

UK compliance with Decision V/9n of the Meeting of the Parties
Statement to the Aarhus Convention Compliance Committee
Thursday, 2 March 2017

My name is William Rundle, Lawyer at Friends of the Earth. I make this statement on behalf of Friends of the Earth Ltd and the Royal Society for the Protection of Birds. It is endorsed by ClientEarth. We welcome the opportunity to make this statement on the UK's implementation and compliance with Decision V/9n.

1. Introduction

In making this statement I would like to draw the committee's attention to the more detailed submissions contained in the "*Environment Links UK statement: Access to Justice in the UK*" (enclosed)¹, with which we agree.

This statement builds on that last made by Gita Parihar, Head of Legal at Friends of the Earth, in March 2016, on behalf of Friends of the Earth, the RSPB and C&J Black Solicitors in Northern Ireland.

2. Current Situation

The UK Government has completed its consultation on reforming the costs protection scheme for environmental claimants, with new rules now in force as of 28 February 2017². The new rules contain two main changes that are of most concern for environmental claimants. The changes have previously been criticised by the Committee in its second progress review (24 February 2017), for failing to fulfil the requirements of decision V/9n and bring the UK into compliance. They are:

1. So called "hybrid caps" – a system whereby a claimant has a default cap at the outset of a claim, but which can be varied at any time right up to trial.
2. Financial Disclosure – in order to obtain costs protection a claimant must now disclose its private financial affairs at the outset of a claim.

Hybrid caps

The hybrid caps scheme means claimants start at an initial adverse costs limit (£5,000 for individuals; £10,000 in all other cases) but this can be changed during the proceedings right up to trial. It builds uncertainty into the rules because costs protection could worsen for claimants as a case progresses (and as more costs are incurred). It is not possible for a claimant to be certain at any point in proceedings of the level of costs protection it will have. The rules allow the limit to be changed more than once in each stage of proceedings.³

¹ See https://www.unece.org/fileadmin/DAM/env/pp/a.to.i/TF10-2017/10TFAJ_Environment_Links_UK_statement.pdf

² See: <http://www.legislation.gov.uk/ukxi/2017/95/contents/made> and section 8

³ This may, in turn, increase the costs of litigation as parties argue about what level of costs protection should be granted – increasing so called "satellite litigation".

A claimant will therefore not know at an early stage what their eventual costs liability might be if it were to lose a case. The current civil procedure rules⁴ also require claimants who withdraw from a claim to pay costs up to that point (subject to any limit). However, if a claimant has its costs cap raised and then wishes to withdraw as a result of the increased liability, it is already too late to avoid those higher costs.

This uncertainty is a major risk that many claimants, literally, cannot afford to take. It means that only the wealthier can afford to litigate. The only safe option for claimants without large financial resources is to decline to take the case in the first place. This restricts access to justice due to the potential financial burden on claimants and is unfair within the meaning of Article 9 (4).

Financial Disclosure

The financial disclosure provisions are unfair to individuals and community groups, who must now expose their private financial affairs in order to obtain costs protection at the start a claim. This includes potential third party financial support. There are no guarantees that this information will remain confidential. Many individuals will not want to publically expose their private financial affairs and so will avoid taking legitimate cases as a result.

The requirement to disclose third party financial support means that the identity of individual charitable/NGO donors, or other third parties supporting claimants, may have to be disclosed, possibly against the wishes of those supporters.⁵ This could present difficult practical difficulties for charities and other NGOs and it is unfair within the meaning of Article 9(4) of the Convention.

Neither is there any guidance on the extent of information necessary to disclose in order to satisfy this pre-condition. As such, the rules that enable access to costs protection are not clear and transparent.

The Government's further stated position on the reform programme is set out in its response to the consultation and accompanying Impact Assessment⁶. Whilst some of the worse proposals (as criticised in the Committee's second progress review of 24 February 2017) have been dropped, of further concern are the UK's express rejection of including a claimant's own incurred costs when calculating prohibitive expense, as well as a lack of clarity in applying the principles set out in recent jurisprudence⁷, so as to ensure a clear, consistent and transparent legal framework.

3. Further context

We note the Compliance Committee's findings in its second progress report on UK compliance with Decision V/9n, and that these, now implemented, proposals would meet the requirements of decision V/9n and bring the UK into compliance. Indeed,

⁴ Civil procedure rule 38.6: <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part38#38.6>

⁵ They in turn could be exposed to costs orders themselves.

⁶ See <https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/>

⁷ Case C-530/11 *European Commission v. UK* [2014] 3 WLR 853; 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.

the uncertainty and added costs that will be created go in the opposite direction needed.

Such is our own concern that Friends of the Earth Ltd, the RSPB and ClientEarth have initiated court proceedings to challenge them. We believe both these reforms are unlawful, and contrary to both EU law and the Aarhus Convention.

The House of Lords Secondary Legislation Scrutiny Committee, which scrutinises new secondary legislation, has also raised concerns, partly in response to evidence submitted by ourselves (also enclosed). In particular, concluding that:

“While asserting that the changes are to “discourage unmeritorious claims”... [and] the MOJ states that its policy objective is to introduce greater certainty into the regime, the strongly negative response to the consultation and the submission received indicate the reverse outcome, and that as a result of the increased uncertainty introduced by these changes, people with a genuine complaint will be discouraged from pursuing it in the courts...” (underlining added)⁸

The adverse effects of these reforms on environmental claimants are – as the Committee is well aware – compounded by continuing issues over a number of years:

- High (and increased) court fees – now approximately £1000 simply to apply for JR in the High Court;
- Reduced time-limits within which to take a case (challenges to decisions on planning matters must be brought within a demanding six weeks deadline);
- The vague and unclear rule that a claim must be brought “promptly” within 3 months. This rule still applies to cases challenging national legal provisions and not EU law;
- Fewer types of claims protected than the full range covered by the Convention;
- Further reductions in legal aid – financial assistance for poorer individuals (NGOs do not qualify in any event); and
- Other reforms brought in by the Criminal Courts and Justice Act 2015.

Whilst it is true that the UK has expanded the scope of claims falling within the environmental costs protection regime, the Committee will note that the expanded scope will encompass very few new cases⁹ and still falls far short of the full range of claims that qualify under the Convention (e.g. excluding private and public nuisance claims and the full range of statutory reviews and appeals).

4. Northern Ireland and Scotland

We respectfully refer the committee to the more detailed submissions contained in the Environment Links UK’s (February 2017) statement regarding the divergent

⁸ <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldsecleg/114/11403.htm>

⁹ For further detail, please see Wildlife & Countryside Link’s response to the Consultation (question 1) available here: <http://www.wcl.org.uk/docs/Wildlife%20and%20Countryside%20Link%20-%20Cost%20Protection%20in%20Environmental%20Claims%20-%20consultation%20response.pdf>

position in the UK on access to justice, depending on where you live. In particular, we would highlight that the Department of Justice in Northern Ireland conducted a very similar consultation to the Ministry of Justice in 2015/16 but declined to continue with these amendments to the costs rules in light of public opposition to them.

We wish to emphasise that this means access to justice is unequal, and inconsistent, throughout the UK.

5. Conclusion

Claimants are now in a worse position than before, because there is no longer early certainty of the financial burden they will face if they lose.

The new regime will introduce greater uncertainty and financial risk for claimants, as well as exposing their private financial affairs. There is no doubt that this will deter claimants from pursuing environmental cases. The Ministry of Justice has effected these changes despite overwhelming public opposition to them (for example 98.2% of those consulted opposed the hybrid caps model).

Accordingly, the UK does not comply with the Aarhus Convention with regards to Articles 9(4) and (5) and 'prohibitive expense'.

Our conclusions are corroborated by both the House of Lords Secondary Legislation Scrutiny Committee and by the Compliance Committee's own second progress review. The Committee noted the potential adverse effects of the (then) proposals for England and Wales in that report. That backwards step has now been taken by the UK.

We call upon the Compliance Committee to urge the Ministry of Justice in England and Wales to withdraw the Statutory Instrument and take steps to improve environmental justice in concert with the other jurisdictions of the UK.

We ask the Committee to issue such a statement very soon, as the reforms – whilst legally effective – are currently within a period of Parliamentary reflection and can still be annulled by either chamber of Parliament.

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Also on behalf of

The Royal Society for the Protection of Birds