

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

15th March 2018

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, Friends of the Earth and Friends of the Earth Scotland

This Statement supplements a separate written Statement prepared by Environment Links UK (ELUK) and presented to the Eleventh Meeting of the Task Force on Access to Justice, which took place on 27th-28th February 2018. 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:

England and Wales

- We understand the Ministry of Justice (MoJ) has affected a number of changes to the Civil Procedure Rules (CPR) in respect of the costs regime for environmental cases by way of Statutory Instrument following our successful Judicial Review¹ (JR) against the MoJ and the Civil Procedure Rules Committee in 2017. We understand the following changes to the CPR will come into effect on 6th April 2018: (i) clarifying that the financial information that must now be provided to the court by claimants when applying for JR or relevant statutory review extends to income, expenditure, significant assets and liabilities. Also, that information about third party funding extends only to the aggregate amount raised (or expected to be raised); (ii) defendants will be required to indicate an intention to apply to vary the default caps of £5,000 and £10,000 on adverse costs liability at an early stage in the proceedings (i.e. in their Acknowledgement of Service); (iii) clarifying that later applications to vary the cap may only be made in situations where it can be shown that the claimant's financial position has changed materially during the course of the proceedings (e.g. where new financial resources become available) such that it would not be prohibitively expensive to weaken costs protection, or where the financial information presented to the court was incorrect or misleading.
- Whilst welcoming these changes, we are concerned that the Ministry of Justice is not minded to amend the CPR to affect the judgment of the Hon. Mr Justice Dove, in requiring hearings into the claimant's financial situation to be held in private, pending the outcome of the current Open

¹ See *The Royal Society for the Protection of Birds Friends of the Earth Ltd & ClientEarth v Secretary of State for Justice the Lord Chancellor* [2017] EWHC 2309 (Admin)

Justice Review (the time frame for which has not been confirmed). Whilst noting that practical arrangements have been made to ensure that hearings will be held in private in the interim, we continue to press the Government to effect changes to the CPR to respect the High Court judgment. This is to ensure that all claimants can be informed/aware that their privacy will be protected from the outset as it would be clearly set out in court rules, and so better facilitate access to justice.

- While our successful JR was able to ameliorate some of the damaging changes introduced into the costs regime for environmental cases in 2017 as a result of the judgments of the Court of Justice of the European Union (CJEU) in *Edwards*² and *Commission v UK*³, we remain concerned that the requirement on claimants to provide the court with information about their personal financial situation when making an application for JR or relevant statutory review, and the uncertainty introduced as a result of the possibility that the default caps will be increased during the course of the proceedings, will still deter some claimants from pursuing legal action (as the changes were ostensibly designed to do). We note that almost identical measures consulted upon in 2015/2016 by the Department of Justice in Northern Ireland were not affected on the basis of the response to the public consultation and taking account of the small number of cases in question and the public interest of such cases. We remain concerned that changes to the costs regime in England and Wales will compound other adverse changes to JR cases generally as outlined in the ELUK Statement (for example reduced time limits) and urge the Ministry of Justice to monitor the effect of the changes to the CPR in England and Wales and publish their findings.
- A key concern also remains the discretion afforded to individual judges to interpret and apply new ambiguous factors when determining prohibitive expense, which we consider is likely to lead to a period of inconsistency and additional (expensive) costs litigation.
- The Compliance Committee should also note that the current costs protection regime extends to environmental Judicial Reviews and certain statutory reviews (essentially those covered by the EC Public Participation Directive). It does not cover statutory reviews within the ambit of Article 9(3) of the Aarhus Convention or private law cases (as determined by the Compliance Committee in ACCC/C/2013/85⁴ and ACCC/C/2013/86⁵).
- We remain concerned over the lack of legal aid for many of the poorest in society to obtain access to justice in environmental matters and the government's resistance to improving financial assistance systems. As things stand currently, those of lesser means may still have restricted access to the courts on the basis of financial weakness.

Scotland

- Friends of the Earth Scotland would refer the Committee to the ELUK Statement submitted to the Task Force in February 2018. The only pertinent development since then is that Ministers are not, as anticipated and flagged previously, keen to extend Qualified One Way Costs Shifting (QOCS) to all Aarhus cases under the Civil Litigation Bill.

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

³ Case C-530/11

⁴ See [here](#)

⁵ See [here](#)



Yours sincerely,

Carol Day and Rosie Sutherland, the RSPB
Mary Church, Friends of the Earth Scotland
Will Rundle, Friends of the Earth

