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By email only

18 March 2020

Dear Sir/Madam,

ClientEarth's Written Statement on the UK's compliance with decision VI/8k

1. We would like to thank the Compliance Committee for inviting ClientEarth to participate in the hearing on the 13th March 2020 and to submit this written statement. Our comments are by way of response to the findings of the Compliance Committee in its second progress report and the statement made by the Party at the hearing.
2. We welcome the observations and findings of the Compliance Committee in its second progress report.
3. We refer to our written comments on the Party's second progress report of the 31st October 2019, which we still consider relevant.
4. We do remain concerned that a cross costs cap of £35,000 for a public authority defendant is prohibitively expensive for a claimant. This is because :
 - In all but the simplest cases a claimant, even when paying reduced rates for its external lawyers, will be out of pocket in circumstances when a public authority is found to have acted unlawfully. The defendant's costs cap of £35,000 serves as a deterrent to potential claimants, whilst financially insulating a defendant who would seek to defend a poor decision that fails to protect or may even damage the environment.
 - An application by a claimant to increase the defendant's costs cap (and by the defendant to increase the claimant's costs cap) is uncertain because the assessment of what is prohibitively expensive for a claimant under Civil Procedure Rule 45.44(3) is very broad and subject to the discretion of the permission judge. Further, by the time the court determines such an application the claimant is very likely to already have incurred or be liable for potentially substantial legal costs. Such uncertainty creates financial risk for claimants who cannot properly evaluate their likely prospects

of defending or making an application to vary their own or the defendant's costs cap. Again, this position may have a chilling effect on potential claims. We welcome the Compliance Committee's invitation at paragraph 49 of the second review that the Party report on the proportion of applications to vary costs caps, the outcomes of each application, the quantum of any variation made and the reason for the variation.

- The UK could alleviate the financial burden on claimants in environmental cases by introducing one way costs shifting or by raising the defendant's costs cap to a more realistic level, taking into account that it will only be paid in circumstances when a public authority's actions have been found to be unlawful and when the claimant can show that the costs have been reasonably incurred.
5. We also wish to invite the Party to explain its inconsistent approach in relation to promptness, namely the Department of Environment, Food and Rural Affairs' raising promptness as an issue in *ClientEarth and the Marine Conservation Society v Department of Environment, Food and Rural Affairs* (CO/2317/2019), given its report to the Compliance Committee on the practice of the courts in England and Wales. We can only conclude that it was to seek a tactical advantage by creating uncertainty and increasing the Claimants' costs and therefore contributing to the proceedings being prohibitively expensive.
6. Please let me know if you require any further information.

Yours faithfully,

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