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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10
Switzerland
(By email only)

3 April 2017

Dear Ms Marshall

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

Thank you for enclosing the Committee's second progress review on the implementation of decision V/9n concerning compliance by the United Kingdom. I set out below the United Kingdom's progress report regarding the recommendations included in paragraphs 8 and 9 of the decision.

Recommendations included in paragraphs 8(a), 8(b) and 8(d): of the Decision

England & Wales – overview of the main changes to the environmental costs protection regime

1. The consultation 'Costs Protection in Environmental Claims: proposals to revise the costs capping scheme for eligible environmental cases' was published on 17 September and closed on 10 December 2015. The Government published its response on 17 November 2016¹.
2. Following consultation, the Government settled on an approach designed to balance the interests of claimants and defendants (including both external bodies and the Government and its agencies) in light of developments in case law. The Government decided to update the environmental costs protection regime (ECPR). The new rules changes were drafted with particular regard to the principles set out by the European Court of Justice (CJEU) in its decisions in cases *C-530/11 Commission v. United Kingdom* and *C260/11 Edwards*.
3. The new rules amended Section VII of Part 45 of the Civil Procedure Rules (CPR), related parts of the CPR and associated Practice Directions. These changes were

¹ <https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/>

made by the statutory instrument, the Civil Procedure (Amendment) Rules (SI 2017/95)². The statutory instrument was laid before Parliament on 3 February 2017 and the changes in respect of Aarhus Convention claims came into effect on 28 February 2017.

4. As before, the new arrangements start with a default costs cap on the liability of an unsuccessful claimant in such a case to pay the defendant's costs of £5,000 or £10,000 (depending on whether the claimant is an individual or not), with a cross-cap on an unsuccessful defendant's liability to pay the claimant's costs of £35,000. The previous regime had fixed capped costs in these amounts.
5. However, the new ECPR differs from its predecessor in the following main respects:
 - a. Amending the definition of an "Aarhus Convention Claim", so that references to a 'member or members of the public' are to be construed in accordance with the Aarhus Convention. This will ensure that only a claimant who is a 'member of the public' is entitled to costs protection.
 - b. extending the ECPR so that it applies not only to judicial reviews, but also now includes statutory reviews in relation to Aarhus Convention claims (in particular planning challenges);
 - c. allowing the court to vary the cap and cross-cap either up or down, provided always that any change does not render the cost of proceedings prohibitively expensive for the claimant;
 - d. providing an express provision that, in considering varying a cap, the court will take into account the amount of court fees payable by the claimant;
 - e. in applying for costs protection under the ECPR the claimant's application must be supported by a schedule of the claimant's financial resources which takes into account any financial support the claimant has or is likely to receive;
 - f. requiring the court, when assessing whether proceedings would be prohibitively expensive if the change is or is not made, to take into account a list of factors which mirrors those set out by the CJEU in the *Edwards* case;
 - g. making specific provision for appeals requiring the court to apply the same principles on appeal as at first instance; and
 - h. clarifying certain issues such as: that the ECPR can only be used by claimants who require costs protection because of EU law or the Aarhus Convention; the factors for a court to consider in ECPR cases when deciding whether to require a cross-undertaking in damages for an interim injunction; and that a separate costs cap applies to each claimant or defendant in cases with multiple parties.
6. The Government also decided not to extend, at this stage, the scope of the ECPR so that it would apply to reviews under statute which engage Article 9(3) of the

² <http://www.legislation.gov.uk/ukSI/2017/95/article/8/made>

Convention or more widely. The changes were intended to address compliance with UK and EU law, including Case C-530/11. We are currently considering other issues covered by the Decision further and continue to engage with key stakeholders to consider options

Issues raised by the Compliance Committee in relation to the 2015 consultation proposals, which are set out at paragraphs 78-90 of the second progress review

7. The Compliance Committee's review included some observations on the UK Government's proposals for England and Wales, which are set out at paragraphs 78-90 of the second progress review. As we have explained, in general terms our approach has been to apply the principles set out by the European Court of Justice (CJEU) in its decisions in cases *C-530/11 Commission v. United Kingdom* and *C260/11 Edwards*. At this stage, it is difficult to say very much more to the Committee at present as the changes have been subject to judicial review so these issues are before our Courts. We will need to consider our position in light of the determination of our Courts. It therefore appears more appropriate to provide a further update once we know the outcome of those proceedings.
8. *Eligibility for costs protection (paragraphs 78-79)*: The new rules apply to a 'member or members of the public' as defined in the Aarhus Convention, which is set out at 44.41(2)(b) of the Civil Procedure Rules. We can confirm that costs protection under the ECPR is available to NGOs or groups of individuals.
9. *Costs protection depending on a permission to apply (paragraph 85-86)*: Following consultation, the Government decided not to proceed with the proposal that costs protection should only be awarded in those cases where permission to proceed with the claim is given.

Northern Ireland

Changes made

10. In Northern Ireland, the regulations already extend costs protection to applicants in statutory reviews as well as judicial reviews to the High Court of decisions within the scope of the Convention. The changes to the costs regime are as follows. On 23 January 2017, the Department of Justice in Northern Ireland made the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017 at <http://www.legislation.gov.uk/nisr/2017/27/contents/made>). The regulations came into force on 14 February 2017 and apply to proceedings commenced after that date. They made changes to the Costs Protection (Aarhus Convention) (Northern Ireland) Regulations 2013 (the original Regulations) in the following areas;

(a) Level of costs protection

11. The regulations as amended provide that, if an applicant loses, the maximum amount of costs that can be recovered from it will continue to be capped at current levels ((£5,000 where the applicant is an individual and £10,000 in other cases) but be capable of being lowered if necessary to avoid prohibitive expense to the applicant. They provide that, if an applicant wins, the amount of costs that can be recovered by it from the respondent can be increased from the current cap of £35,000, again if this is necessary to avoid prohibitive expense to the applicant. The

regulations as amended also provide that, in deciding whether a cap is prohibitively expensive, the court should have regard to the *Edwards* principles and any court fee that the applicant is liable to pay.

(b) Costs on appeal

12. The amended regulations apply a separate cap to appeals in Aarhus Convention cases. This is set at the same levels as is applied to first instances cases and the court has the same flexibility to vary the caps on appeal.

(c) Eligibility for costs protection

13. The amended regulations also make it clear (as was always intended) that only applicants that are members of the public (and not public bodies) are entitled to costs protection. The term 'the public' is defined with reference to the definition provided by the Aarhus Convention.

(d) Interim injunctions

14. The amended regulations provide that, in deciding whether to require a cross undertaking in damages in an Aarhus case, the court must have regard to the need for the undertaking not to be such that it would make continuing with the case prohibitively expensive. They direct the court to apply the *Edwards* principles when considering whether continuing with proceedings would be prohibitively expensive. They also make it clear that the provisions they contain in relation to cross-undertakings in damages only apply to an applicant for an interim injunction who is a member of the public (as defined by the Convention).

Proposals not progressed

15. The Department of Justice in Northern Ireland did not proceed with the proposals it had made regarding multiple applicants, the disclosure of applicant finances, third party support and costs in unsuccessful status. Unsuccessful challenges to the status of Aarhus cases in Northern Ireland, therefore, continue to be ordered on the indemnity basis. The amending regulations do not require an applicant to disclose its means or require the court to have regard to third party support or change to the costs position in cases involving multiple applicants or respondents.

16. The regulations apply in the Northern Ireland already extend costs protection to applicants in statutory reviews as well as judicial reviews to the High Court of decisions within the scope of the Convention.

Court fees

17. Regulations made on 16 January 2017 will introduce a phased increase to most civil court fees in Northern Ireland from 1 April 2017 (the first such increase since 2007). The fees applicable to judicial reviews (and statutory reviews) within the scope of the Aarhus Convention will, however, be exempt from the increase and retained at current levels (see Article 4 of the Court of Judicature Fees (Amendment) Order (Northern Ireland) 2017).

Scotland

18. The Scottish Civil Justice Council (SCJC) has responsibility for making court rules. On that basis, as noted in the progress report of 13th November 2015, the Scottish Government asked the SCJC to make the changes described in the progress report. The SCJC considered and agreed the draft rules at its meeting on 16th November 2015 (see paragraph 22 of the minutes³). The rules were amended with effect from 11th January 2016⁴.
19. We note the Committee's comments at paragraph 102, 103 and 106 that the proposed rules once in force would enhance the compliance of the Scottish costs protection regime with the Convention and decision V/9n. In the progress report of 13th November 2015 we also advised that the SCJC had agreed that a small working group be established with a remit to consider the practical operation of the rules on PEOs.
20. At its meeting on 16th November 2015, the SCJC considered a short paper setting out the key issues (see paragraphs 23 to 25 of the minutes⁵). The SCJC agreed that key stakeholders would be asked to consider the paper and that there would be a report to the SCJC as a result of the consultations.
21. At its meeting on 3rd October 2016, the SCJC considered draft rules and agreed that there should be a consultation on the draft rules. It agreed that a revised draft of the rules alongside a consultation paper should be submitted for consideration at the next appropriate Council meeting. The SCJC considered the revised rules and consultation at its meeting on 20th March 2017.
22. The rule changes are aimed at addressing concerns that, in the light of experience, it has proved that applications for Protective Expenses Orders can be protracted and expensive. The proposals provide for a simplified and accelerated procedure for the determination of PEO applications and a restriction to be placed upon the liability in expenses for applicants in the event that an application is unsuccessful. The consultation paper issued on 28 March⁶.

Recommendations included in paragraph 8(c) of the decision

Northern Ireland

23. We note the Committee's observations here that the only issue with regard to issue of time limits raised in paragraph 8(c) is in relation to Northern Ireland.

³ <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-meeting-papers/16-november-2015-meeting/minutes-16th-november-2015---approved.pdf?sfvrsn=2>

⁴ http://www.legislation.gov.uk/ssi/2015/408/pdfs/ssi_20150408_en.pdf

⁵ <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-meeting-papers/16-november-2015-meeting/minutes-16th-november-2015---approved.pdf?sfvrsn=2>

⁶ <http://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/consultation-on-draft-court-rules-in-relation-to-protective-expenses-orders>

24. As noted by the Committee, following the *Uniplex* case, the 'promptly requirement' is disapplied by the courts in judicial review cases brought on European Union grounds in Northern Ireland. In practice therefore, compliance is achieved through these means.
25. In a consultation issued on 22 June 2015, the Department of Justice in Northern Ireland proposed to remove the requirement for all judicial review cases. The consultation closed on 14 September 2015 and a summary of response to it was published on 7 December 2015. As the proposal impacts on other Northern Ireland Departments, it was considered and agreed by the Northern Ireland Executive on 24 March 2016. This was followed by Assembly elections in May 2016. In September 2016, the Civil and Family Justice Review Group was established to carry out a fundamental review the current procedures for the administration of civil and family justice in Northern Ireland (including those for judicial review). In its preliminary report, published in October 2016, the Group recommended that the 'promptly requirement' be abolished. It is expected to issue its final report soon. Subject to the outcome of that report and the views of incoming ministers (following the further recent Assembly election), the Court of Judicature Rules Committee (the body responsible for making the relevant court rule changes) will be invited to consider the matter.

Recommendations included in paragraph 9

26. With regard to the recommendation in paragraph 9, we refer to paragraph 31 of our letter of 29 December 2014.

Yours sincerely



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