Second Progress Report on Decision VI/8k concerning compliance by the UK with its obligations under the Aarhus Convention

Comments from the RSPB, Friends of the Earth and Friends of the Earth Scotland

Introduction

1. We welcome the opportunity to comment on the UK's Second Progress Report ("the Report") on Decision VI/8k of the Meeting of the Parties to the Aarhus Convention. This response provides an overview of the current UK position and supplements the enclosed joint Report on access to justice in England and Wales prepared by Friends of the Earth and the RSPB ("*A Pillar of Justice*"). We are grateful to Roger Watts, Solicitor at C&J Black in Belfast, for views on the Northern Ireland regime.[1]

England and Wales

2. *A Pillar of Justice* is based on anecdotal data available before the introduction of the Environmental Costs Protection Regimes (ECPR) in April 2013 and data obtained from the Ministry of Justice under the Environmental Information Regulations 2004 (EIRs 2004) between 2013-2019. To summarise, the findings of the Report are as follows:

- The number of Aarhus Convention claims peaked in 2015-16 but has now fallen back to 2013-14 levels. The continuing decrease in cases is a concerning trend given their clear public interest basis, the established parlous state of the environment generally, and by extension environmental governance. It may indicate a loss of public confidence with access to justice.

- There has been an increase in the number of challenges to the status of Aarhus Convention claims by defendant public bodies seeking to remove costs protection from claimants. This will partly be due to the introduction of reduced adverse costs exposure from losing such applications. We await further data to confirm any trend in the actual success rate of such challenges out of the total challenges made annually. Most recently, there has been an unexplained steep fall in the number of challenges.

- The number of Aarhus Convention claims granted permission to proceed has markedly decreased since April 2016. This decline follows the passage of the Criminal Justice and Courts Act 2015 (CJCA 2015), which introduced a new test requiring the High Court to refuse permission for JR where it appears to the court to be "*highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*".[2] Notwithstanding this, Aarhus Convention claims continue to demonstrate a higher success rate at the permission stage when compared to JRs generally.

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- The average number of Aarhus Convention claims per month that are ultimately successful for the claimant at final hearing fell by two-thirds between April 2016 and May 2019. While it is possible the CJCA 2015 has played a role in this, it does not, in our view, fully explain the continuing decline. It is possible that some other factor(s) are in play here that bear further investigation, including judicial approach and standards of review, as well as possibly limitations in underlying environmental law. Despite this, Ministry of Justice Quarterly Statistics demonstrate that Aarhus Convention claims are approximately twice as successful as JR claims generally at first instance.[3]

3. The combined impact of an increase in challenges by defendant public bodies to the status of Aarhus Convention claims (thus potentially removing costs protection), a fall in cases being granted permission, and an overall fall in success rate creates a concerning picture of an uninviting and challenging system that can (and does) deter claimants from pursuing JRs.

4. We make the following recommendations on the basis of the findings of *A Pillar of Justice*:

   The number of Aarhus claims has fallen significantly since April 2016

   - We recommend the reinstatement of a slightly modified version of the 2013 Aarhus fixed cost caps regime, with the removal of the reciprocal cap for defendant public bodies.

     Despite minor imperfections, the 2013 regime worked and significantly improved access to justice by providing advance clarity and certainty with regards to adverse costs exposure. The caps should be set at a maximum of £5,000 for individuals and £10,000 in all other cases and apply throughout the duration of the first instance proceedings. The level of these caps should be reduced where it can be shown that those figures are prohibitively expensive for a claimant. This cap should also remain throughout all other stages of proceedings. The imposition of a new additional cap (at the same levels) upon any appeal should be granted exceptionally and only where this can be proven to not be prohibitively expensive for the claimant, taking into account all costs incurred up to that point. The default position should be that the same cap remains in place for all appeals, because it represents the limit already set above which it is 'prohibitively expensive'.

   - This would negate the requirement for claimants to provide a statement of financial information when submitting the claim form (unless applying for a reduction in the cap). It would also address the emerging tendency for defendant public bodies to request intrusive and detailed information (which can act as a deterrent for claimants) and to challenge the level of the cap, even at late stages of the proceedings. This conduct is serving to create a form of satellite litigation on costs - one of the outcomes the Aarhus costs regime was established to prevent.

   - Clearer and more tightly drawn provisions are required in any event to manage the costs position on appeal up to the Supreme Court.

   - This should then be monitored and followed by an evidence-based consultation that explores how best to ensure all Aarhus Convention claims under Article 9 of the Convention are not 'prohibitively expensive' for claimants, such as: reducing court fees, instigating 'qualified one-way costs

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[3] i.e. as decided at the High Court – not taking account of unsuccessful claims that are then ultimately successful in the Court of Appeal or Supreme Court

shifting',[4] payment of costs from central funds; and/or, as the case may be, on retaining the above system.

The number of challenges to the status of Aarhus claims is rising; further data is required to verify success rate trends

- We recommend the 2013 indemnity basis for costs awards for unsuccessful challenges to Aarhus Convention claims be reinstated. This would mitigate aggressive behaviour by defendants by reversing the cost exposure and – crucially - avoid any amount of unrecoverable costs for claimants who successfully defend such challenges to their eligibility to costs protection.

- We also recommend clearer rules and guidance to ensure challenges are made on an informed basis and environmental claimants receive the full benefit of Aarhus protection, to which they are entitled.

The number of cases granted permission has fallen since early 2016

- We recommend that Aarhus Convention claims are exempt from the requirements of section 84 of the Criminal Justice and Courts Act 2015, namely that permission to JR is refused where it appears "*highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*".

- Alternatively, regarding s.84 CJCA 2015, while it is conceptually undesirable in principle to allow defendants to 'get away' with unlawful behaviour due to the claimant being declined permission or a remedy (on the basis that the Judge agrees they would do the same thing again even if lawfully conducting themselves) there are practical arguments for this. However, the authors recommend that this should not prevent a case being given permission, if it is to apply at all. Unlawful conduct should be judged and exposed at court in any event. There are sound public policy reasons for doing so, not least that claimants feel they are fairly treated within the legal process and that justice be seen to be done (at least to some extent). That said, the Aarhus Convention does require access to an effective remedy too, so this approach may not lead to full compliance.

The success rate of environmental JRs has fallen substantially since early 2016

- We recommend conducting a full review to identify why the success rates of Aarhus Convention claims are falling at permission and first instance. This should extend beyond cost considerations to encompass other issues such as judicial attitudes and the intensity of review.

Observations on the UK's Report

Types of claims covered

5. We welcome the extension of costs protection to challenges brought under s.288 of the Town and Country Planning Act 1990 (as a result of the Civil Procedure (Amendment No.3) Rules 2019) and urge the Government to monitor the effect of this change. We regret the UK's decision not to extend the scope of the ECPR to encompass private nuisance cases and other private law claims (para 6 of Decision VI/8k) in light of the Findings of the Compliance Committee in Communications ACCC/C/2013/85 and ACCC/C/2013/86.

[4] i.e. that unsuccessful claimants do not have to pay adverse costs, but can recover own costs when they win, thereby not being 'prohibitively expensive' in either case.

Eligibility for costs protection

6. We note the UK's comments in relation to Unincorporated Associations (UA) in paras 2-6 of the Report. The UK appears to be saying:
   - Where a named individual brings a claim on behalf of an UA, the default cap is set at £5,000;
   - Where a claim is brought by multiple individuals on behalf of the UA, the £5,000 cap will attach to each of them; and
   - Where an UA incorporates and brings an action in the name of the legal entity formed, the default cap will be set at £10,000.

7. This situation for UAs is unacceptably inconsistent and uncertain. The simple point should be that provision should be made for the unique situation of UA's so that one single cap is required, and it will either be a single £5k cap if represented by individuals, or a single £10k cap as an organisation. However, a UA should not have to change legal status and incorporate in order to obtain the early certainty over its costs position that it should already have.

8. The Report also points out that where an UA has its own separate finances and funding support, the court will take this information into account where the defendant challenges the default cap. We are concerned that there remains a substantial element of judicial discretion regarding the applicable caps for UAs. Individual claimants are still being advised that while they may argue the £5,000 cap applies, the defendant may challenge this and, on the basis of financial information submitted the court may increase the cap to an unconfirmed level. We are aware that this has a chilling effect on claimants. We urge the UK to clarify that where an application is brought by an individual on behalf of an UA the applicable cap is £5,000 because the question of prohibitive expense is directed at the claimant.

Level of costs caps

9. Data obtained from the Ministry of Justice confirms that challenges to the default cap are generally being made in the Acknowledgement of Service. However, this is not always the case. An example of an exception is R (on the application of Friends of the Earth Limited) v SSHCLG [2019] EWHC 518 (Admin), a case seeking to challenge the failure of government to conduct a Strategic Environmental Assessment on the production of the National Planning Policy Framework. The relevant government department reserved its position in the Acknowledgment of Service, and then sought to challenge the claimant's cap much later in proceedings, with the result that the matter was only resolved by the Court less than a month before the court hearing. The government department then sought to challenge the claimant's cap again – after judgment had been given. This demonstrates that the rules do not provide certainty and reasonable predictability for claimants. They permit late applications to vary on purported grounds that there has been a change in position – notably, the second variation attempt in this case was based in part on the "change of position" which the government department alleged was created by the Judgment being handed down.

10. While the Report discusses the timing at which challenges to the default caps are made, it says nothing about the outcome of such challenges. Although information on this issue is limited (because the regime has only recently come into existence), data obtained from the Ministry of Justice suggests that when the default cap is varied, it is almost always (i.e. in six out of seven cases) being increased. This is exactly what we feared would happen (and, incidentally, what the Government intended to happen). If this trend continues, and parties become aware of this as normal judicial practice, we anticipate that defendants will be routinely encouraged to challenge the level of the default caps as a matter of course, and so creating the potential for routine satellite litigation on costs, and claimants will be

deterred from issuing meritorious claims owing to the resultant cost uncertainty. This is clearly taking the UK in the opposite direction to compliance with Decision VI/8k. We urge the Committee to recommend that the default caps remain in place for the duration of the proceedings and are not subject to variation, unless that variation is downwards (with regard to the default cap) and upwards (with regard to any reciprocal cap) in order to ensure appropriate access to environmental justice.

Costs for procedures with multiple claimants

11. The UK maintains that the basis for separate costs caps for each claimant is to provide fairness and proportionality to all the parties while ensuring the costs of the claim are not prohibitively expensive (para 11). There is no basis for this rationale - the Committee has already clarified that the concept of "fairness" in Article 9(4) of the Convention refers to what is fair for the claimant (not the defendant).[5] Moreover, it results in practical difficulties. Previously, multiple claimants would bring one claim together (and all using the same claim form) that may have raised a number of arguments (as such, it is incorrect for the UK to maintain that multiple claimants increased administrative costs (para 12)). Under the new regime, the organisation bringing the claim is naturally reluctant to raise arguments that do not reflect their stated aims and objectives. Supporting organisations may seek to raise their concerns by way of a Witness Statement, but these points do not form the legal basis of the claim and will not be afforded the same status by the court.

Costs protection on appeal

12. The UK sets out the position regarding costs in appeal (paras 13-14). We are still in the process of obtaining data from the Ministry of Justice on this point, but early indications are that, in the majority of cases, the claimant's adverse cap is either imposed again at the same level or is increased – and that the defendant's reciprocal cap is either imposed again at the same level or decreased. If this is the case, it is unhelpful as it suggests the trend on appeal is for unsuccessful claimants to be required to pay more but for unsuccessful defendants to be required to pay less. However, we would caution this finding as the dataset is small and the results are mixed. We urge the Committee to recommend the Ministry of Justice monitors the situation with regard to costs on appeal and evaluates emerging practice against the achievement of Article 9(4) of the Convention.

13. Friends of the Earth has also had to argue with the government that the default cost cap regime applies to proceedings on appeal at all in their challenge to the expansion of Heathrow on climate grounds. The relevant government department submitted that the default cost cap regime applied only to proceedings at first instance, and argued that it was appropriate for both parties to have a reciprocal cost cap of £35k each for the appeal. £35k is the default cost cap for defendants under the ECPR. In the event, the court did not accept the government's arguments and ordered a second £10k cap; however, it should be noted that costs on appeal are uncertain, and, Friends of the Earth in effect now has a £20k adverse costs cap taking into account the £10k at first instance that was supposed to already be set at the level at which prohibitive expense was engaged. This has now been doubled.

Schedule of claimants' financial resources

14. The Report confirms that amendments to CPR 39 regarding public hearings came into force on 6 April 2019. Specifically CPR 39.2 (Annex B) states that "*A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice – … (c) it involves confidential information (including information relating to personal financial*

[5] ACCC/C/2008/33, para 135

matters) and publicity would damage that confidentiality; … (g) the court for any other reason considers this to be necessary to secure the proper administration of justice." (underlining added)

15. The changes made reinforced the fundamental principle of 'open justice' as a priority such that private hearings will be held only if one or more of the above criteria are fulfilled. The premise that conditions must be met for hearings in private fails to make private hearings the default position for environmental claimants. This could have a chilling effect on claimants by adding an extra procedural hurdle in order to prove a private hearing is required. Additionally, the focus on 'damage to confidentiality' is not necessarily the same concern that a claimant will have on what is, or is not, private. The way in which the rule has been drafted creates unwelcome ambiguity when it could be much clearer and more certain for claimants. We urge the Committee to recommend the Ministry of Justice monitors the effectiveness of this provision and publishes its findings.

Costs relating to determination of an Aarhus claim

16. We refer the Committee to our recommendations in paragraph 3 of this response. It is clearly wrong in our view, and contrary to Article 9(4), that where a claimant defeats a challenge by a defendant public body to its claim's status as an 'Aarhus Convention claim', then in that circumstance it is not possible to recover all the associated costs in doing so, because the basis of assessment is on the standard basis and not an indemnity basis. This unfairly adds to the costs burden on claimants. We ask the Committee to consider this issue in its next response.

Cross-undertakings for damages

17. The Report sets out CPR Practice Direction 25A (Annex B) and highlights that the court has the discretion to award interim injunctive relief without requiring a cross-undertaking in damages in Aarhus cases (paras 24-28).

18. The Report also refers to an EIR request submitted by the RSPB concerning data on injunctions made between April 2013 and May 2015. The Report states that of the 12 applications for an interim injunction (of which 8 were granted), in only one order did the claimant give a cross-undertaking in damages. In fact, the data showed a mixed pattern (EIR response attached to this response) but could now be usefully supplemented by a further four years of data. We will request that data to discern whether there are any trends. It remains our position that no cross-undertaking should be ordered that would increase costs burden on a claimant over and above the cap that is set at the outset which marks the boundary of prohibitive expense.

Costs orders against or in favour of interveners and funders of litigation

19. The Report refers to CPR Rule 46.15 and sets out the position regarding interveners and costs (paras 29-33). The Report states that the court retains complete discretion not to award costs against an intervener (para 32) but the stark reality, as evidenced by the Ministry of Justice's own data, is that interventions in environmental JRs are now rarely, if ever, made. While the Report acknowledges that interveners can add value and expertise to a case, Rule 46.15 appears to be working to dissuade such interventions. This is concerning because not only do interventions assist the court in understanding the legal issues, and therefore in attaining justice in each case, they also maximise participation in the justice system. We recommend the application of this Rule to environmental cases should be removed.

General conclusion

20. Our overall view is that while there have been one or two helpful modifications to the Aarhus costs rules in England and Wales (notably the extension of costs protection to challenges brought under s.288 of the Town and Country Planning Act 1990), there is a concerning picture in relation to access

to justice in England and Wales. The overall picture is unsatisfactory – the committee is respectfully referred back to the findings of *A Pillar of Justice*.

21. Notwithstanding that the Aarhus regime in England and Wales is relatively new, that the dataset is small, and that the impact of legislative and other changes will take some time to manifest themselves, it is clear that:
    - The number of environmental cases has fallen following the passage of the CJCA 2015 - and continues to fall;
    - The number of challenges to Aarhus Convention cases appears to be rising, although further data is required to discern whether there is also a rise in the number of successful challenges to the status of Aarhus Convention claims;
    - The success rates at permission and first instance have fallen following the passage of the CJCA 2015 and CPR reforms in 2017;
    - Early indications are that where the defendant seeks to vary the default cap, the level of the cap is increased notwithstanding the public interest nature of environmental claims;
    - The caps imposed on appeal are inconsistent. More data is required to verify early indications that the claimant's cap is usually imposed again at the same, or a higher, level and the defendant's cap is imposed again at the same, or a lower, level – which offends the principle of access to justice; and
    - Third party interventions in environmental JRs are rare.

22. A number of these concerns are directly related to the issue of cost. While we welcome the Government's commitment to formally review the ECPR and publish findings (para 7) we see no reason to wait until 2020, particularly as the Government's review will be based on the same data as *A Pillar of Justice*. We urge the Committee to recommend that the Ministry of Justice addresses the findings of our report immediately by effecting the requisite statutory amendments in line with the report recommendations, and in issuing Guidance to assist judges and all parties to litigation in complying with the Convention's requirements on access to justice.

Scotland

Types of claims covered

23. The revised rules for Protective Expenses Orders (PEOs) have achieved some progress towards compliance with Article 9(4) of the Convention (paras 35-37). For example, the extended scope and eligibility of PEOs now better reflect the requirements of the Convention. However, as acknowledged in the Report, the rules do not cover proceedings in private law claims (though 'toxic torts' are now covered by qualified one-way cost shifting in the Personal Injury court).

Level of the cost caps

24. As in England and Wales, the default PEO caps can now be varied in either direction 'on cause shown'. While the Report maintains that: "*it is not expected that there will be large numbers of cases in which cost caps are increased but the Council's conclusion was that a measure of flexibility should be granted to the court in responding to the particular circumstances of the case*" (para 39), we have a number of concerns about the revised PEO system. Firstly, "on cause shown" is a low test. Secondly, the terms of the system have been set without an assessment of the overall costs of litigation to an applicant (noting the requirement to a holistic view of the costs of litigation which includes any relevant costs on appeal and associated costs such as court fees). We believe the ability to increase the default caps will lead to increased uncertainty and exacerbate the 'chilling effect' on litigants.

Costs protection on appeal

25. The Report confirms the Scottish Civil Justice Council's view that the court should enjoy a measure of flexibility regarding costs on appeal. In particular, it highlights that if the circumstances of the case (or the claimant) have changed then a PEO may "no longer be appropriate" (para 40). We would also point out that 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.

Other concerns

26. The Report's brief summary of the situation in Scotland fails to cover the following issues:
    - **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. We are aware of examples of environmental judicial reviews where court fees alone would run into 5 figures under this regime, while further 'uplifts' of 2% or more are planned for each of the next three years. The Compliance Committee's most recent Progress Report notes with concern the submission by observers that some fees, e.g. hearing fees, have doubled in recent time. In this regard, the Committee encourages the Party concerned to following the approach of England and Wales to expressly include any court fees in the assessment of what would be "prohibitively expensive".

    - **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. The Compliance Committee has previously noted that that "*it has not received any further information from the Party concerned with regard to legal aid in Scotland and notes observers' submission that the availability of legal aid is limited in Scotland in practice*". It is therefore disappointing that the UK Report again fails to address this issue.

    - **Publication of PEO decisions** – the fact that it is not mandatory to publish PEO decisions makes it difficult to monitor compliance with the Convention.

27. We have repeatedly urged the Scottish Government to undertake a comprehensive review of the Scottish legal system in relation to Article 9(4) of the Convention in light of these concerns.

Northern Ireland

28. The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017 {SRNI 2017/27} have introduced welcome improvements to the protective costs regime in Northern Ireland, as originally codified by The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 {SR 2013/81}. As amended, these Regulations have, to date, operated reasonably well in practice, within their limits.

29. In cases involving Northern Ireland Government Departments, it has usually been accepted, at an early stage, that they were Aarhus Convention Cases and Protective Cost Orders ("PCO") have been consented to or not opposed. The practice is that, in Aarhus Convention Cases, a PCO is applied for when the case papers for leave (permission) are first filed with the Court and, generally, a PCO is granted along with leave (permission) for the Judicial Review to proceed, without much debate. This gives the Applicant a measure of certainty over costs at a reasonably early stage in proceedings.

30. The form of the Order is usually that provided for as a default in the Regulations - that any order for costs against the Applicant is limited to £5,000 plus VAT, if an individual or £10,000 plus VAT if an organisation, and any costs that are awarded against the Respondent will not exceed £35,000 plus VAT.

31. In 2015, development planning powers were devolved from the Department of the Environment (now the Department for Infrastructure) in most, but not all cases, to local authorities and it is not yet clear if these 11 public authorities are adopting a similar practice uniformly. It is noted that in one reported case, leave was granted and part of the directions required the local authority to put in its response to the PCO application within a certain time – suggesting that there was sort of difficulty or debate over it. Accordingly, the PCO was not granted at the leave stage. However, the final decision in that case records that the Applicant (having lost the case) was protected by a PCO of £5,000 plus VAT.

32. The limits are that, in many cases, environmental challenges remain "prohibitively expensive" as PCOs only address the exposure to adverse costs orders. Applicants also have to budget for their own legal costs in the High Court, should they lose, and this is unaffordable for many members of the public. It is noted that there has been an increase in major environmental cases being brought to the High Court of Northern Ireland by personal litigants. The likelihood is that the PCO regime has encouraged some of the more self-assured, confident and/or committed members of the public to dispense with the assistance of lawyers, as they can't afford this, but take cases on the basis that they will at least have the comfort of knowing that their exposure to paying the Respondent's costs, should they lose, is limited by a PCO. These cases are apt to suffer considerably through the lack of access to legal assistance in what is a complex area of the law. Cases have been brought to lawyers, after they have been dismissed in the High Court, to evaluate the prospects of an appeal, where it is clear they could have been framed differently, with greater prospects of success.

33. Another difficulty is the cross cap of £35,000 plus VAT. There are small, medium and large environmental cases and the larger ones simply cannot be properly conducted for £35,000 plus VAT, even with concessionary fee rates that some lawyers might be prepared to agree to. Applicants in those cases, therefore, face the choice of mounting a challenge to the cross cap, which will absorb more time, energy and expense, with an uncertain outcome or accepting they will have to live with and budget for the prospect that a proportion of their own costs will be non-recoverable, even if they are successful. This is obviously a further disincentive to take such cases – in often the more important cases in terms of scale and impact on the environment.

34. It remains the case that Legal Aid (assistance from public funds) is generally not available for such 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.

35. As commented on before and elsewhere, it is disputed that these Regulations do not apply to legal proceedings other than judicial reviews or statutory appeals or reviews. It is the case that these are the procedures most likely to apply to the matters specified in Annex I to the Convention. The Regulations do not apply to private law environmental cases although these may involve activities or operations which, as the Convention states in Article 6, "*may have a significant effect on the environment*." This should be remedied. There is no reason why the Courts would not be unable to determine, on a case by case basis, whether or not the private law case in question involves matters which "*may have a significant effect on the environment*."

29th October 2019