From:	Carol Day
To:	aarhus compliance <aarhus.compliance@unece.org>, Fiona Marshall <fiona.marshall@unece.org>
Cc:	"Sutherland, Rosie" <Rosie.Sutherland@rspb.org.uk>, Gillian Lobo <globo@clientearth.org>, Will Rundle <will.rundle@foe.co.uk>
Date:	20/09/2017 15:39
Subject:	Re: Decision V/9n (UK) - Party concerned's reply to questions raised by observers

Dear Fiona and Sebastian,

Firstly, we hope that you have recovered from your successful (but no doubt exhausting) week in Budva at the MOP. These things look effortless but always take an enormous amount of pre-planning and organisation so well done to you and all the Team involved.

We thought the Compliance Committee would be interested to see the judgment in our Judicial Review challenging aspects of the new Aarhus costs capping regime in England and Wales (attached), which was handed down in the High Court on Friday 15th September.

The MoJ had largely conceded on Grounds 2 and 3 before the Hearing and made further concessions in relation to Ground 1 during the Hearing. As such, the judgment looks to be something of a mixed bag but, in practice, we achieved everything we wanted and could have achieved given the CJEU judgment in *Edwards*. We have included a brief summary of the case and the judgment below as we appreciate Compliance Committee members may not all have time to wade through the entire document. We are still in correspondence with the MoJ regarding relief and will update you and the Committee on that as soon as we can.

The Committee may also be interested to know that a Regret Motion laid by Lord Marks QC in the House of Lords succeeded by a vote of 142 to 97 while we were actually in Budva. It was an excellent debate and, most unusually, resulted in a defeat for the Government. The debate can be viewed here (starting at 18:46pm).

We sincerely hope that the judgment, the Lords Debate and Decision VI/8k arising from MOP 6 will urge the Government to address non-compliance with Article 9(4) of the Convention as a matter of some urgency.

Please do not hesitate to contact us should you or the Committee would welcome any further information or clarification.

Yours sincerely,

Carol.

Carol Day, Solicitor and Legal Consultant to the RSPB on behalf of Rosie Sutherland (RSPB), Will Rundle (Friends of the Earth) and Gillian Lobo (ClientEarth)

Summary of RSPB, Friends of the Earth & Client Earth v. Secretary of State for Justice [2017] EWHC 2309 (Admin))

On 24th February 2017, the RSPB, Friends of the Earth and ClientEarth applied for a Judicial Review of the amendments made by the Civil Procedure Rules (Amendment) Rules 2017 (**Amendment Rules**) that came into force on the 28th February 2017.

CPR r45.44 of the Amendment Rules replaced the previous fixed costs caps regime (£5000 for an individual, £10,000 for an organisation and £35,000 for a defendant) for certain environmental judicial reviews with new 'hybrid' costs, namely default caps that the court can vary as long as it is satisfied that in doing so the proceedings will not be "prohibitively expensive" for the claimant. Art 11(4) of Directive 2011/92 art 11(4), requires that the judicial review procedures for certain Aarhus Convention claims should not be "prohibitively expensive" for the claimant. The challenge was brought under EU law only.

There were two main grounds of challenge:

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*Ground 1- variation in costs caps limits- CPR 45.44 fails to provide claimants with early certainty as to their likely costs exposure, because the Amendment Rules allow for the default cap to be varied at any point in the proceedings; and

- Ground 2 the failure to provide for mandatory private hearings when considering an individual's finances – because the claimants will be deterred from bringing claims if there is a risk that their personal financial information, or that of the individual funders will be discussed in open court; and

In addition, we sought a declaration that in assessing what is prohibitively expensive for the claimant, the court may take into account what the claimant must pay for his own costs.

Dove J held that:

- Ground 1 –the rules varying the default costs caps are consistent with EU law when considered in the context of the surrounding rules and practice. This means that a defendant must make an application for a variation to the claimant's costs cap at the earliest opportunity – this will in almost all cases be when the defendant files an acknowledgment of service. Later applications to vary the cap may be considered if the claimant has lied or misled the court over his finances or if his means substantially change. As long as the

Amendment Rules operate in this way in practice they do not offend against EU law and the requirements of early certainty and reasonable predictability;

(2) Private hearings – The possibility that a claimant's financial affairs will be discussed in public could deter meritorious claims, and therefore should in the first instance be in private. The rules need to be amended accordingly. Dove J also thought it would be beneficial for a specific definition to be provided as to the nature and content of the financial information a claimant must file with the court.

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(3) Claimant's own costs - It was not necessary to grant the claimants a declaratory relief because the court's endorsement of their t consensus provided everything that might be accomplished by a declaration.

We still need to resolve the matter of remedies and costs.
The Amendment Rules now align more with Jackson's proposals for costs caps in all JRs.