

18 December 2015

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

1 Executive Summary

1. The United Kingdom (UK) has failed to remedy its non-compliance with its obligations under article 9 of the Aarhus Convention¹ and respond effectively to the recommendations made by the Aarhus Convention Compliance Committee (the Committee) in its decision V/9n (Decision).
2. The UK's second progress report dated 13 November 2015 reveals a failure to address the findings of the Committee and to make substantive progress towards implementing the requirements of the Decision.
3. It has, to date, failed to "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", as required by recommendation 8(d) of the Decision, and furthermore, its proposed changes to the Civil Procedure Rules (CPR) in England and Wales (Consultation Proposal)² will make it more difficult for citizens to challenge public authorities in environmental cases.
4. The Consultation Proposal will create a procedural maze which will have the effect of deterring the average citizen or non-governmental organisation (NGO) from bringing environmental claims in the public interest. It is our view that the Consultation Proposal will introduce greater uncertainty, barriers and expense for claimants seeking to bring a public law claim and will therefore worsen access to justice in England and Wales and worsen the UK's compliance with its obligations under the Aarhus Convention.

2 Introduction

5. The UK was found to be non-compliant with article 9 of the Aarhus Convention (the Convention), at the fifth session of the Meeting of the Parties to the Convention when decision V/9n was adopted (see (ECE/MP.PP/2014/2/Add.1)³).
6. The Committee reiterated at paragraph 8 of the Decision of its recommendation 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;

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 Consultation on these proposed changes to the Civil Procedure Rules closed on 10 December 2015, the consultation paper is available at https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/supporting_documents/costprotectioninenvironmentalclaimsonconsultationpaper.pdf

³ <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>

(c) Further review its rules regarding the time frame for the bringing of applications for judicial review to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework;

(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."

7. The Committee in its first progress review of the UK's implementation of the Decision noted at paragraph 18 that, in order to have fulfilled the requirements of the Decision, the UK would have to "provide evidence that:

(a) Its system for allocating costs in all court procedures subject to article 9 of the Convention has been further reviewed, and practical and legislative measures to ensure that the allocation of costs in all such cases is fair and equitable and not prohibitively expensive has been undertaken;

(b) The establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice has been further considered;

(c) Rules regarding the time frame for the bringing of applications for judicial review to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework have been further reviewed;

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

8. The Committee concluded its first progress report 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.

9. ClientEarth is one of the three communicants⁴ of communications ACCC/C/2008/33. Our comments relate to the UK's Consultation Proposal as they apply in England and Wales only.

⁴ Joint communicants are The Marine Conservation Society and Robert Lattimer.

3 Comments on the UK's second progress report

10. The UK's second progress report is incomplete and inadequate. It purports to respond to sub-paragraphs 8 (a), (b) and (d) of the Committee's Decision but fails to do so. The UK has failed to report adequately to the Committee on:
 - a. the outcomes of the cross government review of the law in England and Wales; and
 - b. the actions it has taken or proposes to take to bring the law in England and Wales into compliance with the Convention, together with a timeline for doing so.
11. Indeed, the UK's response fails to give the Committee an estimated date for completion of the consultation process or the enactment of appropriate legislation or regulations in England and Wales. The substantive content of the Consultation Proposal and its compliance with the Convention is discussed in detail at section 3.1 below.

Sub paragraph 8 (a)

12. The UK has failed to provide any evidence to show that it has reviewed **all** court procedures in England and Wales.
13. It has only reported on its proposals in relation to changes to judicial review cases and certain statutory reviews.
14. The proposals set out in the consultation will not remedy the UK's non-compliance but will instead re-introduce measures that the Committee and courts have found to be prohibitively expensive.

Sub paragraph 8 (b)

15. The UK has not reported on its review of the assistance mechanisms that should be established to remove or reduce financial barriers to access to justice. The UK's silence in response to this recommendation implies that it has failed to conduct such a review.
16. Importantly, the Consultation Proposal will increase financial barriers for all claimants who wish to bring a public law challenge.

Sub paragraph 8 (d)

17. The UK has 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.
18. The Consultation Proposal, including the requirement for multiple claimants to contribute to cross-undertakings for damages, fails to address the UK's longstanding non-compliance with article 9 paragraph 4.

4 ClientEarth's comments on the Consultation Proposal to amend the Civil Procedure Rules for England and Wales

19. The Consultation Proposal is said to be influenced by the recent judgements in the following cases:

- the Court of Justice of the European Union (CJEU) in the case C-260/11 Edwards v Environment Agency [2013] 1 W.L.R. 2914;
- the Supreme Court in the same case of R (Edwards) v Environment Agency (No 2) [2014] 1 W.L.R.55; and
- the CJEU in the case C-530/11 European Commission v UK [2014] 3 W.L.R. 853.

20. In order to bring the UK into compliance it must introduce changes that meet the recommendations of the Committee and findings of courts in the Edwards cases.

21. The CJEU in Edwards set out the test for determining what is 'prohibitively expensive' for a citizen under EU law⁵ and the Aarhus Convention. This test was subsequently reiterated by the Supreme Court when the matter was referred back to the national court.

22. The court's findings were further summarised by the Advocate General's opinion in Commission v UK. at paragraph 55 "[...] the correct position is that litigation costs may not exceed the personal financial resources of the person concerned and that in objective terms, that is to say, regardless of the person's own financial capacity they must not be unreasonable."

23. In assessing what is objectively unreasonable the court must have regard to a number of factors⁶.

24. The Consultation Proposal, if implemented, will fail to bring the UK into compliance with article 9 of the Aarhus Convention as it fails to introduce a system where the claimants' costs are not prohibitively expensive.

25. The Consultation Proposal, if implemented in its current form, will:

- amend the definition of an Aarhus Convention claim in CPR 45.41(2) to mean (a) claims brought by 'a member of the public'; and (b) extend environmental costs protection to statutory reviews of 'decisions, acts and omissions' falling within article 9 paragraph 2 of the Convention⁷ only; and
- make environmental costs protection contingent on a claimant being granted permission to pursue a claim before the court;

⁵ 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.

⁶ Including "the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the law and the applicable procedure and the potentially frivolous nature of the claim at its various stages (see, to this effect, Edwards and Pallikaropoulos, paragraph 42 and the case-law cited), but also, where appropriate, costs already incurred at earlier levels in the same dispute"

⁷ The proposal does not extend to statutory reviews of "acts or omissions" falling within article paragraph 3 of the Convention.

- remove the certainty of standard costs caps and introduce 'hybrid' cost caps, at increased levels of £10,000 and £20,000 for an individual claimants and groups of claimants respectively, and a reduced level of £25,000 for public authorities, which can be further increased or decreased by the court;
- withhold environmental costs protection unless a claimant files with the court and serves on the defendant a schedule of their financial resources, including any support a third party has provided or is likely to provide;
- apply separate cost caps to individual claimants in the same case;
- remove the deterrent of indemnity costs to challenges brought by public authorities to the status of an Aarhus claim or claimant;
- require the court to take into account the financial contributions made by third parties when assessing the level of damages to be set when asking for a cross-undertaking, with the implication that the third party may be called upon to contribute to a future award of damages if the claim is unsuccessful.

Definition of an Aarhus Claim

26. The revised definition of an Aarhus Convention claim does not cover (a) private law claims arising out of the act or omission of a private person, as required by article 9 paragraph, 3 of the Convention, such as private nuisance claims; or (b) statutory reviews of decisions that fall within article 9 paragraph 3 of the Convention.⁸

27. The proposal therefore does not give full effect to article 9, paragraphs 3, and as a result a wide range of Aarhus Convention claims will not be covered by the environmental costs regime. The UK has therefore failed to address Sullivan LJ's concern about a costs regime based on the identity of the decision-maker, as stated in the case of Venn⁹ at para 34:

"[...] A costs regime for environmental cases falling within Aarhus under which costs protection depends not on the nature of the environmental decision or the legal principles upon which it may be challenged, but upon the identity of the decision-taker, is systemically flawed in terms of Aarhus compliance.

35. This Court is not able to remedy that flaw by the exercise of a judicial discretion. If the flaw is to be remedied action by the legislature is necessary. We were told that the government is reviewing the current costs regime in environmental cases, and that as part of that review the Government will consider whether the current costs regime for Aarhus claims should make provision for statutory review proceedings dealing with environmental matters ... That review will be able to take our conclusions in this Appeal, including our conclusion as to the scope of Article 9(3), into account in the formulation of a costs regime that is Aarhus compliant."

28. Such an approach runs contrary to the Committee's findings of non-compliance in cases ACC/C/2008/33/27 and/23, which the Committee considered in its report of May 2014. The

⁸ Article 9 paragraph 3 may include acts and omissions contravening provisions on such matters as environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships, regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws.

⁹ Secretary of State for Communities and Local Government v Venn [2014] EWCA Civ 1539.

report confirmed that the UK was failing to comply with its obligations, because it only provided costs protection in cases brought for judicial review.

29. The Consultation Proposal only covers proposed changes to the court rules in relation to cases at first instance, and not appeals.

Definition of an Aarhus claimant

30. The UK at paragraph 9 of its second progress report says that the UK intends to align the wording in the rules with its obligations under EU law and the Convention, with the aim of granting costs protection to 'members of the public'. However the draft rules refer to 'a member of the public' and therefore on the face of the rules fail to include all those entitled to environmental costs protection.
31. The Aarhus Convention gives rights to two classes of claimants: "*members of the public*"¹⁰ and the "*public concerned*".¹¹ The Convention defines 'the public' as "*one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups*"; and 'public concerned' as "*the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.*"
32. We would invite the UK to confirm its intentions, and in particular whether the definition will cover all claimants who are entitled to costs protection under EU law and the Convention. We suggest that the term "the public" in the CPR should be defined by reference to the Convention.
33. The combined effect of excluding certain claims that fall within article 9 paragraph 3 of the Convention, as explained at 3.1 above, and a narrow definition of those eligible to bring a claim will mean that many claimants will be excluded from the costs protection regime even though they are entitled to such protection under the Convention. In public law claims they will have to rely on the more limited costs capping procedures implemented by sections 88 and 89 of the Criminal Justice and Courts Act 2015 (CJ&CA) (UK), which will re-introduce the element of judicial discretion in assessing whether or not the claimant should be granted cost protection, that the Committee has already found to be non-compliant.

Deferring costs protection until the grant of permission

34. Any delay in granting costs protection introduces uncertainty for the claimant, which means that he cannot assess his financial risk of bringing a claim until the court has determined the issue of permission, by which time both the claimant and defendant will have incurred substantial costs. The claimant is entitled to reasonable predictability as stated in Commission v UK at paragraph 58 "*It is also apparent from the foregoing that that regime laid down by case-law does not ensure the claimant reasonable predictability as regards both whether the costs of the judicial proceedings in which he becomes involved are payable by him and their amount, although such predictability appears particularly necessary*

¹⁰ Article 2 paragraph 4.

¹¹ Article 2 paragraph 5.

because, as the United Kingdom acknowledges, judicial proceedings in the United Kingdom entail high lawyers' fees."

35. Further, this proposal will remove all costs protection in cases where permission is not granted, regardless of the claimant's financial resources. Such an approach is contrary to the decision of the CJEU in Edwards, in that there is no early assessment of the claimant's financial resources to establish whether his potential liability for costs to the stage of permission is prohibitively expensive for him personally. Also, there is no assessment of whether or not the costs are objectively reasonable, as if permission is not granted this will be solely on the merits of the case, without any consideration of the other equally important factors identified in *Edwards*.
36. This proposal therefore fails to meet either of the limbs of the test established by the CJEU in *Edwards* on what is prohibitively expensive, both of which must be met if the UK's legal and procedural system is to be compliant.
37. The Committee has also found that costs prior to the grant of permission can be prohibitively expensive under the current rules. In communication ACCC/ 2012 /77 an adverse costs order of £8,000 made against the claimant, Greenpeace, for costs incurred by the defendant prior to the grant of permission was found to be prohibitively expensive. If the UK's proposal for removing costs protection prior to the grant of permission is implemented, claimants will be exposed to costs that are prohibitively expensive without any form of redress in the national courts.
38. Finally the short time frame for bringing a claim for certain statutory reviews,¹² coupled with the increased burden of gathering complex information on actual and likely funding (if the proposals set out at paragraphs 41 to 46 in the Consultation Proposal were to be implemented), makes this proposal unfair, uncertain, burdensome and disproportionate.

Requirement that claimants provide financial information

39. This proposal, if introduced, will deter citizens, and the associations and organisations that they belong to and support, from bringing proceedings. It will require claimants to seek financial information from their supporters and funders, which is invasive and is likely to deter such support. The rules also require the claimant to file the information with the court and serve it on the defendant(s).
40. Further, in Garner¹³, the Court of Appeal held:

"52 The more intrusive the investigation into the means of those who seek PCOs and the more detail that is required of them, the more likely it is that there will be a chilling effect on the willingness of ordinary members of the public (who need the protection that a PCO would afford) to challenge the lawfulness of environmental decisions."
41. The blanket requirement that the claimant be required to file at court a schedule of his resources or likely resources at the commencement of proceedings will have a chilling effect and deter claims.

¹² Six weeks in planning cases.

¹³ See R (Garner) v Elmbridge Borough Council [2012] P.T.S.R. 250 paragraphs 50-53.

Levels of costs protection available - hybrid costs caps

42. This proposal for 'hybrid' cost caps introduces uncertainty for the claimant, as she cannot assess her financial exposure to legal costs prior to bringing her claim because the court has the discretion to increase her liability, even if the defendant does not ask the court to do this. The proposal is therefore regressive, in that it will re-introduce the failings of the previous costs regime, which the Committee has already found to be non-compliant.
43. Besides removing certainty for the claimant, any assessment by the court will introduce new stages in the court process and the likelihood of another hearing for the court to consider the various factors proposed in the draft of CPR 45.44(4)(b)(ii), including a new factor in judicial review claims, namely that the claimant 'has a reasonable prospect of success'.
44. A claimant faced with (a) the risk of being held responsible for an unknown adverse cost order; (b) the requirement to provide her personal financial information to the court, public authority and possibly other parties to the claim; and (c) increased costs and delay caused by an additional hearing, will be deterred from bringing, or supporting an NGO, in bringing an environmental claim in the public interest.
45. Following the decisions of the CJEU and Supreme Court in Edwards, the primary requirement is that costs will not exceed the personal financial resources of the person bringing the claim, that is, the risk of costs must be 'subjectively reasonable' for the claimant. Only if the costs are found to be subjectively reasonable does the court need to move to the next stage, namely whether or not the costs are 'objectively reasonable'. To this end, the drafting in the proposed rules is not correct because it provides that costs will be prohibitively expensive if they either (a) exceed the financial resources of the claimant or (b) they are objectively unreasonable. This could be interpreted as meaning that the court could increase the costs cap if it was objectively reasonable to do so, even though the costs exceed the financial means of the particular claimant.
46. Further, the Aarhus Convention only requires the UK to ensure that the citizen's costs are not prohibitively expensive. What is prohibitively expensive means the entire citizen's costs liability that is both her own costs plus any adverse costs she may be ordered to pay, if the claim is unsuccessful. This is relevant when setting the costs cap for the public authority, as a successful claimant must be able to recover sufficient costs from the public authority so that she is not left with a costs bill she cannot pay.
47. The UK is obliged to remove or reduce financial barriers to access to justice under article 9 paragraph 5, which was recognised by the Committee's requirement at paragraph 8(b) of the Decision. The proposal of hybrid costs however introduces financial and practical barriers to access to justice.

Introduction of individual costs caps for multiple claimants

48. The introduction of individual costs caps for multiple claimants will require complex procedures to be introduced.
49. The UK argued that it was not prohibitively expensive to divide a final adverse costs award of £39,454 between the five claimants in communication ACCC/C/2008/27. The Committee

found that the manner of allocating costs on this basis was unfair, within the meaning of article 9 paragraph 4.

Replace the deterrent of indemnity costs when challenging the status of claim

50. Defendants may be more willing to challenge the status of an Aarhus claim, if the current risk of having to meet an indemnity costs order is replaced with standard costs.
51. The likelihood of such challenges will be increased with the imprecise definition of who is eligible to bring a claim.

Introduce a procedure for multiple claimants to contribute to cross-undertakings for damages

52. The Parties to the Aarhus Convention recognised that citizens bring claims in the public interest to protect the environment for all of us, and not for personal gain.
53. Given that most citizens will struggle to meet even a standard costs cap plus their own legal costs, it is vital that they are not discouraged further from bringing environmental claims, which they do in the public interest. Therefore, in cases where there is a high risk of irreparable damage being caused to the environment, then interim relief should be ordered, without the requirement for a cross-undertaking for damages.
54. The CJEU has also confirmed that interim relief and the issue of cross undertakings in damages in particular, must be taken into account when evaluating what is prohibitively expensive for the claimant.¹⁴
55. We also refer to paragraphs 49 to 50 above, as our views on individual costs caps for multiple claimants also applies to the UK's proposal to require contributions towards cross-undertakings damages from multiple claimants.
56. Further, the requirement that the court have regard to any financial support, which any person has provided or is likely to provide, is burdensome and will have a chilling effect.
57. The UK in its Second Progress Report has not addressed the requirement to reduce the financial barriers to access to justice that arise in cases where it is appropriate to grant interim relief.

5 Other statutory considerations

58. Part 4 of CJ&CA has introduced sweeping changes to judicial review. Section 84 of the CJ&CA amends section 31 of the Senior Courts Act 1981, the statute that contains the major framework for judicial review in primary legislation.

¹⁴ See *Commission v UK*, paragraphs 64-72

59. Section 84 also empowers the court to consider of its own motion, or when requested by the defendant, whether the outcome of the decision would have been substantially different if the conduct complained of had not occurred. Where it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different then the court must refuse to:
- grant permission; or
 - grant relief or a monetary award on an application for judicial review.
60. It is open to the court to disregard this requirement if it is appropriate to do so for reasons of exceptional public interest. In that case the judge must certify that the case is one where the exception applies.
61. These provisions will make it more difficult and uncertain for claimants who seek to bring a challenge on procedural grounds and will therefore deter such claims.
62. A claimant who finds himself not entitled to environmental costs protection under the UK's narrow definition of either a claimant or claim must apply for a costs capping order under the provisions of Part 4 of the CJ&CA. This means that he will not be entitled to costs protection unless he is granted permission¹⁵. He must also file with the court information about his personal financial resources and that of his supporters, and in the case of an NGO its funders and members.¹⁶ The court is then required to take his financial support into account and also consider making a cost order against any person identified as providing financial support for the proceedings.¹⁷
63. The changes introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA) are also relevant. We commented in detail on the changes introduced by the UK in our remarks on the UK's first progress report.¹⁸ Our comments at paragraphs 38 to 50 are still pertinent and we refer the Committee to our earlier submission.
64. The UK has not addressed the lack of financial assistance available to environmental claimants in its second progress report.

6 Conclusion

65. 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.
66. The Meeting of the Parties adopted the findings of the Committee on three communications ACCC/C/2008/23, ACCC/C/2008/27, and ACCC/C/2008/33 at its fourth session in 2011. The UK has to date failed to provide a full and substantive response to the Committee's findings and recommendations. It has instead introduced piecemeal changes that inhibit access to justice.

¹⁵ Sections 88 to 90.

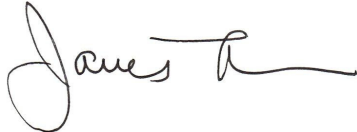
¹⁶ Section 85.

¹⁷ Section 86.

¹⁸ Submitted to the Committee on 23 January 2015.

67. The cumulative effect of the statutory changes introduced by LASPOA and the CJ&CA, increases in court fees (of up to £1,000 in a judicial review case) and the UK's proposed changes to the court rules on costs protection in environmental cases is that the UK will be less compliant with the Convention.

68. This leads us to the view that the UK has no intention of complying with the Committee's recommendations in an effective and timely manner.



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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.

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