

9c Lawn Road
London
NW3 2XS

6th May 2016

Ms Fiona Marshall
Environmental Affairs Officer and Secretary to the Compliance Committee,
Aarhus Convention Secretariat
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10
Switzerland

Dear Madam

DECISION V/9N CONCERNING COMPLIANCE BY THE UK WITH ITS OBLIGATIONS UNDER THE AARHUS CONVENTION

I would respond to the issues raised by the Defra letter as follows.

COSTS RULES IN ENVIRONMENTAL CASES

Like others, I share the concerns at the delayed Government's response to the consultation regarding costs in environmental cases.

I enclose for your information my representations made in connection with that consultation.

As can be seen, I am in favour of extending the costs protection provisions in force regarding Judicial Review to both statutory planning review cases such as those brought under section 288 of the Town and Country Planning Act 1990 and private nuisance cases.

All of these constitute environmental cases, and as such fall under the ambit of access to environmental justice under article 9 of the Aarhus Convention.

In addition, these provisions have been incorporated into EU law in article 11.1-5 of Directive 2011/92/EU as amended by Directive 2014/52/EU. Accordingly, this takes precedent in domestic law under section 2(1) of the European Communities Act 1972.

In addition, as EU law is engaged, further guarantees to access to EU justice is also provided under article 47 of the Charter of Fundamental Rights of the European Union.

It is therefore incumbent on the Government to both amend the current costs regulations in Aarhus cases for Judicial Review to fully comply with the rulings of the Court of Justice of the European Union in Edwards v. Environment Agency (No. 2) [2013] 1 W.L.R. 2914 and the recent case of European Commission v. UK (supporting Denmark and anor.) [2014] Q.B. 988, copies enclosed.

PROVISIONS OF SECTIONS 85 AND 86 OF THE CRIMINAL JUSTICE AND COURTS ACT 2015 RELATING TO DISCLOSURE OF FINANCIAL INFORMATION

Like others, I consider that the requirements of sections 85 and 86 of the Criminal Justice and Courts Act 2015 are in gross breach of article 9 of the Aarhus Convention, as incorporated into EU law under article 11.1-5 of Directive 2011/92/EU as amended by Directive 2014/52/EU.

Again, I consider them also to be in breach of article 47 of the Charter of Fundamental Rights of the European Union regarding access to justice regarding EU law.

In addition, I also consider that they cause inequality in the law, in breach of article 20 of the Charter of Fundamental Rights of the European Union.

I therefore consider that these provisions create disproportionate barriers to access to environmental justice, and indeed are a gross invasion of privacy and the right to private life under article 8(1) ECHR as incorporated under schedule 1 of the Human Rights Act 1998.

Whilst the provisions may seek to override the Data Protection Act 1998, although this may also be challengeable under section 2(1) of the European Communities Act 1972, they are in breach of the protection of “personal data” in article 8 of the Charter of Fundamental Rights of the European Union.

PROVISIONS OF SECTION 87 OF THE CRIMINAL JUSTICE AND COURTS ACT 2015 RELATING TO COSTS AGAINST INTERVENERS

Again like others, I consider that the provisions of section 87 of the Criminal Justice and Courts Act 2015 are in gross breach of article 9 of the Aarhus Convention, as incorporated into EU law under article 11.1-5 of Directive 2011/92/EU as amended by Directive 2014/52/EU.

Again, I consider them also to be in breach of article 47 of the Charter of Fundamental Rights of the European Union regarding access to justice regarding EU law.

They again seek to impose disproportionate barriers to environmental justice regarding third party interveners, such as Justice and Greenpeace and other similar organisations.

PROVISIONS OF SECTIONS 84 OF THE CRIMINAL JUSTICE AND COURTS ACT 2015 RELATING TO SAME OUTCOME

Again like others, I consider that the provisions of section 87 of the Criminal Justice and Courts Act 2015 are in gross breach of article 9 of the Aarhus Convention, as incorporated into EU law under article 11.1-5 of Directive 2011/92/EU as amended by Directive 2014/52/EU.

Again, I consider them also to be in breach of article 47 of the Charter of Fundamental Rights of the European Union regarding access to justice regarding EU law.

They again seek to impose disproportionate barriers to environmental justice regarding access to the court to challenge decisions of local authorities made in environmental cases.

The requirement for fair and open procedures and full transparency is vital as part of the decision making process in planning and environmental decisions.

Section 87 of the Criminal Justice and Courts Act 2015 seeks to impose an impossible burden on the court to determine issues as to whether or not the outcome would have been the same if the procedural irregularities and breaches hadn't occurred.

It is also incumbent under article 9 of the Aarhus Convention that there is a right of access to a court or tribunal in order for members of the public affected to be able to challenge environmental decisions including shortcomings in procedures and natural justice *etc.*

As such, it is submitted that section 87 of the Criminal Justice and Courts Act 2015 is incompatible with article 9 of the Aarhus Convention as incorporated into EU law under article 11.1-5 of Directive 2011/92/EU as amended by Directive 2014/52/EU.

AMENDMENTS TO CPR PART 54.12(7) AND CPR PART 52.15(1A) REGARDING JUDICIAL REVIEW

Although the Defra letter doesn't deal with the amendments made to Judicial Review, whereby a judge now has the power to certify an application for permission for Judicial Review as being "totally without merit", which results in the Claimant not being able to renew a refusal of permission to an oral hearing, I would also draw the Committee's attention to them.

In addition, if an application for permission is made to the Court of Appeal, it is considered on the papers if there has been a finding that the application has been "totally without merit".

I did seek to challenge them by Judicial Review but was prevented by an order refusing me permission to do so. I intend to send a complaint about this to the Committee shortly.

Again I consider that the provisions of CPR Part 54.12(7) and CPR Part 52.15(1A) are in gross breach of article 9 of the Aarhus Convention, as incorporated into EU law under article 11.1-5 of Directive 2011/92/EU as amended by Directive 2014/52/EU.

Again, I also consider them also to be in breach of article 47 of the Charter of Fundamental Rights of the European Union regarding access to justice regarding EU law.

I enclose the relevant extracts regarding CPR Part 54.12(7) and CPR Part 52.15(1A) from the 2016 White Book for the information of the Commission accordingly.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Terence Ewing', written in a cursive style.

Terence Ewing

Encs