

ClientEarth's response to the United Kingdom's second progress report on compliance with decision VI/8k and its obligations under the Aarhus Convention

1 Introduction

1. We are grateful for the opportunity to comment on the UK's second progress report on compliance with decision VI/8k.
2. ClientEarth is one of the three communicants¹ of communication ACCC/C/2008/33.
3. We have had the benefit of reading the submissions made on the UK's second progress report by the Communicants in ACCC/C/2010/53, and those made on behalf of the Communicants in ACCC/C/2013/84 and 85, Link UK and the RSPB, Friends of the Earth and Friends of the Earth Scotland (the "**Observers**"). In this submission, ClientEarth seeks to build on the observations already made by others with reference to England and Wales only, focussing on the following issues:
 - Level of costs caps for claimants and defendants;
 - The requirement of promptitude; and
 - Assistance mechanisms to remove or reduce financial barriers to access to justice.

2 Level of costs cap

4. We support and adopt the request by Environment Link UK and the Observers calling for the reinstatement of the 2013 maximum costs caps of £5,000 for individuals and £10,000 for organisations. When first introduced in 2013, these levels were, in our submission, prohibitively expensive for claimants because they failed to satisfy both the subjective and objective limbs of the test set by the Court of Justice of the European Union in the *Commission v UK*² and *Edwards*³. However, following developments over the past six years, we now consider that these levels of caps, if serving as absolute caps, meet the objective limb in that any cap exceeding these amounts would be objectively prohibitively expensive. This is even more so when the claimant has no financial interest in the litigation and/or when the case is of wide public benefit. The Observer's recommendation therefore ensures fairness, certainty and is not prohibitively expensive for claimants.
5. We also support the removal of the defendant's cross cap. A statutory costs cap of £35,000 for a public authority serves to restrict the public authority's financial liability when its decisions have been held by a court to be unlawful. The protection of a cross-cap therefore does not encourage good decision making, particularly as the sum of

¹ Joint communicants are The Marine Conservation Society and Robert Latimer.

² Case C-530/1

³ *Edwards v Environment Agency* (Case C-260/11) and *R (Edwards) v Environment Agency* (No. 2) [2013] UKSC 78)

£35,000 is no longer sufficient to deter the public authority from defending a poor decision all the way to a full hearing.

6. A cross cap of £35,000 however is a deterrent to claimants who wish to bring complex or technical environmental claims, because even if they are successful and recover their costs up to the cap, they are in most cases likely to still be left out of pocket.
7. Further, a cross cap of just £35,000 creates inequality of arms between the parties. Claimants often have to rely on the goodwill of the legal teams (solicitors and counsel) who act for them either pro bono or at non-commercial rates. This means that claimants may only be able to instruct one barrister, often a single junior counsel, while the public authority often instructs specialist junior and leading counsel as a matter of course. This unfairness is especially acute in complex and technical cases where the claimant is required to instruct an independent expert to counter the public authority's employed expert.
8. There is also a risk that, over time, specialist solicitor firms and counsel will not be able to sustain these low rates. This will lead to claimants being unable to access legal advice and support at all.
9. It is no response that the claimant can apply to increase the cross cap. By the time the court determines such an application the costs will have been incurred or committed, with the claimant being at risk of their application being unsuccessful. If the claimant then seeks to withdraw from the claim, it will have to meet an adverse costs order. Claimants will be reluctant to take on such uncertain risk and expense.
10. A cross cap that does not represent a fair commercial rate of recovery of a claimant's legal costs when successful therefore embeds an insidious disadvantage for claimants in the very procedural rules introduced to rectify unfairness and ensure that claimants' costs are not prohibitively expensive. Such a cross-cap therefore creates prohibitive expense for claimants and creates a real risk of excluding claimants from accessing the courts in environmental matters.

3 Requirement of promptitude

11. The UK at paragraph 61 of its report says, "*In practice, the courts consider the requirement for a claimant to act promptly as being demonstrated by complying with a 3 month limit.*" However, this does not deter defendants from making an application that the claim is out of time.
12. *In ClientEarth and the Marine Conservation Society v the Department for Environment, Food and Rural Affairs (CO/2317/2019)*, Defra - the government department responsible for reporting to the Aarhus Convention Compliance Committee (the "**Committee**") on the implementation of the Aarhus Convention in the UK - argued that the claim was out of time because it had not been issued promptly. This was the case even though the claim was issued within three months of the delegated legislation the claimants were challenging was made (and, importantly, after Defra's lawyers had initially confirmed that it would take no point on time and had requested extensions to respond to the claimants' pre-action correspondence, thus delaying the pre-action process).

13. The permission judge said in his order of 1 August 2019 that he would have found that the action was not begun promptly if he had considered that the matter was urgent and needed to be resolved prior to the date the parties had expected the UK to leave the European Union. The judge's order is at annex A of this submission. In the circumstances it appears that the UK's statement is incorrect.
14. It is important to note that the defendant's arguments on promptness were not linked to the claimants' application for an expedited hearing. Clearly, public authorities are willing to use the requirement of promptness to create uncertainty and deter claimants from proceeding with their claims.
15. Further, even if it is not the court's general practice to grant such an application, the defendant's willingness to make such arguments means that the claimant must incur the costs of opposing an application.
16. In the circumstances, there is no justification for retaining the requirement of promptitude for environmental claims.

4 Assistance mechanisms to promote access to justice

17. The Committee at paragraph 16(b) of its first progress review identified the need for the UK to consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice. The UK has failed to report on the steps, if any, it has taken to meet this finding.
18. The UK could alleviate the financial burden on claimants in environmental cases by implementing the recommendations made by the Observers in their submission, such as: *"reducing court fees, instigating 'qualified one-way costs shifting', payment of costs from central funds"*.

5 Conclusion

19. The Committee in its first progress review set out at paragraphs 16 to 20 the steps the UK must take to fulfil the requirements of paragraph 2 of decision VI/8. The several submissions made by the Communicants and the Observers show that the UK has still not taken the necessary steps to achieve compliance. In reality very little has actually been done by the UK since decision VI/8 was adopted in September 2017.

Gillian Lobo
Senior Lawyer, UK Litigation
Specialist
020 3030 5983
globo@clientearth.org
www.clientearth.org

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Beijing
1950 Sunflower Tower
No. 37 Maizidianjie
Chaoyang District
Beijing 100026
China

Berlin
Albrechtstraße 22
10117 Berlin
Germany

Brussels
3ème étage
1050 Bruxelles
Belgique

London
274 Richmond Road
London
E8 3QW
UK

Madrid
García de Paredes,
76 duplicado,
1º Dcha.
28010 Madrid
Spain

Warsaw
ul. Żurawia 45
00-680 Warszawa
Polska

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