

From: "Christine Metcalfe"  
To: Aarhus Compliance  
Date: 16/05/2016 12:35  
Subject: Re: Decision V/9n: UK response to ACCC's questions & response to Uk Govt. reply of 26.04.16.

Dear Vira,

Please find below the answer to your question as received from our legal representative.

Kind regards,

Christine Metcalfe. AKCC.

From: jdcampbell  
Sent: Sunday, May 15, 2016 7:12 PM  
To: Christine Metcalfe  
Subject: Re Decision V/9n: UK response to ACCC's questions & response to Uk Govt. reply of 26.04.16.

Dear Christine,

Thank you for your email. The time allowed is short, and the request for a compressed summary makes the task more difficult than it might otherwise be.

However, to try to answer the question, the key part of the finding in Decision V/9n is as follows:

2 (a) By not taking sufficient measures to ensure that the costs for all court procedures subject to article 9 in England and Wales, Scotland and Northern Ireland are not prohibitively expensive and, in particular, by not providing clear legally binding directions from the legislature or the judiciary to this effect, the Party concerned continues to fail to comply with article 9, paragraph 4, of the Convention;

(b) In the light of the above finding that the Party concerned has failed to take sufficient measures to ensure that the costs for all court procedures subject to article 9 in England and Wales, Scotland and Northern Ireland are not prohibitively expensive, the Party concerned has failed to sufficiently consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice, as required by article 9, paragraph 5; (underlining added)

It is of course for the Committee to make a judgment as to whether the current Rule of Court 58 A complies with those criteria. But that is not the question for today.

The decision of the Court in Gibson v Scottish Ministers reads in part as follows

[54] ....When considering the subjective test, it appears that the Lord Ordinary addressed the question of whether the petitioner was able to meet the expenses; we agree with counsel for the petitioner that the test is not the petitioner's ability to pay, but whether it is reasonable, in all the circumstances, that he should be required to do so. The focus of the Aarhus Convention, the 2011 Directive and the authorities to which we have referred is the protection of the environment, and the removal of unreasonable financial barriers which may act as a disincentive to members of the public (whether individuals or organisations) from playing an active role in protecting and improving the quality of the environment. (underlining added)

and

[63] Having regard to all the information before us about the petitioner's individual financial circumstances we are satisfied by applying the subjective test that the proceedings are prohibitively expensive for the applicant. It follows that we must make a PEO.

and

[66] We have rehearsed the importance of what is at stake for the protection of the environment. Essentially, this appears to fall into three parts - impact on the Dark Sky Park, impact on the Dark Sky Observatory, and impact on the designed landscape of the Craigengillan Estate. Concerns about these issues have not been confined to the petitioner; they were referred to in the objections on behalf of South Ayrshire Council and East

Ayrshire Council and we note that there were 4,723 objections to the application. As Advocate General Kokott observed, the environment cannot defend itself, but needs to be represented by concerned citizens or organisations acting in the public interest. We are persuaded that the petitioner may properly be described as one of these concerned citizens.

and

[69] Having regard to all of these factors, and to the fact that it is not disputed that the likely total costs of these proceedings may exceed £170,000, in applying the objective test we are satisfied that the proceedings are prohibitively expensive.

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AKCC submits that on the current state of the Rule of Court, the reasoning and application of rule 58A in this case is consistent with the rule itself and with the Convention, and therefore provides a helpful example for the Committee to assist its judgment as to whether or not the Party concerned is in breach in Scotland, or complies with, the Convention. In particular the point is strongly made that it is not the applicant's ability to pay which is in issue, but whether it is reasonable in all the circumstances judging the matter both subjectively and objectively, that he should do so.

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In *John Muir Trust*, the court was divided. The majority opinion of Lady Smith is clearly focussed (though not exclusively) on the JMT's ability to pay in the circumstances. She has eschewed any need to offer this particular litigant protection at this stage, but she has left the door open for the time when expenses are finally dealt with after the Reclaiming Motion (Appeal) is actually determined. It is submitted that this is not the approach envisaged by the Convention. Lord Brodie delivered a concurring opinion, though observing that an application for a PEO under Rule 58A is but "one way whereby the UK's obligation under the EIA directive may be dealt with." His meaning is not clear. Article 11 of the EIA Directive does not touch on the question of costs, or indeed prohibitive expense. He may have meant to refer to the Public Participation Directive. In any event, it is submitted that his opinion is not helpful.

Lord Drummond Young dissented, and it is not possible to summarise his opinion easily. Members of the Committee are respectfully asked to read it for themselves. Lord Drummond Young's observations touch on the way in which applications, even by relatively wealthy NGO's like the JMT, must be dealt with. They follow the precedents of *Edwards* and the AG's Opinion in *Djurgården*. He said

"[53] For the foregoing reasons I consider that the question of whether the expenses of litigation are "prohibitively expensive" should be approached in a practical manner that has regard to the overall financial requirements of an environmental charity. " His opinion explains his approach, which is expressly consistent with the Convention.

This is significant for decision V/9n, where the question is whether the UK has complied with the Convention. That seems to AKCC to depend (in Scotland) on the Committee's judgment about the actual wording of RC 58A, read in the light of these two decisions. Neither contained a challenge that the Rule (58A) did not comply with the Directive.

AKCC re-emphasises that its comments focus only on the Scottish rules.

Respectfully submitted,

John Campbell QC  
for AKCC

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