25 April 2017

ClientEarth - response to the United Kingdom's third progress report on compliance with decision V/9n and its obligations under the Aarhus Convention

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1 Executive Summary

1. The UK has failed to remedy its non-compliance with its obligations under article 9 of the Aarhus Convention[1] (the "**Convention**") and to respond effectively to the recommendations made by the Aarhus Convention Compliance Committee (the "**Committee**"), which were adopted at the fifth session of the Meeting of the Parties (the "**MOP**"), decision V/9n (the "**Decision**").

2. The UK's third progress report of 3 April 2017 reveals a failure to address the findings of the Committee and to make substantive progress towards implementing the requirements of the Decision.

3. Further, those changes that have been implemented make the UK less compliant, and were formulated with the aim of achieving compliance under EU law[2] and not the Aarhus Convention.

4. The result is that the UK, instead of remedying its non-compliance, has introduced greater uncertainty, barriers and expense for claimants, leaving many citizens without access to the courts when they need to protect the environment from the unlawful actions of public authorities and private actors.

2 Introduction

5. ClientEarth is one of the three communicants[3] of communication ACCC/C/2008/33. It is also a co-claimant (with the Royal Society for the Protection of Birds (RSPB) and Friends of the Earth (FoE)) in legal proceedings[4] challenging the lawfulness of the UK's amendments to Section VII of Part 45 of the Civil Procedure Rules (the "**Amendment Rules**")[5].

6. We refer to the comments of the Observers[6] of 24 April 2017, which ClientEarth has also signed. This response adopts the Observer's submission and seeks to develop further ClientEarth's position.

7. We attach at Annex A a chronology of key events since communication ACCC/C/2008/33 was made, which we hope will assist the Committee in its consideration of the UK's third progress report.

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[1] The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998.
[2] Primarily Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.
[3] Joint communicants are The Marine Conservation Society and Robert Lattimer.
[4] *RSPB(1), Friends of the Earth(2) and ClientEarth(3) v The Lord Chancellor and Secretary of State for Justice* (case number CO/1011/2017))
[5] http://www.legislation.gov.uk/uksi/2017/95/contents/made
[6] RSPB, FoE and C&J Black Solicitors

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3 Decision V/9n

8. Decision V/9n was adopted at the fifth session of the MOP to the Aarhus Convention in July 2014[7].

9. However, it is important to note that the findings of the UK's non-compliance with Article 9 of the Convention and recommendations at paragraph 8 (a), (b) and (d) of the Decision were first adopted by decision IV/9i[8] in July 2011 at the fourth session of the MOP to the Convention.

10. The Party has therefore had more than six years since decision IV/9i to implement the Committee's recommendations. However, this submission will focus on the UK's compliance since the Committee reiterated at paragraph 8 of the Decision its recommendations through IV/9i that the UK take urgent action to:

    (a) Further review its system for allocating costs in all court procedures subject to article 9, and undertake practical and legislative measures to ensure that the allocation of costs in all such cases is fair and equitable and not prohibitively expensive;

    (b) Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;

    (c) [Omitted]; and

    (d) Put in place the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4 of the Convention.

11. The Committee concluded its first progress report of 20 October 2015 with an invitation that the UK, in relation to England and Wales, Scotland and Northern Ireland, report on the following:

    - the outcomes of each government's or cross government's review or considerations;
    - the actions each government or cross government has taken; and
    - the actions each government or cross government proposes to take, together with a timeline for doing so.

4 Comments on the UK's third progress report

12. The UK's third progress report, which is the final report to the Committee on the steps it has taken to comply with the Committee's recommendations, is incomplete and inadequate. It purports to respond to sub-paragraphs 8 (a), (b) and (d) of the Decision but fails to do so.

[7] see (ECE/MP.PP/2014/2/Add.1) http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppcc/envppccimplementation/fifth-meeting-of-the-parties-2014/united-kingdom-decision-v9n.html
[8] (see ECE/MP.PP/2011/2/Add.1) https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppccimplementation/fourth-meeting-of-the-parties-2011/united-kingdom-decision-iv9l.html

Indeed, the UK has never provided a complete report or answered the Committee's invitation to report on the outcomes, actions and timeline for implementing the Decision.

13. The most significant changes the UK has made to its legal procedures are through its amendments to Section VII of Part 45 of the Civil Procedure Rules (the "**CPR**"), related parts of the CPR and associated Practice Directions. These changes were made by statutory instrument, namely the Civil Procedure (Amendment) Rules (SI 2017/95) (the "**Amendment Rules**") that was laid before Parliament on 3 February 2017 and came into effect on 28 February 2017.

14. The Amendment Rules provide the only environmental costs protection regime available to claimants in England & Wales, and only apply to claims for judicial review and statutory appeals that come within the scope of Article 9(1) and (2), and judicial review within the scope of Article 9(3). The UK's stated aim when implementing the Amendment Rules was to bring the UK into compliance with its EU obligations. The UK therefore recognises that these changes do not remedy the UK's non-compliance with Article 9, and in particular do not cover all procedures that come within the scope of Article 9(1), (2) and (3) of the Convention.

15. The Amendment Rules implement pernicious changes to the environmental costs protection regime they replace. The rules introduce:

    - the requirement that the claimant will only be entitled to costs protection if they provide a schedule of financial resources at the same time as issuing their claim;
    - "hybrid costs caps", that can be increased at any stage of the proceedings; and
    - the removal of the deterrent of indemnity costs to challenges brought by public authorities to the status of an Aarhus claim.

16. In addition to the uncertainty and chilling effect for claimants, the changes are financially and procedurally burdensome. Claimants will now have to:

    - obtain and file financial information on their and their funders' financial resources. The UK's failure to provide any proper guidance on what needs to be included in the schedule of finances is not only unhelpful, it is likely to lead to satellite litigation on the level of information to be provided by claimants;
    - prepare and defend one or more applications for the hybrid costs cap to be increased; and
    - face increased risk of a public authority challenging the Aarhus status of a claim because the penalty of indemnity costs has been removed.

17. The Amendment Rules, which came into effect without fair notice to potential claimants, run contrary to the UK's obligation to implement the Committee's recommendation 8(b) of V/9i in that the changes increase barriers, particularly the financial cost of bringing a claim by introducing more work and procedural steps for claimants, creating uncertainty and encouraging satellite litigation.

18. The UK claims that the changes have been drafted with particular regard to the principles set out by the Court of Justice in C-530/11 Commission v. United Kingdom and C260/11

Edwards. However, the Amendment Rules, when considered in the context of an actual claim, fail to comply with either the spirit or letter of the judgments..

19. The UK also chose to implement the Amendment Rules knowing that there was a risk that the changes may deter meritorious claims. The UK's impact assessment[9] of the changes notes that the main risk is that:

"*Some claims might be discouraged even though they are meritorious; this could have potential negative impacts on the environment (but our analysis is that this risk is minimal because of the continued availability of costs protection in meritorious cases and the ability to increase the level of costs protection in appropriate cases).*"

20. The analysis is not coherent or logical, and importantly fails to consider the fact that the changes to the rules will deter claimants from bringing claims if they do not wish to disclose their financial information to the defendant or are unwilling to risk an unknown adverse cost award. These concerns apply equally to all claimants, whether their claim is meritorious or not.

21. The UK has also introduced other changes to judicial review through the Criminal Justice & Courts Act 2015 (the "CJ&CA").

22. Section 84(2) of the CJ&CA requires the court to refuse permission for judicial review or to grant a remedy where it considers that it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained about had not occurred. There is an exception if the court considers it appropriate to grant permission or a remedy for reasons of exceptional public interest, and certifies that this is the case. This provision introduces uncertainty for claimants, as such findings rely on the judge's discretion.

23. Section 87 of the CJ&CA amends the costs position of those who apply for permission to intervene in a judicial review in the High Court or Court of Appeal. The courts can now make costs orders against or in favour of interveners under their general discretion in relation to costs. Section 87 establishes two presumptions that the court must follow unless there are exceptional circumstances: this provision will deter interveners from applying to join proceedings, and so remove an important source of expert information and evidence that is likely to inform the court's findings.

24. Also in England & Wales, court fees alone can be prohibitively expensive for claimants. In recent years there have been substantial increases in court fees. For example, the fees for judicial review now total £770 (with much higher sums for appeals), whilst the maximum court issue fee for a private nuisance claim is £10,000.

25. In summary therefore the UK has failed to comply with the recommendations at sub-paragraphs 8(a), 8(b) and (d). In particular the UK has:

- failed to provide any evidence to show that it has reviewed all court procedures in England and Wales;

[9] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/570259/costs-protection-impact-assessment.pdf

- only reported on its proposals in relation to changes to judicial review and certain statutory reviews;
- not reported on its review, if any, of the assistance mechanisms that should be established to remove or reduce financial barriers to access to justice; and
- failed to provide evidence of the necessary legislative, regulatory and other measures required to establish a clear, transparent, and consistent framework to provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

26. Further, and importantly, the changes that the UK has made to its environmental costs rules increase financial barriers for all claimants who wish to bring a public law challenge.

27. In other environmental public law claims that do not come within the Amendment Rules, claimants will have to rely on the more limited costs capping procedures implemented by sections 88 and 89 of the CJ&CA. Grant of a costs cap in such cases still depends on judges exercising their discretion, which the Committee has already found to be non-compliant.

5 Conclusion

28. It is with deep concern and regret that we note that the UK has chosen to disregard the views of the Committee, the Commission, the CJEU and its national courts.

29. The UK has to date failed to provide a full and substantive response to the Decision. It has instead introduced piecemeal changes that inhibit access to justice.

30. The cumulative effect of the changes the UK has chosen to implement since 2014 make it less compliant than when the Decision was adopted.

31. This leads us to the view that the UK, despite being allowed a period of more than six years to remedy its breaches, has no intention of complying with the Committee's recommendations in an effective and timely manner.

32. The UK therefore not only remains in non-compliance, but those changes that it has introduced have worsened access to the justice in environmental cases in England & Wales, and has made it less compliant than when the Decision was adopted in 2014.

33. In the circumstances, we repeat the request made by the Observers, namely that the Committee consider additional constructive measures to bring the UK back into compliance with the Convention. We also endorse their suggestions that the Committee recommend that the Sixth MOP to the Convention issue the UK with a caution and invite the UK to accommodate an expert mission, to provide expert opinion on possible ways to implement the measures in Decision V/9n and bring the UK into compliance.

25th April 2017

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

ClientEarth is funded by the generous support of philanthropic foundations, institutional donors and engaged individuals.

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Annex A

Date	Event
2 December 2008	ClientEarth communication ACCC/C/2008/33 submitted to the Aarhus Convention Compliance Committee.
24 September 2010	Report of 29th meeting of the Committee on communication ACCC/C/2008/33 makes a finding that the UK is not compliant with Articles 3(1) and 9(4) of the Aarhus Convention.
1 July 2011	Decision IV/9i adopted by the 4th Meeting of the Parties (**MOP**) to the Aarhus Convention, endorsing the findings of the Committee that: a) *"By failing to ensure that the costs for all court procedures subject to article 9 were not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect, the Party concerned failed to comply with article 9, paragraph 4 of the Convention;* b) *The system as a whole was not such as "to remove or reduce financial [...] barriers to access to justice" as article 9 paragraph 5, of the Convention requires a Party to the Convention to consider...;* c) *By not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4, the Party concerned also failed to comply with article 3, paragraph 1 of the Convention".*
1 April 2013	Fixed costs rules were introduced into Part 45, Section VII of the Civil Procedure Rules.
11 April 2013	Decision of the Court of Justice of the European Union in Edwards and Pallikaropoulos v Environment Agency and others Case C-260/11.
11 December 2013	Decision of the UK Supreme Court in Edwards v Environment Agency (No 2) [2013] UKSC 78.
13 February 2014	Decision of the Court of Justice of the European Union in Commission v UK Case C-530/11 concerning compliance with Directive 2003/35/EC.
1 July 2014	Decision V/9n (the **Decision**) was adopted at the 5th MOP to the Convention endorsing the finding that "despite the parties serious and active efforts to implement the recommendations made by the Committee...the Party concerned has not yet fully addressed the

	points of non-compliance identified" in decision IV/9i.
29 December 2014	The UK's first progress report on implementation of the Decision.
12 February 2015	Criminal Justice and Courts Act 2015 came into force – Part 4 *Judicial review in the High Court and Upper Tribunal* 84. Likelihood of substantially different outcome for applicant 85. Provision of information about financial resources 86. Use of information about financial resources 87. Interveners and costs 88. Capping of costs 89. Capping of costs: orders and their terms 90. Capping of costs: environmental cases
20 October 2015	The Committee's first progress review of the Decision. The Committee concluded its first progress report with an invitation to the UK to report on the following; • the outcomes of each government's or cross government's review or considerations; • the actions each government or cross government has taken; and • the actions each government or cross government proposes to take, together with a timeline for doing so.
24 July 2015 – 15 September 2015	UK consultation on the reform of Judicial Review. "The government wants to have greater transparency in how judicial reviews are funded. This consultation seeks views on the proposals for court and tribunal rules to set out: • that a declaration of funding sources is required on an application for permission • that details of third party funding or likely funding in connection with an application for judicial review, need not be provided where the funding is below a threshold of £1,500 • that a more detailed picture of the applicant's financial circumstances is required on application for a costs capping order than on application for permission These proposals will limit the potential for third party funders to avoid their appropriate liability for litigation costs. It will also ensure that when costs capping orders are made – limiting or abolishing a party's costs liability -- they are made in appropriate cases."
17 September 2015	UK consultation on costs protection in environmental claims.

-10 December 2015	The UK's aim was to improve the environmental costs regime within the framework of relevant EU law requirements. The main areas of focus were: • the scope of the cases to be covered by the regime; • eligibility for protection; • the level of costs caps and whether they should fixed or not; and • factors the court should consider when seeking a cross-undertaking in damages when considering interim injunctions.
13 November 2015	UK's second progress report on implementation of the Decision.
13 April 2016	Committee's written questions to the UK.
29 April 2016	UK's response to the Committee's questions: Question: What consequences, if any, have the 2015 amendments to sections 84(2), 85, 86 and 87 of the Criminal Justice and Courts Act had for costs protection in environmental cases? Answer: None of the provisions listed have negative consequences for the availability or nature of costs protection in environmental cases.
31 August 2016	UK's third progress report due, but not submitted.
17 November 2016	UK's response to its consultation on improving the environmental costs regime. Proposals to amend the costs regime to : • include statutory reviews within Article 9(3) of the Convention; • implement 'hybrid' costs caps, namely variable caps that can be increased; • clarify factors that the court should use to assess cross-undertakings in damages; and • clarify how costs caps are applied when there are multiple claimants.
3 February 2017	Civil Procedure (Amendment) Rules (SI 2017/95) laid in Parliament. The rules : • extend protection to include statutory reviews within Article 9(2); • remove the deterrent of indemnity costs for a defendant if it unsuccessfully challenges the status of an Aarhus claim; • implement hybrid caps (£5,000 for an individual claimant, £10,000 for all other claimants and £35,000 for the defendant) that can be increased or decreased at any time during the course of the proceedings; • require the court, when deciding whether to vary the hybrid costs for the claimant to assess whether to do so would be

	prohibitively expensive for the claimant by using the factors in the CJEU judgment in the case of Edwards; and • require the court to apply the same principles on costs caps on appeals as it does at first instance.
24 February 2017	Royal Society for the Protection of Birds (RSPB), Friends of the Earth (FoE) and ClientEarth issue judicial review proceedings challenging the lawfulness of the amendments to the environmental costs rules (RSPB(1), FoE(2) and ClientEarth(3) v The Lord Chancellor and Secretary of State for Justice (case number CO/1011/2017)).
24 February 2017	Committee's second progress review.
28 February 2017	Civil Procedure (Amendment) Rules (SI 2017/95) come into effect.
3 April 2107	UK's third progress report – limited to reporting on the implementation of the changes introduced to the judicial review procedure.
12 April 2017	The Claimants granted permission to proceed with the judicial review.

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