

Aarhus Convention Compliance Committee: 63rd Meeting, 11-15 March 2019

UK Government oral statement in relation to the Compliance Committee's review of the UK's 1st annual progress report on Decision VI/8k: 15 March 2019

11:00-12:30 CET

Introduction

1. The UK Government would like to thank the Compliance Committee for organising the session and welcome the chance to seek clarifications and ask questions on the report.
2. We will be taking into consideration the Compliance Committee's review and the responses from communicants and observers as we compile our 2nd annual progress report.

New developments

3. Before addressing the Committee's review, we would like to take the opportunity to provide an update on recent developments in relation to the UK's implementation of the Aarhus Convention, specifically in relation to Article 9 provisions on costs.
4. The UK Government's general approach to costs protection in environmental cases in England and Wales brought under the Aarhus Convention, as revised in April 2018, has been developed in the light of Supreme Court and Court of Justice of the European Union case law.
5. The UK Government has already given a commitment to keeping the Environmental Costs Protection Regime (ECPR) under review and will of course consider any developments in case law. As the UK Government said to the Compliance Committee at its 60th session in March 2018, we will formally review the ECPR when we have sufficient data to do so, which is likely to be by April 2020.
6. We would like to draw attention to the letter of 8 March 2019, sent to the Compliance Committee and Secretariat, which covers recent developments in relation to the two grounds of Compliance Committee Case 157. This relates to the provisions raised by Decision VI/8k concerned with Article 9(4) of the Aarhus Convention.
7. In summary, regarding the first ground of the case, the UK Government, having reflected fully on the issue of cost protection in planning challenges brought under section 288 of the Town and County Planning Act 1990, intends to request the Civil Procedure Rule Committee (CPRC) to amend the ECPR. It is anticipated that this change would take place later in 2019.
8. In respect of the second ground of the case, the CPRC having completed its open justice review, laid amendments to the Civil Procedure Rules (CPR) before

Parliament on 25 February 2019 which include new provisions on open justice. The amended rules affirm the fundamental principle of open justice, central to which is that hearings are to be in public unless the court is satisfied that the criteria for a hearing in private are fulfilled, in which case the hearing in question (or the relevant part of it) must be in private.

9. The CPRC concluded that the provision in the 2019 Amendment Rules appropriately balances the principle of open justice with the protection of claimants in Aarhus Convention claims from any “chilling effect” of holding in public any hearing of an application to vary a costs cap in such a claim.
10. In relation to Scotland, and with regard to the Compliance Committee’s comment in paragraph 89 of its review that it has not seen the changes to the Rules of the Court of Session in relation to Protective Expenses Orders (PEOs), these rules came into force in December 2018. As this was after the date of submission of the UK’s 1st progress report, the UK Government will update the Compliance Committee on the content of the rules in its 2nd progress report.
11. The Compliance Committee may also wish to be aware that an Advisory Group on Human Rights Leadership was set up by Scotland’s First Minister to make recommendations on how Scotland can continue to lead by example in the field of human rights. This includes economic, social, cultural and environmental rights. Consideration will be given to a Human Rights Bill that will legislate in this area. The content of the environmental right may make reference to international standards, including the Aarhus Convention.

Questions and clarifications

12. We would now like to move on to the UK Government’s specific comments and questions on the Compliance Committee’s review, where we have a number of points.
13. On the general remarks made by the Committee in their review, we have had a useful exchange with the Secretariat about the Committee’s comments on the structure of the report. We don’t therefore propose to cover those issues in this session but will rather focus on specific issues of content where we have clarifications or questions.
14. We would like to begin with costs issues, where we note that the Committee evaluation of the first progress report adopts the framework of the final report on compliance with Decision V/9n.
15. There are a number of matters raised by the Committee on which we would be grateful for clarification or further information.

16. Firstly, in relation to the eligibility for costs protection in England and Wales referenced in paragraphs 33-34 of the review: The Report of the Compliance Committee submitted at the 6th Meeting of the Parties regarding decision V/9n considered the UK's third progress report on this issue, which stated that interpretation of "members of the public" in Civil Procedure Rules (CPR) Rule 45.41, would be in line with the Aarhus Convention and so would "include NGOs as well as one or more private individuals". The Committee concluded that Rule 45.51 was not inconsistent with decision V/9n.
17. The UK Government has noted the further issue on this point raised by ClientEarth, RSPB and Friends of the Earth concerning unincorporated associations and residents groups. We would welcome any specific examples from the Committee or Communicants where this has been an issue.
18. Next, we have a brief comment regarding the Committee's concerns in paragraph 39 that variations of costs caps will increase rather than decrease. With regards to this, we note ClientEarth, FoE and RSPB's submissions of 31 October 2018 refer to a case in which the cost cap was lowered at the pre-permission stage.
19. In relation to the timing of applications to vary costs caps, we also note the case raised by ClientEarth, FoE and RSPB in their comments of 31 October, and acknowledge the Committee's invitation to comment on the concern that the CPR may not in practice be operating as they should. In this regard, we would welcome details of the particular case referred to or any others, and generally any other data held by the Committee or Communicants regarding the submissions made on varying costs caps.
20. In relation to the schedule of claimant's financial interests in England and Wales referred to in paragraphs 53 to 64: The UK Government's first progress report informed the Committee of the amendment to the CPR to clarify the financial information that claimant's must provide in order to have the benefit of a costs cap. We note the further concerns now raised in paragraph 55 that "defendants have challenged the amount of information provided by the claimant" and would welcome for consideration further details of such cases or examples of court orders which have required disclosure of information beyond that set out in the CPR.
21. Moving on from costs, the UK Government has the following comments and clarifications on those elements in the Committee's review pertaining to the public participation paragraphs 8a and 8b of Decision VI/8k, which are centred on Compliance Committee Case 91.
22. The examination process for the Wylfa Newydd development consent application is ongoing and other states are engaged or participating in that process. The representations of all interested parties will be taken into account by the Secretary of State for Business, Energy and Industrial Strategy in making his decision on the Wylfa Development Consent Order (DCO).

23. The UK Government considers that the steps we have taken in relation to the Wylfa DCO are consistent with the application of the precautionary principle. The UK has informed a number of states where no likely significant transboundary effect has been identified, in addition to formally notifying Ireland where such an effect has been identified.
24. The UK Government will provide a full second progress report covering paragraphs 8a and 8b for Decision VI/8k in October 2019. In the meantime we would like to offer the Compliance Committee with the following points of clarification in relation to their comments on these paragraphs first review.
25. In relation to paragraph 111 and the status of Planning Inspectorate Advice Note 12: As well as the position for other nationally significant planning applications, the Advice Note sets out the planning position in relation to the transboundary consultation for proposed nuclear power stations. If the policy set out in Advice Note is not followed then this could be a suitable ground for a successful challenge to a subsequent grant of development consent.
26. In relation to paragraph 112: The UK is fully aware of the broader application of Article 6 of the Aarhus Convention. Planning Inspectorate Advice Note 12 does not focus solely on new nuclear power stations.
27. In relation to paragraph 115(b): We consider that the steps we took in relation to the Wylfa Development Consent Order were consistent with the application of the precautionary principle. As such, the UK did not only notify Ireland where a transboundary effect was identified.
28. Finally, we consider that paragraphs 117 and 120 misinterpret the position adopted. It was not those states that "registered an interest in participating in the EIA transboundary consultation process" that received the press notice but, as the UK's progress report is quoted as saying in paragraph 116, it was those where "significant public interest had been established (or requested)".