



Wildlife and
Countryside



ELUK Statement on the UK's Second Progress Report on Decision VI/8k concerning compliance with the Aarhus Convention

Environment Links UK (ELUK) welcomes the opportunity to submit a statement about the UK's Second Progress Report on Decision VI/8k of the Meeting of the Parties to the Aarhus Convention.

England and Wales

ELUK notes the conclusions of *A Pillar of Justice* published by Friends of the Earth and the RSPB in October 2019. We are concerned to see that numbers of Aarhus Convention claims are declining, as are overall success rates for claimants. It would appear that successive government reforms have indeed moved the UK further from compliance.

We support the following recommendations to help address this:

- The reinstatement of the 2013 Aarhus fixed cost caps, at a maximum of £5,000 for individuals and £10,000 in all other cases, for the duration of the first instance proceedings. The caps should be reduced where it can be shown that these figures are prohibitively expensive for the claimant. This would remove the need for the claimant to provide the court with a schedule of financial resources when making an application for JR (unless applying for a reduction in the cap).
- The imposition of a further additional cap (at the same levels) at any appeal should be granted exceptionally and only where it can be shown that a further cap is not be prohibitively expensive for the claimant (taking all costs incurred up to that point into account). The default position should be that the earlier cap set at first instance is the level above which expense is prohibitive for environmental cases.
- We also call for clearer and more tightly drawn provisions to manage the costs position on appeal to the Supreme Court.
- The 2013 indemnity basis for costs awards for unsuccessful challenges to the status of claim as Aarhus Convention claims should be reinstated.
- Aarhus Convention claims should be exempt from the "substantially different outcome" text introduced by s.84 of the CJCA 2015.
- The Ministry of Justice should conduct a full and evidence-based review and consultation to identify why success rates for Aarhus Convention claims at permission and first instance are falling.

Comments on the UK's Second Progress Report

Eligibility – we welcome the extension of costs protection to challenges brought under s.288 of the Town and Country Planning Act 1990 but regret the UK's decision not to extend Aarhus costs protection to private law claims in line with Communications ACCC/C/2013/85 and ACCC/C/2013/86.

Reciprocal caps – the UK's rationale for the cross-cap of £35,000 is flawed as the concept of "fairness" in Article 9(4) of the Convention refers to what is fair for the claimant, not the defendant. We recommend the removal of the reciprocal cap.

Eligibility for costs protection - the substantial element of judicial discretion on the applicable cap for Unincorporated Associations has a chilling effect on claimants. We urge the Government to confirm that where the claim is brought by an individual on behalf of an Unincorporated Association, the applicable cap is a single £5,000 for the whole association.

Multiple claimants [issuing a claim together] - we call on the MoJ to remove the separate costs caps for multiple claimants.

Private hearings – we are unconvinced that amendments to CPR 39 will ensure hearings into the level of Aarhus caps will be held in private to the extent necessary to avoid a chilling effect on claimants. For example, the premise that a private hearing must be demonstrated as necessary before given on the basis that there could be damage to confidentiality puts the onus on the claimant to demonstrate the need for protection rather than it being automatic. In addition, what the court may see as potential damage to confidential information will not always be the same as what a claimant requires to protect his or her privacy. We recommend the MoJ monitors the effectiveness of this provision and publish its findings and improves the protection to remove the possibility of a deterrent effect on claimants.

Cross-undertakings for damages – we urge the MoJ to clarify the number of cases in which claimants have been required to provide the Court with a cross-undertaking in damages in order to obtain interim injunctive relief, and in particular where given over and above an adverse costs cap; and, if necessary, to consult on removing this requirement in Aarhus claims.

Costs and interveners – MoJ data confirms that interventions in Aarhus Convention claims are now rarely, if ever, made. We recommend the application of this Rule to Aarhus cases should be removed. Not only are interventions important in supporting the attainment of justice and assisting the court, they are also an important way in which participation in the administration of justice can be maximised.

While we welcome the Government's commitment to formally review the ECPR and publish findings, we see no reason to wait until 2020. We recommend the MoJ addresses the above failings in the Aarhus Convention costs regime now via appropriate legislative change and/or guidance to assist judges and parties to litigation complying with the Convention's requirements on access to justice.

Scotland

While the revised rules for Protective Expenses Orders (PEOs) have achieved some progress towards compliance with Article 9(4) of the Convention, the following concerns remain:

Private law claims – the revised rules on eligibility now better reflect the Aarhus Convention but continue to exclude private law claims.

Cap variation - the default PEO caps can now (as in England and Wales) be varied in either direction ‘on cause shown’ – this is a low test. The ability to increase the default caps will lead to increased uncertainty and exacerbate the ‘chilling effect’ on litigants. We are also concerned that the terms of the PEO system have been set without an assessment of the overall costs of litigation to an applicant. Finally, the failure to require the publication of PEO decisions makes it difficult to monitor compliance with the Convention.

Costs on appeal - the court retains a high degree of flexibility regarding costs on appeal, including dispensing with a PEO on the grounds that it may “no longer be appropriate”. PEOs are also not carried over if litigants appeal - only if respondents appeal - and then the cap set is inflexible despite the logical incurrence of greater costs.

Court fees - certain court fees have doubled in recent years. For example, hearing fees for the Court’s time now range from £209 in the Outer House to £629 in the Inner House per half an hour per party, which can result in court fees alone running into 5 figures. Further ‘uplifts’ of 2% or more are planned for each of the next three years.

Legal aid - Regulation 15 of the Civil Legal Aid Regulations appear to exclude environmental public interest cases. Very few environmental cases receive legal aid (most that do are private law cases). Furthermore, the system of caps of £7,000 on legal aid remain unrealistic for running complex JRs.

ELUK supports the general recommendations made for England and Wales (as above) insofar as they relate to Scotland.

Northern Ireland

While the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017 operate reasonably well in practice, the following concerns remain:

Own costs - environmental challenges remain prohibitively expensive as applicants must also cover their own legal costs. Costs can be very high, as evidenced by an increase in major environmental cases being brought by personal litigants. These cases are apt to suffer through the lack of legal assistance in a complex area of the law and success on appeal (where cases have been brought to lawyers following dismissal in the High Court) are reduced because of the failure to frame them appropriately at first instance.

Reciprocal cap - large environmental cases cannot be properly conducted for £35,000 (plus VAT) even with the concessionary fee rates lawyers may agree to. Applicants in such cases must either mount a costly, uncertain and time-consuming challenge to the cross cap or budget for the prospect that a proportion of their own costs will be non-recoverable when successful. This is a further disincentive to take cases that are often, in terms of scale and impact, the most environmentally damaging.

Private law cases – as with other jurisdictions of the UK, the Regulations exclude private law environmental cases that “may have a significant effect on the environment”.

Public funding - Legal Aid is generally not available for Aarhus challenges because of the “group interest rule” and that only a planning applicant can appeal (refusals etc.) to the Planning Appeals Commission, which is a specialist and less formidable and expensive forum than the High Court, in cases involving planning permission for development.

ELUK supports the general recommendations made for England and Wales (as above) insofar as they relate to Northern Ireland.

October 2019