

Response to the reply by DEFRA on behalf of the UK Government in respect of Decision V/9n

The Aarhus Convention Compliance Committee has asked Avich and Kilchrenan Community Council (AKCC) for a response to the UK Government's letter of 26 April 2016.

### **AKCC respectfully responds as follows**

#### 1 Scottish interests

The UK is the relevant Member State in this matter. UK law as such does not exist. That is to say, there is no single provision covering the entire UK. There is a provision in the law of England and Wales (Civil Procedure Rules, Chapter 45, part VII), and a provision in Scotland (Chapter 58A of the Rules of the Court of Session). It is important that the Committee appreciates that distinction.

AKCC is a Scottish Community Council, It therefore comments only upon the UK response, in so far as it affects the Scottish rules for which deal with access to justice, as they are found in the Aarhus Convention.

There is no standing Committee in Scotland charged expressly with reviewing Chapter 58A Rules of the Court of Session. However, the Court keeps all its rules under review.

#### 2 Scottish cases

Chapter 58A of the Scottish Rules was most recently considered by a superior Scottish Court (the Inner House of the Court of Session – the Scottish Appeal Court) in *Gibson v Scottish Ministers* [2016] CSIH 10 (10 February 2016) and in *John Muir Trust v Scottish Ministers* [2016] CSIH [number to be allocated] on 29 April 2016.

The full Opinion in *Gibson* is to be found at <https://www.scotcourts.gov.uk/search-judgments/judgment?id=4f8106a7-8980-69d2-b500-ff0000d74aa7>

The full Opinions in *John Muir Trust* are not yet posted to the internet and only became available on 7 May. When they are available, they will be found at <http://www.scotcourts.gov.uk> > Judgments > Court of Session.

It is submitted that the full Court's Opinion in *Gibson*, and the dissenting Opinion of Lord Drummond Young in *John Muir Trust* correctly set out the application of the Convention rules. AKCC does not summarise the cases here, but attaches these Opinions to this Note in the form of two appendices.

In *Gibson*, the Court was unanimous. In *John Muir Trust* the Court was divided, with the majority against the grant of a Protected Expenses Order.

The Committee is referred with respect to these and invited to conclude that the decision in *Gibson* and the minority Opinion in *John Muir Trust* are in its eyes correct.

### 3 Alteration of the rules as to eligibility

AKCC agrees that alteration of the definition of eligible claimants in the Convention is not desirable, and that the Åarhus rules should be applied on an inclusive basis, to comprehend individuals, NGO's and environmental bodies, and unincorporated or incorporated associations. The circumlocution in the UK's response seems to say, at one hand, that there is no intention to narrow the definition of "eligible claimant" yet on the other to bestow on the Court a power to exclude a case based on the nature of the Claimant. AKCC does not believe that this was the intention of the Convention.

### 4 The cost of making an application

It is obviously critical to the successful application of the Convention that the cost of seeking permission to make an application before the Court be covered by any protective expenses order. The UK Government's response says nothing new. In Scotland, an application for a Protected Expenses Order, following Chapter 58A, allows the Court discretion to apply the protective provisions retrospectively so as to cover the initial application(s). It is therefore a matter for the Court's discretion, allowing it to grant the order retrospectively in meritorious cases and, *per contra*, to refuse it in cases which are refused permission because they lack merit.

AKCC is obliged to the Committee for the opportunity to comment further. It adopts all its previous submissions and invites the Committee to hold that the UK Government is not in compliance with the provisions of the Convention concerned with the expense of access to justice.

Christine Metcalfe

AKCC

7 May 2016.