

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

22nd February 2019

Dear Ms Marshall,

Re: Implementation of ACCC/C/2008/33 and Decision VI/8k of the Meeting of the Parties to the Aarhus Convention: Statement on behalf of The RSPB and Friends of the Earth

This Statement supplements a separate written Statement prepared by Environment Links UK (ELUK) and presented to the Twelfth Meeting of the Task Force on Access to Justice, which took place on 28th February – 1st March 2019. This ELUK Statement can be found on the UNECE Task Force website and is attached again for ease of reference. We wish to make the following brief points to update and amplify the main points in that Statement:

The RSPB and Friends of the Earth (FoE) welcome the opportunity to comment on the Compliance Committee's First 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.

We support the Committee's findings in relation to what the UK needs to do to fulfil the requirements of Decision VI/8k (para 2) of the Meeting of the Parties to the Convention. WE also share the Committee's concerns concerning the depth and quality of the Report submitted by the UK on 1st October 2018, particularly in light of the detailed and comprehensive information submitted by the Communicant and Observers since the MoP. We hope the forthcoming Report submitted by the UK in October 2019 will be more informative.

In terms of the content of the Report, we refer the Committee to the ELUK Statement on Access to Justice in the UK submitted to the Twelfth Meeting of the Task Force on Access to Justice. This is the most up to date summary of the position across the UK with regard to costs and other matters covered by the third pillar of the Convention.

We would highlight a few issues as being of particular concern:

- **England and Wales** – it is too early to evaluate the impact of changes to the Aarhus Costs regime introduced in February 2017, the most significant of which include the requirement to submit a statement of financial resources when applying for Judicial Review (JR) and the courts' power to vary the initial default caps of £5,000 and £10,000 on application from the Defendant. However, we would refer the Committee to the very high costs cited in relation to the current Heathrow JR and the Government's unhelpful decision to reserve its position with regard to the cap when submitting its Acknowledgment of Service in this case. The costs incurred in this case illustrate how important it is that the Aarhus costs regimes operate effectively and how civil society could be deterred from bringing important public interest cases if deficiencies remain.
- **Schedule of financial resources** – we are aware of one case lodged recently in respect of which the claimant decided against applying for Aarhus costs protection because they did not feel comfortable revealing their financial position;
- **Private hearings** – we remain uncertain whether hearings into the level of the cap will always be held in private. We received a letter from the Rt. Hon Lord Keen of Elie QC (MoJ Spokesperson in the House of Lords) dated 25th February 2019 (attached), which confirmed that the balance (presumably between the principle of open justice and protecting the claimant's financial confidentiality) would be appropriately maintained by the provision now in the Civil Procedure (Amendment) Rules 2019 (see [here](#)) that hearings into the level of the costs cap will, as with any other hearings, not necessarily be held in private unless certain criteria are satisfied – in which case they must be held in private (see [here](#)). The relevant criteria can be found in CPR 39.2 [here](#) and (c) includes the fact that the hearing involves confidential information (including that relating to personal financial matters). We hope that this is sufficient to guarantee that such hearings will always be held in private.

To conclude, we urge the UK to monitor the position with regard to access to justice in England/Wales, Scotland and Northern Ireland with regard to the costs of legal action, the scope of review, the exposure of interveners to costs, the ability to secure cross-undertakings in damages, the intensity of review available and time limits.

For recent developments in Scotland and Northern Ireland, we refer the Committee to the ELUK Statement.

Thank you,

Carol Day, Consultant Solicitor, The RSPB.