere & Dark Skies Protection Ltd., yet there is reference in the polluter pays DIRECTIVE 2004/35/CE as to how a non-government organisation has the right to take a case forward:
"(25) Persons adversely affected or likely to be affected by environmental damage should be entitled to ask the competent authority to take action. Environmental protection is, however, a diffuse interest on behalf of which individuals will not always act or will not be in a position to act. Non-governmental organisations promoting environmental protection should also therefore be given the opportunity to properly contribute to the effective implementation of the Directive.

In respect of Scotland. Clauses 9 – 14 of the response, in Scotland the proposed system in no way improves this difficulty in respect of PEO's and serious risks of 'prohibitively expensive' fees remain. It is noteworthy that the refusal of the John Muir Trust's application for a PEO exposed just how badly the system is working. For two full days on 8th & 9th Oct. 2014 at Court of Session the John Muir trust sought a Protective Expenses Order. The subsequent refusal of the application cost JMT at least least half of what the actual Judicial Review is supposed to cost (estimated "three days" in court) just on the "simple procedure" -- which PEO is ***supposed*** to be. This demonstrates how it is failing. The judiciary would claim to be "only letting the best through the door", but ***in reality*** the system is ungenerous to the point of being a barrier to fairness - whereas Aarhus is meant to be an already open door, which should let most people in. ***So now we have UN Law running into a collision with UK Law to the clear detriment of the UK population.***

It also remains an important barrier to legitimate and badly needed progress that ***there is no means*** by which an individual or an NGO can mount a challenge on Planning Grounds, because there is a wealth of authority which says that in the UK, that is the "exclusive province of the planners." This has to be undemocratic at the very least and almost certainly illegal under UN law.

5. In addition, a complaint has been lodged with the Commission of the EU Communities concerning the failure to comply with EU Law.

6. Justice can only work if it is affordable and therefore available to everyone. The whole "system" of Judicial Review (hereafter JR) is now simply too expensive and unpredictable for negatively impacted citizens to

contemplate. It is therefore very clear that JR's should be low cost exercises for all parties as the cost of JR is beyond the ordinary person. *That means that commercial parties simply have to threaten a JR in order to compel ordinary individuals and hard pressed public authorities to refrain from challenges which would otherwise be seen as perfectly legitimate.* This unwarranted bar to access to justice clearly requires that the process of Judicial Review needs to be made less expensive, as the end result in time will be better Governance because large public bodies in particular would know they would be held to account.

In conclusion, the question being asked is, are we seeing the JR system being used as a false prospectus? The answer is Yes, as putting justice beyond the reach of people means ***there is no justice***. The barriers remain firmly in place in the UK as a whole, and are a serious obstacle to progress.

Yours sincerely,

Mrs. V.C.K. Metcalfe.

(See attached file: Response for Aarhus Convention Implementation Consultation .pdf)