

UK compliance with Decision V/9n of the Meeting of the Parties

Further statement by Friends of the Earth, Royal Society for the Protection of Birds (Observers) and ClientEarth (Communicant) of 7 March 2017

1. Introduction

At its meeting of 3 March 2017, the Compliance Committee invited participants to make further written statements, partly due to an insufficiency of time. We hope this further information will assist the Committee. Please consider this with our earlier joint statement dated 2 March 2017.

2. Legal Proceedings

The Committee expressed an interest in our current legal proceedings. We have applied for judicial review of three aspects of the UK's new reforms. These relate to the "hybrid caps" scheme (under which costs protection can change at any point in proceedings), the requirement for claimants to make financial disclosure in order to facilitate that scheme, and to clarify that the total costs burden on a claimant can be taken into account when assessing 'prohibitive expense'.

We consider that these new rules are incompatible with Article 3(7) of the "Public Participation Directive" (Directive 2003/35/EC), and the amendments it made to the "EIA Directive" (Directive 85/337/EEC) and the "IPPC Directive" (Directive 96/61/EC¹) as interpreted by the rulings of the Court of Justice of the European Union in *Commission v UK*² and *Edwards*³ cases

Hybrid caps – varying the costs protection

- a) The new civil procedure rule 45.44 fails to provide certainty to claimants as to their costs exposure, and at the earliest opportunity, because that limit can change as a case progresses and greater costs are incurred.

It opens up the possibility that a claimant will embark on litigation willing to take a particular cost risk only to discover that risk later changes. That possibility is likely to have a chilling effect on claims being commenced in the first place, because most claimants cannot afford – in financial terms – to take on an unquantifiable and large costs risk. The lack of certainty contradicts the requirements of the Convention and EU law, as explained in leading case law.

Financial Disclosure - Failure to provide for mandatory private hearings into a Claimant's finances.

- b) The new civil procedure rule 45.42 requires a claimant, when starting a claim, to have "*filed and served with the claim form a schedule of the claimant's financial resources which takes into account any financial support which any person has provided or is likely to provide to the claimant*". If a claimant does not do this it will not have any costs protection. However, the absence of any guidance specifying the scope and format of financial information required makes the requirements hard to understand and comply with, and is more onerous than similar requirements for non-environmental JR cases even though this is a scheme

¹ Now incorporated into the Industrial Emissions Directive

² Case C-530/11 *European Commission v. UK* [2014] 3 WLR 853

³ Case C-260/11 *Edwards v. Environment Agency* [2013] 1 W.L.R. 2914, as considered and ruled upon by the UK Supreme Court in the same case: *R (Edwards) v. Environment Agency* (No.2) [2014] 1 W.L.R. 55.

intended to facilitate access to environmental justice. What is more, the failure to guarantee the privacy of the claimant's private financial affairs as disclosed will deter legitimate claimants. It is also unfair within the meaning of Article 9(4) of the Convention as implemented by Article 3(7) of the Public Participation Directive.

Declaration that court may consider the claimant's total costs burden

- c) The Ministry of Justice expressly stated that the claimant's own costs should not be considered in assessing whether the costs of legal proceedings will be prohibitively expensive. We have sought a declaration from the court that this is unlawful and contradicts leading case law.

3. Written Questions for the UK

We are grateful to the Committee for the opportunity of putting questions in writing to the UK. We have five questions in total:

- 3.1 In order to access costs protection claimants must serve "*a schedule of the claimant's financial resources which takes into account any financial support which any person has provided or is likely to provide to the claimant*". It is unclear what this specifically requires. What guidance, if any, will be provided to potential claimants on the level of detail to be included in the schedule of financial resources so that they can understand what is required?
- 3.2 Does the UK consider that this rule on financial disclosure could lead to satellite litigation on what should be included in the schedule of financial resources, and consequently impact on the eligibility of claimants for costs protection in Aarhus Convention claims after they have initiated proceedings?
- 3.3 How will the hybrid caps scheme (whereby costs protection can be varied multiple times during the proceedings) provide claimants with certainty that their costs' liability will not be prohibitively expensive?
- 3.4 Does the UK have evidence that the hybrid costs scheme will deter unmeritorious cases, and not deter meritorious cases, and will it share that evidence to justify its changes?
- 3.5 What monitoring system has the UK set up to assess and report on the impact of the rule changes over the next 12 to 24 months? If it is not yet set up, when will it start?

4. Compliance Mechanism – further measures

We are increasingly concerned that the Ministry of Justice in England and Wales has taken the decision to progress damaging amendments to the costs regime for environmental cases, notwithstanding Decision V/9n concerning the UK's compliance with Articles 9(4) and (5) of the Convention on prohibitive expense ([here](#)).

These proposals were made in the absence of evidential justification, based on flawed assumptions, and effected in the face of overwhelming public opposition to them, because of the chilling effect on access to justice they are widely perceived to have. This was again reflected by the participants to the meeting on 3 March 2017.

In light of the above, we call upon the Compliance Committee to consider additional constructive measures to bring the UK back into compliance with the Convention. We believe this is proportionate given the intentional and informed decision to effect

these adverse changes, and the long period of time over which the UK has been out of compliance.

With reference to the Guidance Document on the Aarhus Convention Compliance Mechanism ([here](#)). These measures may include recommending that the Sixth Meeting of the Parties to the Aarhus Convention issues the UK with a caution. It may also include inviting the UK to accommodate an expert mission, with the involvement of Committee members and other experts, as appropriate, to provide expert opinion on possible ways to implement the measures referred to in Decision V/9n and address non-compliance.

We would be pleased to assist the Compliance Committee further in its ongoing consideration of this issue.

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