Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
Palais des Nations
8-14 avenue de la Paix
CH - 1211 Geneva 10, Switzerland

13 March 2020

Dear Ms Marshall,

Re: Second progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention

Thank you for your email of 6th March copying us the Committee's second progress review on the implementation of decision VI/8k concerning compliance by the UK.

We welcome the opportunity to submit brief written comments in advance of our participation in the Audioconference to discuss decision VI/8k during the 66th meeting of the Aarhus Convention Compliance Committee.

Introduction

We welcome the contents of the Committee's progress review insofar as they relate to our observations on Communications ACCC/C/2008/23, ACCC/C/2008/27, ACCC/C/2008/33, ACCC/C/2012/77, ACCC/2013/85 and ACCC/C/2013/86 regarding prohibitive expense. We would like to thank the Committee for its careful and expert consideration of a complex matter, in which they have reached some important conclusions.

We also appreciate the Governments of the UK are operating at a time of challenging political circumstances. We hope that they will continue to engage in a serious and constructive manner to improve the situation as a matter of urgency.

As the Committee has noted, the RSPB, Friends of the Earth and Friends of the Earth Scotland made a comprehensive submission on the UK's Second Progress Review on 29th October 2019. This submission included the Report *A Pillar of Justice*, based on information obtained from the Ministry of Justice and covered the situation in England and Wales and comments concerning Scotland and Northern Ireland. We therefore confine this statement to any further relevant developments that have occurred since that date.

Relevant developments post 29th October 2019

England and Wales

Eligibility for costs protection (paras 40-43)

We welcome the Committee's recognition that, in the absence of legal personality of unincorporated associations, the situation of individuals bringing proceedings on behalf of such association is no different from that of individuals bringing proceedings on their own behalf (para 42). The Committee therefore notes that the potential chilling effect of costs or complexity not as an issue of eligibility for the costs protection regime but in its evaluation of the level of the costs caps, including in the case of multiple claimants. In light of this, the Committee observes that no evidence has been provided that the UK fails to meet the requirements of paragraphs 2 (a), (b) and (d) and 4.

We wish to raise two recent cases in which the High Court has held that an individual bringing a case on behalf of an unincorporated association should be subject to a default cap of £10,000 as opposed to £5,000. In *R (on the application of Sarah Finch) v Surrey County Council and Horse Hill Developments Ltd* (Interested Party) [2020] EWHC 399 (Admin), the Hon Mrs Justice Lang held that the £5,000 default cap awarded to the claimant could be raised following the refusal of permission by way of an oral hearing and after follow-up submissions by the defendant, Surrey County Council.

Secondly, in *R (on the application of Joan Girling) v East Suffolk Council and (1) EDF Energy Nuclear Generation Ltd & (2) NNB Generation Company (SZC) Ltd* (CO/5052/2019), the Hon Justice Wakeman refused permission for JR on the papers and ordered the default cap be raised from the £5,000 claimed to £10,000 because the application was made by Ms Girling on behalf of Together Against Sizewell C (TASC).

Increasing the default cap at this stage of the proceedings (i.e. following a decision on permission and after the acknowledgement of service) is unhelpful and late, and as such undermines prior certainty and is indicative of non-compliance due to prohibitive expense to individuals (who should have received the £5k cap), and due to a lack of consistency in implementing the Convention.

Variation of the level of the caps

It is now abundantly clear that the costs variation scheme brought into force in 2017 is simply not compliant with the Convention - and is not even working as intended. We make two main points in relation to this:

- The scheme needs much greater <u>early</u> certainty with claimant's interests clearly at the heart of how it works – there are late applications to vary happening, and defendant's seeking to vary caps upwards, so it is clear the rules are not sufficiently prescriptive to ensure compliance; and

- As is the clear view of the committee, which we strongly support, any possible revision of the claimant's cost cap should only be downwards (and when requested by the Claimant), in order to reduce prohibitive expense. Indeed, if this were the standard position, there would be no need for a blanket rule that everyone must file their private financial information – removing another area of controversy which has a chilling effect on access to environmental justice.

Costs protection on Appeal

Costs on Appeal are a major problem. Claimants are routinely advised that the courts will not generally accept a lower cap on appeal than was received before at the High Court – indeed, it is routine in our experience for the claimant to be liable to pay the same cap twice (and that is what happened in Friends of the Earth's Heathrow case). The rules allow the Court of Appeal to make a new costs decision. It is clear that what is needed is a rule for there to be a total cost cap for all proceedings, and it should require that the limit be no more than the default cost cap as set in the High Court, or as revised downward on application of the Claimant – as that would be the level at which 'prohibitive expense' would have already been set by the time of any appeal.

Other matters

We wish to briefly raise two issues that are not explicitly covered in the UK's Second Progress Report (and therefore, the Compliance Committee's progress review). Firstly, we are increasingly aware of the difficulties associated with **Reciprocal caps** (which limit the Defendant's costs liability to the Claimant if it loses). In the Heathrow litigation, a further default cap of £10,000 was imposed on the claimant/Friends of the Earth on appeal, despite the proceedings being a continuation of the same first instance claim (with permission to appeal for judicial review having only been granted after a second rolled-up hearing in the Court of Appeal was concluded). The reciprocal cap was also doubled to £70,000. However, the Claimant's legal costs on winning the appeal are substantially in excess of that figure, which essentially means that environmental lawyers are unable to recover their full fees and are effectively subsidising public interest litigation because of how the system works. Secondly, it is unclear whether **Value Added Tax (VAT)** is payable on the reciprocal cap, with the UK seemingly taking an inconsistent approach across different claims. Moreover, the position on this would appear to differ between jurisdictions. It would be helpful to have clarity from the UK on this issue going forwards. The problem is that if VAT is not paid in addition to the cap, this must be covered by the Claimant and further reduces the money received.

Finally, it is clear the UK is not comprehensively monitoring or reviewing the non-compliant system in place. As mentioned above, Friends of the Earth and the RSPB have produced a detailed report covering England and Wales based on data obtained from the Ministry of Justice (such as we have been able to collect) and the report speaks to many of the issues raised in this progress review. We would be happy to re-circulate that to Committee members if helpful. We are also seeking to update it further. In this regard, we echo the Committee's requests for better information and evidence. It would help everyone involved if the UK provided complete and up to date information across all areas of concern.

<u>Scotland</u>

We note that the Scottish Parliament's Equalities and Human Right Committee corresponded with the Scottish and UK Government in June 2019 regarding Friends of the Earth Scotland's longstanding petition on Aarhus Compliance (PE1372).[1] On the basis of this correspondence, and a briefing from Friends of the Earth Scotland in September 2019, the EHR Committee decided at its meeting on 14 November 2019 to write to the Scottish Civil Justice Council for further information, and to await the outcome of the recent Scottish Government consultation on Environmental Principles and

[1] https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/112393.aspx

Governance in Scotland, before moving to next steps.[2] In December 2019, the Scottish Civil Justice Council made a brief submission to the Committee,[3] and we are still awaiting the outcome of the Scottish Government's consultation.

In regard to the recent correspondence between the EHR Committee and the Scottish Government[4], we would like to draw the Compliance Committee's attention to the continued failure of the Scottish Government to take its obligations under the Aarhus Convention seriously, as demonstrated by the Cabinet Secretary's statement that the Scottish Government is in compliance with the Convention, and its efforts to diminish the role of the Compliance Committee. Friends of the Earth Scotland's briefing to the EHR Committee in relation to this correspondence is available at https://foe.scot/resource/letter-to-equalities-human-rights-committee-regarding-petition-aarhus-compliance. In this briefing we asked the Committee to:

- Undertake an inquiry into Aarhus Compliance. As part of this, the Committee should call the Cabinet Secretary, amongst others, to give oral evidence and produce a report with its findings and recommendations; and
- Request the Scottish Government to publish a legal analysis within a limited, defined timescale (i.e. within three months) which justifies its position that it is compliant with the Convention.

The EHR Committee is due to revisit the petition at its meeting in early April 2020.

The Scottish Government's stated position (as set out most recently in this letter to Equalities and Human Rights committee from June 2019) is that - https://www.parliament.scot/S5_Equal_Opps/ScotGov_responce_petition1372.pdf) appears to be that:

- The Scottish civil justice system is Aarhus Compliant.
- The closure of the European Commission's PPD infraction proceedings is evidence of compliance (it is not).
- The Scottish Government has repeatedly failed to engage with the findings of the ACCC, and has offered no alternative legal analysis to support its position of compliance.
- The Scottish Government downplays the role of the ACCC and the significance of its findings.

Conclusion

Whilst credit must go to the UK for making some, limited progress, it is clear that much more needs to be done before the UK is fully compliant with the Convention. In particular, we support the Committee's call for the UK to urgently take the necessary legislative, regulatory, administrative and practical measures to achieve the requirements of paragraph 29(a)-(d) and paragraphs 30-31 of the Committee's progress review.

---

2 Minutes of Equalities and Human Rights Committee meeting 14 November 2019 https://www.parliament.scot/S5_Equal_Opps/Minutes_EHRiC_14112019.pdf

3 https://www.parliament.scot/S5_Equal_Opps/PE1372_Scottish_Civil_Justice_Council_Secretariat.pdf

4 https://www.parliament.scot/S5_Equal b_Opps/Ruth_Maguire_to_Scot_Gov_Petition_PE01372_20190530.pdf and https://www.parliament.scot/S5_Equal_Opps/ScotGov_responce_petition1372.pdf

Finally, we wish to take this opportunity to highlight that proposals to "curb" Judicial Review are apparently to be "fast-tracked" through Parliament. In January 2020, the Independent newspaper reported that such proposals will be the first act of a new "constitution, democracy and rights commission", which ministers apparently insist is needed to "restore trust in our institutions and in how our democracy operates". It has already been noted that the plans signal "a monstrous attack on the courts" (see here). We wish to bring this matter to the Committee's attention because it is possible that it could undermine access to environmental justice.

As noted in *A Pillar of Justice*, the number of Aarhus claims has been declining in recent years but they also routinely perform twice as well as non-environmental JRs. In ratifying the UNECE Aarhus Convention, the UK has undertaken to ensure a minimum platform for the protection of environmental rights. We therefore hope that any such proposals will not undermine environmental Judicial Reviews and further erode the UK's compliance with the Convention.

Please do not hesitate to contact us should the Committee have any questions arising from this further Statement.

Yours sincerely,

Will Rundle, Head of Legal, Friends of the Earth (Eng., Wales, NI)
Carol Day, Consultant Solicitor, RSPB
Mary Church, Friends of the Earth Scotland

Copy to: Ms. Danielle Angelopoulou, UK Aarhus Focal Point, Department of Environment, Food & Rural Affairs (Defra)