



EUROPEAN COMMISSION
DIRECTORATE-GENERAL ENVIRONMENT
Directorate E - Implementation & Support to Member States
ENV.E.3 - Environmental Enforcement
Head of Unit

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Ms Carol Day
cday2948@gmail.com

Dear Ms Day,

Subject: File 2006/4033 – access to justice and prohibitive costs

Thank you for your e-mail of 7 March 2017 in which you provide the European Commission services with an update on amendments to legislation adopted in the United Kingdom in answer to the judgment of the Court of Justice in Case C-530/11, *Commission v. United Kingdom*. In particular, you draw my attention to the Rules now adopted for England and Wales.

We have not yet had a chance to carry out a full and final assessment of the legislation and rules adopted to implement the judgment in case C-530/11. We were only recently informed that final legislation had now been adopted and were also provided with an update of the assessments of overall costs likely to be incurred by environmental litigants in the various jurisdictions, also taking into account changes in court fees that have taken place in the period since the judgment. We will now be carrying out a more detailed assessment of this information.

When performing their assessment, the services of the European Commission will be guided by the current EU legal framework applicable to all EU Member States, but also by the specific findings and conclusions which the Court of Justice drew in its judgment concerning the UK.

First, preserving any rule that would run explicitly or implicitly against the judgment would obviously not be acceptable. For instance, in line with paragraph 58 of the judgment, the possibility of questioning set cost caps, in particular with an emphasis on them being raised for applicants above their level of £5,000, would undermine the predictability of the likely costs for environmental litigants before embarking on legal action.

The Court was clear in its judgment that the assessment of whether costs in a given action were prohibitive should include all costs i.e. not just exposure to costs of the other party and court fees, but also own legal costs where the legal process necessarily and reasonably entails such costs. Paragraphs 47 and 57 of its judgment emphasized the need for the overall costs not to be or appear to be objectively unreasonable.

Therefore, a reform of the costs regime should not result in increased litigation (so-called satellite litigation) on the issue of cost itself, by adding to the overall costs before the

substantive case is addressed. This was an element of the previous costs regime which the Commission criticised before the Court (see summary at paragraph 16 of the judgment).

Furthermore, a requirement for litigants to provide information of their own personal means is also likely to result in a chilling effect with many individuals not wanting to make their personal finances publicly known. This was an element of the former costs regime which was criticised by Sullivan LJ in *ex parte Garner* and was a matter which was drawn to the attention of the Court of Justice of the EU by the European Commission during the litigation of the case concerning the UK.

Finally, it needs to be borne in mind and reflected adequately in law and practice that the costs regimes are not the appropriate way for discouraging unmeritorious claims which cause unreasonable costs and delays in development projects. The aim of EU rules and of the Aarhus Convention is certainly not to encourage unmeritorious claims and it is legitimate for any legal system to have in place rules to refuse access to the courts for claims that are indeed without merit. However, it does not comply with the letter and the spirit of Directive 2003/35/EC and of the Aarhus Convention to use costs as the mechanism to exclude such claims, not least as this is rather a blunt instrument which is as likely to put off litigants with a valid claim as it is likely to deter litigants with an unmeritorious case.

The Commission services intend to complete the assessment of the legislation now communicated and to liaise with the UK authorities as appropriate.

Yours sincerely,

A handwritten signature in black ink that reads "Paul Speight". The signature is written in a cursive, slightly slanted style.

Paul Speight