giving nature a home

Ms Fiona Marshall,
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6th May 2016

Dear Ms Marshall,

Re: Decision V/9n concerning compliance by the UK with its obligations under the Aarhus Convention

We are grateful for the opportunity to comment on the UK's response to the Compliance Committee's questions as set out in Defra's letter dated 29th April 2016.

We have already commented extensively on the effect of proposals to amend the costs regime for environmental cases as consulted upon by the Ministry of Justice in England and Wales in September 2015 and the Department of Justice in Northern Ireland in December 2015. We therefore make no comment in relation to the UK's substantive response to questions 1-3.

We would, however, ask the Committee to note that the MoJ indicated that a response to the consultation would be published within 12 weeks of the deadline (i.e. on or around 8th March 2016). No response has been published and we now understand that we may not expect one until at least October 2016. This delay is distinctly unhelpful as it is causing practitioners and potential claimants concern about the continuing certainty with regard to costs protection.

We also wish to make a brief comment in relation to the UK's response to the fourth question concerning sections 84(2), 85, 86 and 87 of the Criminal Justice and Courts Act 2015 and their implications in England, Wales and Northern Ireland.

Defra states: "*none of these provisions have negative consequences for the availability or nature of costs protection in environmental cases*". We find this statement puzzling in light of the lengthy submissions that we (and no doubt others) have made in relation to the likely effect of ss. 85 and 86 CJCA 2016. While the Government may have originally maintained that the requirement to file at court and serve on the respondent a schedule of their financial resources at the commencement of proceedings may have no direct impact on the availability or nature of costs protection, this surely cannot still be the case if (as it says) the Government has carefully considered the responses to the consultation.

However, to be absolutely clear - these proposals will deter people from bringing cases for fear that their personal financial details will be in the public domain. Moreover, where a group of

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residents, who by definition live in a community, are applicants, they will not wish their neighbours to have that degree of insight into their personal financial affairs, let alone the public authority and, as these are open Court proceedings, the public. In no other civil proceedings before the Courts do litigants have to declare their financial resources to the Court and to the other side - save in those unusual cases where there are real and objective concerns that the other party will be unable to pay costs if they lose. Accordingly, applicants in environmental cases will now be treated markedly *less* favourably under a regime that is supposed to enable access to justice.

With regard to the impact the CJCA 2015 in England and Wales, section 84 CJCA 2015 requires the High Court to refuse permission (or relief) if it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. While s.84 does not introduce further barriers in relation to prohibitive expense, it does present an additional basis on which a case cannot be progressed – even when it recognised that an unlawful decision has been made. We have examples of cases which have not been brought for this reason and would contend that it renders the process of JR unfair, if not prohibitively expensive.

Similarly, section 87 CJCA obliges the court (if certain conditions are met) to order interveners to pay any costs specified in the application that the court considers have been incurred by the relevant party as a result of the intervener's involvement in that stage of the proceedings. This provision clearly intends to act as a deterrent to parties considering intervening in cases, which in our view is contrary to the spirit of the Convention.

We would point out that no evidence was produced by the Government in relation to the potential impact of the provisions of the CJCA 2015 before they became law, and it is unclear whether they've made any attempt to assess their effect.

Finally, we wish to thank the Committee for providing us with an opportunity to comment on the UK's response and hope these observations will help to inform the Committee's ongoing discussion on this issue.

Yours sincerely,

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