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Meeting of the Parties to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters

Compliance Committee

Forty-eighth meeting

Geneva, 24–27 March 2015

Item 8 of the provisional agenda

Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2012/77 concerning compliance by the United Kingdom of Great Britain and Northern Ireland

Adopted by the Compliance Committee on 2 July 2014

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I. Introduction

1. On 21 August 2012, the non-governmental organization (NGO) Greenpeace Limited (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of the United Kingdom of Great Britain and Northern Ireland to comply with the Convention's provisions on access to justice.¹
2. Specifically, the communicant submits its experience as an environmental NGO that sought judicial review of the designation by the Secretary of State for Energy and Climate Change of the National Policy Statement for Nuclear Power Generation in the United Kingdom (Nuclear National Policy Statement).² Its application for judicial review was refused and it was ordered to pay the Party concerned (the defendant) the amount of £11,813, which was later reduced to £8,000 after the communicant argued that the amount was excessive given that the case fell within the scope of the Aarhus Convention. Notwithstanding this reduction, the communicant alleges that the Party concerned fails to comply with article 9, paragraphs 4 and 5, of the Convention, because of the high costs ordered in the case of refusal of applications for judicial review in environmental cases.
3. At its thirty-eighth meeting (Geneva, 25–28 September 2012), the Committee determined on a preliminary basis that the communication was admissible.
4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 30 October 2012.
5. The Party concerned responded to the allegations on 31 May 2013.
6. At its fortieth meeting (Geneva, 25–28 March 2013), the Committee agreed to discuss the content of the communication at its forty-first meeting (Geneva, 25–28 June 2013).
7. The Committee discussed the communication at its forty-first meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the discussion, the Committee put a number of questions to both the communicant and the Party concerned and invited them to respond in writing after the meeting.
8. The Party concerned and the communicant each submitted their response on 19 August 2013.
9. The Committee prepared draft findings at its forty-fourth meeting (Geneva, 25–28 March 2014). In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 26 May 2014. Both were invited to provide comments by 26 June 2014.
10. Both the Party concerned and the communicant provided comments on 26 June 2014.

¹ The communication and related documentation from the communicant, the Party concerned and the secretariat, is available from <http://www.unece.org/env/pp/compliance/compliancecommittee/77tableuk.html>.

² United Kingdom, Department of Energy and Climate Change, *National Policy Statement for Nuclear Power Generation (EN-6)*, vols. I and II (London, The Stationery Office, 2011). Available from <https://www.gov.uk/consents-and-planning-applications-for-national-energy-infrastructure-projects>.

11. At its forty-fifth meeting (Maastricht, the Netherlands, 29 June–2 July 2014), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document to its forty-eighth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues³

A. Legal framework and relevant case-law

National policy statements

12. The United Kingdom Planning Act 2008 regulates, inter alia, matters relating to the authorization of projects for the development of nationally significant infrastructure. In sections 5–13, the Planning Act provides for national policy statements, which are issued by the Secretary of State and set out national policy in relation to one or more specified descriptions of development.

13. The national policy statement regime was introduced to avoid delay when development consent is subsequently sought for nationally significant infrastructure projects, because “in principle” issues such as the need for nuclear power would then already be settled by the national policy statement. This then enables consideration of individual applications for development consent to concentrate on local issues.

14. The Planning Act provides that challenges to national policy statements can only be brought by way of judicial review. Any challenge must be brought within six weeks following either the date of designation of the national policy statement or the publication of the national policy statement, whichever is the later.

15. The Planning Act also provides for the review of a national policy statement which has been designated if the following conditions all apply:

- (a) There is a significant change in any of the circumstances upon which any of the policy set out in the statement was decided;
- (b) The change was not anticipated at that time;
- (c) If the change had been anticipated, any of the policy would have been materially different.

Pre-action protocol for judicial review

16. The Civil Procedure Rules 1998 introduce “pre-action protocols” in different areas. The purpose of these protocols is to promote cooperation between the parties in various types of disputes and to encourage parties to attempt to negotiate a settlement, by providing information to each other, prior to making a legal claim.

17. One pre-action protocol addresses judicial review. Before submitting an application for judicial review, a claimant should comply with the procedure laid out in the protocol, namely, the claimant should send a letter to the defendant before taking action, identifying the decision/act/omission challenged and setting out a summary of the facts and the reasons for challenging them. The defendant has to respond to the claim within 14 days, also

³ This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

indicating which parts of the claim, if any, it concedes. The pre-action protocol should normally be complied with, but is not a mandatory part of bringing a claim for judicial review, though if a party does not follow the protocol, it may be penalized in costs.

Permission for judicial review in England and Wales and costs

18. The Party concerned explains, in its response to the communication dated 31 May 2013, that in England and Wales, permission to apply for judicial review must be granted by a High Court Judge. The “White Book”, the guide to civil procedure in England and Wales, summarizes the test for granting permissions as follows:

The purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that permission is required is designed to “prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending although misconceived” (*R. v Inland Revenue Commissioners Ex p. National Federation of Self-employed and Small Businesses Ltd* [1982] A.C. 617 at p. 642 per Lord Diplock). Permission will be granted only where the court is satisfied that the papers disclose that there is an arguable case that a ground for seeking judicial review exists which merits full investigation at a full oral hearing with all the parties and all the relevant evidence (*R. v Legal Aid Board Ex p. Hughes* (1992) 5 Admin. L. Rep. 623; *R. v Secretary of State for the Home Department Ex p. Rukshanda Begum and Angur Begum* [1990] C.O.D. 107 and *Sharma v Brown-Antoine* [2007] 1 W.L.R. 780 at para.14(4))

19. In case of refusal of the application, under Civil Procedure Rule 54.12, paragraph 3, the claimant can renew its application for permission, which will then be considered at an oral hearing rather than through written submissions.

Costs

20. With respect to costs in unsuccessful applications for permission to judicial review, the defendant should normally be able to recover the costs of filing an Acknowledgement of Service from the unsuccessful claimant (*R. (Leach) v. Commissioner for Local Administration*).⁴

21. The court, however, should not order an unsuccessful claimant to pay the costs of a defendant attending an oral hearing and successfully resisting an application for permission except in exceptional circumstances. Such circumstances may be indicated by the presence of one or more of the following factors: (a) the hopelessness of the claim; (b) the persistence by the claimant in the claim after having been alerted to facts or the law demonstrating its hopelessness; (c) the extent to which the court considers that the claimant has sought to abuse the process of judicial review for collateral purposes; (d) whether, as a result of full argument and the deployment of documentary evidence, the claimant has, in effect, had the advantage of an early substantive hearing of the claim (*R. (Mount Cook Land Ltd) v. Westminster City Council (Mount Cook case)*).⁵

⁴ [2001] EWHC (Admin) 455.

⁵ [2004] 2 P. & C.R. 405.

22. What is reasonable in terms of the level of costs incurred in filing an Acknowledgment of Service and Summary Defence was examined by the Court of Appeal in *R. (Ewing) v. Office of the Deputy Prime Minister*:

The considerations which may apply in responding to the application for permission will vary enormously from case to case. For example, where the subject-matter is in essence a commercial dispute between rival developers, different considerations may apply. In the ordinary case, however, the court must be particularly careful to ensure that the costs falling on the judicial review claimant are not disproportionately inflated by the involvement of the other parties at the permission stage.⁶

23. The Court of Appeal in *Ewing* noted:

Finally, I would repeat the request made by this court in *Mount Cook* that an opportunity should be found as soon as possible to introduce a specific rule or practice direction governing the procedure for applications for costs at the permission stage, and the principles to be applied. It would be helpful if at the same time there could be clarification of what is required by way of “summary of grounds”, and if thought might also be given to whether it is necessary to impose the same requirement on all parties for a summary of grounds at the acknowledgement stage. It may be thought sufficient to impose such a requirement on the Defendant, leaving other parties free to submit comments if they wish to so.⁷

24. The claimant can appeal the cost order awarded before the Court of Appeal.

25. In *Morgan v. Hinton Organics (Wessex Ltd)*,⁸ cited with approval in *R. (on the application of Garner) v. Elmbridge Borough Council*,⁹ the Court of Appeal held:¹⁰

This court has not encouraged the development of separate principles for “environmental” cases (whether defined by reference to the Convention or otherwise). In particular the principles governing the grant of Protective Costs Orders apply alike to environmental and other public interest cases. The Corner House statement of those principles must now be regarded as settled as far as this court is concerned, but to be applied “flexibly”. Further development or refinement is a matter for legislation or the Rules Committee.

New rules on costs introduced in the Civil Procedure Rules

26. In the light of decision IV/9i of the Meeting of the Parties (see ECE/MP.PP/2011/2/Add.1), the Party concerned introduced changes to its Civil Procedure Rules with respect to the award of costs in claims within the scope of the Aarhus Convention. Rules 45.41–45.44 of the Civil Procedure Rules (England and Wales) provide for costs protection in “Aarhus Convention claims”. Practice Direction 45 provides for a protective costs order of “£5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person; ... in all other cases, £10,000”.¹¹ The liability of the defendant for a successful claimant’s costs is capped at £35,000. The

⁶ [2005] EWCA (Civ) 1583, [2006] 1 W.L.R. 1260, para. 42.

⁷ *Ibid*, para. 46.

⁸ [2009] EWCA (Civ) 107, [2009] 2 P. & C.R. 30.

⁹ [2010] EWCA (Civ) 1006.

¹⁰ *Morgan*, para. 47.

¹¹ Practice Direction 45, para. 5.1 (available from <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs/practice-direction-45-fixed-costs>). The changes to the Practice Direction relating to Aarhus Convention claims came into force on 1 April 2013.

sum of recoverable costs for both the claimant and the defendant cannot be challenged. The amended rules entered into effect for England and Wales on 1 April 2013 (Scotland and Northern Ireland have rules which came into effect separately).

B. Facts

27. On 19 July 2011, the Party concerned exercised its power to designate under section 5 of the Planning Act 2008, the Nuclear National Policy Statement. The National Policy Statement (NPS), together with the Overarching National Policy Statement for Energy, provides the primary basis for decisions taken by the Infrastructure Planning Commission (IPC) on applications it receives for nuclear power stations.¹² The NPS, together with the Overarching National Policy Statement for Energy, is also the primary decision-making document for the IPC when considering development consent applications for the construction of new nuclear power stations on sites in England and Wales that are listed in the NPS.¹³ The NPS provides the binding decision-making framework¹⁴ for the assessment of applications for the development of new nuclear power stations on some or all of the sites listed in Part 4 of the document by the end of 2025.¹⁵

28. The “designation” of the NPS was preceded by a process of consultations with the public and statutory consultees. The NPS was also subjected to an appraisal of sustainability according to the European Union (EU) Strategic Environmental Assessment Directive.¹⁶ Public consultations on the draft NPS closed in January 2011.

29. The Fukushima accident occurred in March 2011, before the designation of the nuclear NPS but after public consultation on the draft had closed. The accident prompted the Party concerned to solicit a review of its civilian nuclear plants from the Chief Nuclear Inspector. The Chief Inspector published an Interim Report in May 2011.¹⁷ The Interim Report apparently did not lead to significant changes to the NPS. Footnote 33 on page 13 of the of the nuclear NPS remarks that the Interim Report focused on issues relevant to the nuclear licensing and regulatory regimes and that were therefore primarily within the regulators’ remit.

30. Given that the Fukushima accident occurred before the designation of the NPS (although after consultation on the draft had closed), a review of the NPS was not legally required under the Planning Act 2008, because any “significant change in circumstances” resulting from the Fukushima accident took place before the NPS was designated. It was therefore not possible to seek a review of the NPS through administrative channels without exceeding the statutory time limit for judicial review other than by a pre-action protocol letter.

31. On 16 August 2011, the communicant sent a judicial review pre-action protocol letter to the Party concerned. The Party concerned received the letter on 18 August 2011. In its pre-action protocol letter, the communicant stated that “the action that the Secretary of State is requested to take is to quash the Nuclear National Policy Statement, if necessary by

¹² Nuclear National Policy Statement, vol. I, para. 1.2.1.

¹³ Ibid, para. 1.5.1.

¹⁴ Planning Act 2008, sect. 104, para. 3.

¹⁵ Nuclear National Policy Statement, vol. I, para. 1.5.1.

¹⁶ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

¹⁷ Available at www.hse.gov.uk/nuclear/fukushima/interim-report.pdf. The final report was published in September 2011 and is available at <http://www.hse.gov.uk/nuclear/fukushima/final-report.pdf>.

submitting to a court of competent jurisdiction”.¹⁸ The letter attached a draft statement of facts and grounds for judicial review numbering 84 paragraphs (29 pages). The Party concerned considered the draft application to be much longer than the summary of the facts and the reasons for the challenge required by the Pre-Action Protocol for Judicial Review. While under the Pre-Action Protocol the defendant normally replies within 14 days, the communicant requested a response by 22 August 2011 because according to section 13 of the Planning Act 2008, the deadline for the communicant to challenge the NPS was 26 August 2011. In its letter, the communicant stated that the reason for sending its pre-action protocol letter almost a month after the decision had been taken was due to the fact that the time for challenging the decision was during the vacation season.

32. The communicant sought to challenge the decision to designate the NPS on two grounds:

(a) Failure to take into account material considerations and/or failing to review the NPS prior to its designation in relation to flood risk, off-site electrical supplies and on-site emergency controls;

(b) Failure to consult on the issue raised by the Fukushima accident and the interim report.

33. On 22 August 2011, the Party concerned sent a holding reply that the deadline set by the communicant was not sufficient for the Party concerned to respond to the points raised and, moreover, was contrary to the Pre-Action Protocol, and that a response would be sent in due course. In its letter, the Party concerned also enclosed several documents essentially addressing both allegations brought by the communicant.

34. On 24 August 2011, the communicant replied to the Party concerned that the Party concerned had not addressed the grounds of its challenge and had given no indication when a response would be provided. The communicant recalled the deadline of 26 August 2011 for any challenges to be brought against the NPS. It also reserved the right to amend its grounds in the light of any substantive response and its position as to costs.

35. On 26 August 2011, the last possible date to do so, the communicant submitted a claim for judicial review of the designation of the NPS. In the meantime, no response had been received from the Party concerned.

36. The proceedings were accompanied by considerable publicity and representatives of the communicant issued press statements.

37. On 20 September 2011, the Party concerned filed its acknowledgement of service.

38. Thereafter, the communicant and the Party concerned exchanged correspondence, but this was not included in the costs claimed.

39. On 5 December 2011, the Court refused permission to apply for judicial review and the parties were informed of this on 12 December 2011. The communicant's application was refused on all grounds of challenge and the communicant was ordered to pay £11,813 to the defendant (the Party concerned) for costs in preparing the acknowledgement of service. The communicant was given 14 days to file written submissions disputing the award either in principle or in relation to the amount. The Party concerned was ordered to file any response within seven days thereafter.

40. On 22 December 2011, the communicant disputed the costs awarded on the grounds that the amount was excessive and the case fell within the scope of the Aarhus Convention.

¹⁸ See annex 1 to the communication.

41. Specifically, the communicant argued that the majority of the claimed costs were Counsel's fees. Taking into account that the case at issue did not progress beyond the application stage, the engagement of two Queen's Counsel (i.e., senior barristers), in addition to an experienced junior barrister, and the submission of a document by the Party concerned of 46 pages/119 paragraphs, instead of a short summary that the Court of Appeal had in mind, were excessive and had a bearing on the costs incurred by the Party concerned and ordered against the communicant. In addition, the communicant argued that the claim, being at the permission stage, did not require consideration of any issues of a technical or scientific nature.

42. In addition, the communicant argued that this was not commercial litigation, that the communicant was an environmental NGO depending financially on private donations and that the claim related to the operation and associated practical consequences of the planning regime for new nuclear power stations and the assessment of nuclear safety, which were matters of the highest public interest, as subsequently also acknowledged by the High Court (Justice Ouseley).

43. Finally, the communicant argued that the fact that the Party concerned did not respond in time to its pre-action letter might have had a bearing on its costs now ordered against the communicant.

44. On those grounds, the communicant requested that an award of costs for an Acknowledgement of Service set at a maximum of £1,500 would be appropriate.

45. On 19 March 2012, the communicant was informed by the Court that its request for a reduction of the costs awarded against it to £1,500 had been refused, and that on 5 March 2012 an order was granted that the communicant pay the sum of £8,000 (instead of £11,813) to the Party concerned. The order stated that "the Aarhus Convention is itself irrelevant; it has only been incorporated into UK law to the extent that an EC Directive is involved; the Directives were not involved, other than as an element of background".

C. Domestic remedies and admissibility

46. On 22 December 2011, the communicant disputed the costs awarded by way of written submission to the High Court of Justice, Queen's Bench Division Administrative Court. On 19 March 2012, the communicant was informed that a cost order of the amount of £8,000 had been granted — instead of the original £11,813 — to be paid by the communicant to the Party concerned (see para. 45 above).

47. The communicant did not seek further remedies.

48. The communicant submits that if it had sought a renewal of its application for permission under Civil Procedure Rule 54.12, paragraph 3, the action would have likely incurred significant costs, in addition to the costs already incurred.

49. Moreover, had it proceeded with the matter before the Court of Appeal to appeal the refusal of the judicial review applications, costs would have been exorbitant.

50. The Party concerned claims that the communicant failed to exhaust domestic remedies and recalls paragraph 21 of the annex to decision I/7 of the Meeting of the Parties.

51. The Party concerned stresses that appealing the costs order would not have been an unreasonably prolonged process nor would it have failed to provide an effective or sufficient means of redress.

52. The Party concerned notes that it is not that uncommon for a judicial review case to be refused on the papers only for the claimant to successfully renew and obtain permission at an oral hearing, while a Court awards costs in an oral renewal in exceptional

circumstances only (see para. 21 above). The fact that the communicant chose not to take this step suggest that it did not have any faith in its grounds of challenge.

D. Substantive issues

53. The communicant alleges that exposing claimants to almost £12,000 for the Acknowledgement of Service merely at the permission stage is not compatible with the obligation of the Party concerned to ensure that access to judicial review in matters relating to the environment is not prohibitively expensive. It further alleges that in circumstances such as those presented in the present communication the exposure of claimants to such costs would serve as a serious deterrent to NGOs and individuals wishing to seek judicial review in environmental matters.

54. For these reasons, the communicant alleges that the Party concerned fails to comply with article 9, paragraphs 4 and 5, of the Convention.

55. In support of its allegations, the communicant refers to a number of decisions by courts of the Party concerned¹⁹ as well as those by the Court of Justice of the European Union (CJEU).²⁰ The communicant also refers to then-ongoing infringement proceedings brought by the European Commission to the CJEU against the Party concerned for failure to ensure that claimants can challenge decisions affecting the environment in a way that is fair, equitable, timely and not prohibitively expensive as required under the Aarhus Convention.²¹

56. The communicant finally refers to previous findings of the Committee on communications ACCC/C/2008/23 (ECE/MP.PP/C.1/2010/6/Add.1), ACCC/C/2008/27 (ECE/MP.PP/C.1/2010/6/Add.2) and ACCC/C/2008/33 (ECE/MP.PP/C.1/2010/6/Add.3), in which the Committee found the Party concerned in each case to be in breach of article 9 of the Convention with respect to costs.

57. The Party concerned refutes the communicant's allegations. It submits that the award of costs in the case at issue was reasonable and not prohibitively expensive and in accordance with article 3, paragraph 8, of the Convention. Therefore, the Party concerned did not fail to comply with article 9, paragraphs 4 and 5, of the Convention.

58. In its response, the Party concerned refers to its letter of 28 February 2013 to the Committee, providing an update on the Party concerned's compliance with decision IV/9i, which also addressed article 9, paragraphs 4 and 5. It also refers to the judgment of the CJEU in C-260/11 *Edwards v. Environment Agency*,²² which considered the correct approach to be taken to the not prohibitively expensive requirement contained in article 9, paragraph 4, of the Convention and transposed into certain EU directives.

59. The Party concerned submits that the NPS was subject to public consultations in full compliance with the requirements of article 7 of the Convention, and notes that the

¹⁹ The cases cited by the communicant in support of its communication included *Ewing; Garner; Morgan; R. (Edwards) v. Environment Agency* (No. 2) [2011] 1 W.L.R. 79 (at the time the communication was submitted to the Committee, the preliminary reference to the CJEU was pending).

²⁰ Case C-240/09, *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, 2011 E.C.R. I-1255.

²¹ The judgement was subsequently issued on 13 February 2014, see Case C-530/11, *European Commission v. United Kingdom of Great Britain and Northern Ireland*, 2014 O.J. C. 93.

²² 2013 EUR-Lex CELEX 62011CJ0260 (11 April 2013).

communicant did not submit any complaints during the consultation procedure, which implies that it concurred with the procedure.

60. With regard to the merits of the claim itself, first the Party concerned asserts that the threshold for getting permission to apply for judicial review is a relatively low one, but the communicant blatantly failed to show that the case was “arguable” and had a “realistic prospect of success”.

61. Second, the Party concerned submits that the claim was densely, at times confusingly, drafted and required considerable work by its advocates to clarify the grounds of challenge. The work had to be carried out under pressure and on an issue of strategic importance for the energy policy. The Party concerned claims that it is disingenuous on the part of the communicant to use the strategic importance of the issue to bring a claim that had no prospect of success and was actually against the public interest, as it led to unnecessary expense, ultimately borne by the taxpayer. In this respect, the Party concerned also refers to the Advocate General’s Opinion in the *Edwards* case stating that, in the context of assessing what is prohibitively expensive, “the prospects of success may also be relevant with regard to the extent of the public interest. A clearly hopeless action is not in the interest of the public, even if it has an interest in the subject-matter of the action in principle”.²³ Third, the Party concerned argues that its response to the communicant’s pre-action letter was a genuine attempt to resolve the issues, and to reassure the communicant that the points it raised, quite properly in its role as a campaigning NGO, had been satisfactorily addressed. Still, in the view of the Party concerned, the communicant irresponsibly pursued an unsuccessful claim.

62. Fourth, the Party concerned considers the challenge premature and misconceived, because the communicant misunderstood the nature of the designation decision and the correct point in the process to issue, as well as the correct public body to receive, a challenge. The NPS sets the framework for future policy on applications for the construction of power stations and any such future decision would be amenable to judicial review.

63. With regard to its non-response to the pre-action protocol letter, the Party concerned argues that the decision to designate the NPS had been widely publicized and had been subject to full public consultations, and there was no reason for the communicant to claim that owing to the timing of the decision (during vacation season) it was not able to submit its letter earlier and allow for more time to the Party to respond. It was also noted by the High Court (Justice Ouseley) that the deadline set by the communicant had been half the time which would have been allowed in an ordinary case.

64. With regard to the characterization of the claim, the Party concerned calls attention to the unusually complex challenge submitted, counting 37 pages plus 1,611 pages of attachments, while judicial review is brought on a point of law. To deal with the complexity of the case, the Party concerned claims that it rightly engaged two Queen’s Counsel and a junior in order to eliminate the challenge at the first stage, and the grounds of defence were proportionate to the complexity of the case. The Party concerned notes that it has negotiated special rates for its regular and first Treasury Counsel and fees were far below those ordinary in commercial cases. The Party concerned equally recalls that the communicant engaged two experienced counsel for the case. In this respect the Party concerned also recalls paragraph 42 of the Court of Appeal in *Ewing* (see para. 22 above).

²³ Opinion of Advocate General Kokott delivered on 18 October 2012 in Case C-260/11, *Edwards*, EUR-Lex CELEX 62011CC0260, para. 47.

65. With regard to the approach to assessing costs, the Party concerned submits that the High Court took the correct approach to assessing costs in this case. The communicant could have applied for an interim protective costs order (PCO) limiting its liability for costs at the permission stage until its application for permission and a full PCO was determined. In this respect, the Party concerned refers to the CJEU judgement in *Edwards* and submits that the case law of the CJEU is a useful source of guidance on the interpretation of the test of what is “prohibitively expensive”. The CJEU in *Edwards* held that an assessment of the question of what is prohibitively expensive cannot

be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs ... the costs of proceedings must not appear ... to be objectively unreasonable. ... The court may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure and the potentially frivolous nature of the claim at its various stages.²⁴

The Party concerned contends that the merits of the case at issue were weak, and there was no strong interest in pursuing the claim, and that these were all matters that the Judge had regard to in making the decision he did on costs.

66. The Party concerned submits that the communicant was well aware of the poor merits of its case and, for that reason, chose not to further attempt to renew permission to apply for judicial review orally.

67. The Party concerned adds that the communicant’s income for 2010 was £8,931,000, and that although a wholly subjective approach to what reasonable costs are for a claimant is not suggested in *Garner* or *Edwards*, it is open to the court assessing the costs to take into account the situation of the parties concerned, as well as the complexity of the relevant law and procedure and the potentially frivolous nature of the claim.

68. In addition, the Party concerned referred to the judgement in *R. (Davey) v. Aylesbury Vale District Council*,²⁵ which held that “the basic rule ... that costs follow the event in public law cases, as in others” exists “because, where an unsuccessful claim is brought against a public body, it imposes costs on that body which have to be met out of money diverted from the funds available to fulfil its primary public functions”. In the light of the fiscal crisis, the Party concerned has suffered significant budget cuts. Under these circumstances, the Party concerned claims that the costs awarded were reasonable.

III. Consideration and evaluation by the Committee

69. The United Kingdom ratified the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

70. The Committee limits its considerations to the following topics:

(a) Whether the cost order of £8,000 awarded against the communicant in this case makes the procedure prohibitively expensive under article 9, paragraph 4, of the Convention;

²⁴ Paras. 40–42.

²⁵ [2007] EWCA (Civ) 1166; [2008] 1 W.L.R. 878; [2008] 2 All E.R.

(b) The potential impact of the new rules on costs introduced in the Civil Procedure Rules (England and Wales) in a situation similar to the one considered in this case;

(c) The relevance of the Convention for the judiciary of the Party concerned.

71. The communication did not make any allegations with respect to the provisions of the Convention on public participation, so the Committee will not look into those issues.

The cost order

72. In determining whether the cost of judicial proceedings is prohibitively expensive the costs borne by the party concerned as a whole must be assessed. Moreover, such an assessment should involve both objective and subjective elements. In addition, the Committee has previously noted with respect to costs that “fairness” in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant.²⁶

73. The Committee considers that the particular context in which the application for permission to apply for judicial review was submitted in the present case is relevant for determining whether the costs ordered were prohibitively expensive in the sense of article 9, paragraph 4, of the Convention. The following elements are important in understanding the context:

(a) The designation of the unmodified NPS, in the wake of the Fukushima accident and after the publication of the Interim Report by the Chief Inspector for Nuclear Installations;

(b) The Interim Report contains recommendations that clearly relate to the safety of nuclear installations and to the public interest in the protection of the environment;

(c) The communicant was seeking to defend the public interest in the protection of the environment in challenging the NPS, and the only available option for doing so was the submission of an application for permission to apply for judicial review, public participation on the NPS having been finalized prior to the Fukushima accident;

(d) During the course of the application for judicial review the communicant furthermore incurred the costs of its own lawyers while bringing a case that was in the public interest.

74. In the light of the above, the Committee finds that the amount of £8,000 that the communicant was ordered to pay the defendant makes the procedures prohibitively expensive, even if the court, in revising the original amount (£11,813) took into account the fact that the communicant was acting in the public interest.

75. In coming to the above conclusion the Committee took into account the fact that the communicant did not apply for a PCO nor exhaust all domestic remedies, namely to appeal the costs award or to seek the renewal of its application for permission to apply for judicial review. With respect to the communicant’s failure to apply for a PCO, the Committee recalls from its findings on ACCC/C/2008/33 that the Sullivan Report estimated the cost of seeking a PCO to be in the order of £2,500–£7,500 plus value added tax,²⁷ with no certainty that after incurring such expense that a PCO would actually be granted.²⁸ With respect to the communicant’s decision not to appeal the costs award or to seek the renewal of its application for permission to apply for judicial review, the Committee considers that, after

²⁶ ECE/MP.PP/C.1/2010/6/Add.3, para. 135.

²⁷ Ibid, para. 105, citing the Sullivan Report, appendix 3, paras. 11–14.

²⁸ ECE/MP.PP/C.1/2010/6/Add.3, paras. 129–131.

being ordered to pay £8,000 (initially £11,813) for merely the permission stage, the communicant's decision not to pursue further domestic remedies for fear of facing even higher costs was entirely understandable. The Committee thus finds that neither the communicant's failure to apply for a PCO nor to appeal the costs award or to seek renewal of its application for permission preclude the Committee's finding that the amount of £8,000 made the procedure prohibitively expensive in the circumstances of this case.

76. The Committee also points out that the present communication needs to be distinguished from its findings on communication ACCC/C/2008/23. In the latter case the communicant had agreed that the costs awarded against it were not prohibitively expensive.²⁹

77. In the light of the above considerations, the Committee finds the Party concerned to be in non-compliance with article 9, paragraph 4, of the Convention due to the cost order awarded against the communicant which rendered the procedure prohibitively expensive.

The relevance of the Convention for the judiciary of the Party concerned

78. As quoted in paragraph 45 above, the High Court maintained that the Convention was irrelevant in the proceedings before it.

79. The Committee takes this opportunity to point out that the Party concerned, being a Party to the Convention, is bound by the Convention under international law and that the nature of its national legal system or lack of incorporation of the Convention in national law are not arguments that it can successfully avail itself of as justification for improper implementation of the Convention.

IV. Conclusions and recommendations

80. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

81. The Committee finds the Party concerned has failed to comply with article 9, paragraph 4, of the Convention since the cost order awarded against the communicant in this case made the procedure prohibitively expensive.

B. Recommendations

82. The Committee, pursuant to paragraph 35 of the annex to decision I/7 of the Meeting of the Parties, and taking into account the cause and degree of non-compliance, recommends that the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned ensure that its new Civil Procedure Rules regarding costs are applied by its courts so as to ensure compliance with the Convention.

²⁹ ECE/MP.PP/C.1/2010/6/Add.1, para. 41.