

Aarhus Convention Compliance Committee: 60th Meeting 12-16 March 2018

Oral update on UK compliance Decision VI/8k: 15 March at 13.15 – 14.00

1. I would firstly like to provide an update on access to justice cost protection elements in 59n contained in 68k and **C-77, C85 and C86**.
2. In 2013, the last Government introduced an Environmental Costs Protection Regime (which I will refer to as the 'ECPR') for England and Wales.
3. This allowed the court to fix the costs that could be ordered for an unsuccessful claimant to pay to the successful party.
4. Both the UK Supreme Court and the European Court of Justice delivered judgments which said costs for the unsuccessful claimant should "not be prohibitively expensive".
5. The Government proposed to amend the ECPR in line with those judgments, and in a manner which allowed claims to be brought without prohibitive expense, whilst not encouraging unmeritorious claims.
6. A public consultation took place between September and December 2015. The Government published its response on 17 November 2016, setting out which changes the Government proposed to implement in light of the responses received.
7. The Government then prepared secondary legislation which was laid before Parliament on 3 February 2017 - the changes in respect of the Aarhus Convention claims came into effect on 28 February 2017.
8. The February 2017 changes introduced several new provisions, some of them are favourable to claimants and are welcomed by claimant groups. These changes include:
 - (i) extending the scope of the ECPR to cover a wider range of cases such as including environmental reviews under statute engaging EU law, as well as judicial reviews;
 - (ii) giving courts the power to vary the level of the costs cap from their default levels;
 - (iii) a provision that when considering an application to vary the cap, the court must take into account the amount of court fees payable by the claimant in determining whether the variation (or a failure to make it) would render the proceedings "prohibitively expensive" for the claimant; and

- (iv) a requirement for the Court of Appeal to grant costs protection in appropriate cases.
9. In July 2017, the Administrative Court of England heard a judicial review by three NGOs (the Royal Society for the Protection of Birds, Friends of the Earth and Client Earth) challenging limited aspects of the revisions to the ECPR. The claimants, however, did not challenge the court's power to vary the costs cap and had accepted that it was permissible under EU law to have such a model. We regard this as an important development given the general concerns raised.
 10. Judgment in the judicial review was given on 15 September 2017. In summary, the court concluded that the costs protection regime as amended in February 2017 is compliant with EU law, as claimants are not expected to pay above their means to bring environmental claims, except in one circumstance - (private hearings).
 11. The Court also concluded that the rules would benefit from clarification to reflect the agreed understanding of how they are intended to operate, thereby providing certainty and minimising any possible "chilling effect".
 12. In relation to private hearings, the judgment also concluded that we need to amend the ECPR, so that the default position is that any hearing for an application to vary the costs caps in an Aarhus Convention claim is to be held in private in the first instance. This change, which would require a minor amendment to the relevant Practice Direction.
 13. The change has not been taken forward immediately, because the Civil Procedure Rule Committee - which is chaired by the Master of the Rolls and is responsible for making the rules of court for the Civil Division of the Court of Appeal, the High Court and the County Court - is presently undertaking a comprehensive open justice review. This includes examining the provisions in the Civil Procedure Rules governing when hearings must be held in private. The Committee will consider this issue as part of that review; but pending the outcome of the review, arrangements have been put in place by the Administrative Court (including the Planning Court), to ensure, that litigants, lawyers and court staff are aware, that any hearing of an application for variation of costs cap will be heard in private until further notice.
 14. The Government has accepted the Court's recommendations on clarification and have made amendments to that effect, which are included in this SI:
 - (i) clarifying the financial information that a claimant has to provide in order to have the benefit of the costs cap and, in particular, making it clear that in relation to any financial support provided by third parties, it is only the aggregate amount that must be provided, rather than a breakdown of individuals' donations;

- (ii) clarifying that the court may vary a costs cap only on an application made by the claimant or the defendant; and
 - (iii) clarifying that an application to vary the costs cap must be made at the outset – either in the claim form (if made by a claimant) or in the acknowledgment of service (if made by a defendant) – and must be determined by the court at the earliest opportunity; and that an application may only be made at a later stage in the process if there has been a significant change in circumstances.
15. The Government laid before the UK Parliament on 28 February 2018 a Statutory Instrument (this is secondary legislation), which amends the ECPR, following the judicial review judgment. The amendments to the costs protection regime will come into force on 6 April 2018.
16. The UK government is of the view that the policy position is settled for the time being; however, we are committed to keeping the ECPR under review and will of course consider any developments in case law. We will formally review the ECPR when we have sufficient data to do so (which is likely to be within two years, that is by April 2020).
17. **I wanted to mention the specific point on cost protection in private nuisance in C85 and C86** – the UK has seen the communicants note on these cases. The government will continue to consider one way cost shifting in addition to other solutions. We have had correspondence from the communicants' representatives and we will respond in due course.
18. **In terms C91 in 68k – public participation** – we thank the Compliance Committee for their clarification of the recommendations at the Meeting of the Parties. We are developing programmes of work to consider how compliance can be achieved and will provide a substantive update by 1 October 2018. We note the statement from the communicant in C-91 and we are currently developing a procedure to implement the recommendations of the Meeting of the Parties. We will provide a substantive update by 1 October 2018.
19. This hopefully addresses all the compliance points in Decision 68k. As agreed in the Decision, we will provide a substantive update by 1 October 2018.