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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
(By email only)

8th March 2019

Dear Ms Marshall

**Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom regarding access to justice in the context of the Environmental Cost Protection Regime (ACCC/C/2017/157)**

I refer to my correspondence dated 21 December 2018 which set out the UK's formal response to this communication and our commitment to provide a substantive update to this formal response at the earliest opportunity. This correspondence constitutes that substantive update, and therefore the below should be read in conjunction with that response and preceding observations submitted by the UK.

This communication identifies two main grounds of alleged non-compliance:

i. "non-compliance with Article 9(3) because the Environmental Cost Protection Regime (ECPR) does not extend to planning challenges brought under s.288 of the Town and Country Planning Act 1990; and
ii. "non-compliance with Article 9(3) due to the "chilling effect" that the disclosure of private financial information will have, since claimants will be reluctant to bring environmental challenges".

In respect of the first ground of alleged non-compliance, the UK Government has now completed its consideration of the scope of the costs capping scheme for eligible environmental challenges, and specifically on proposals within the scope of the Aarhus Convention. Since the UK Government published its response to the September 2015 consultation "Costs Protection in Environmental Claims: Proposals to revise the costs capping scheme for eligible environmental challenges" it has kept under review how best to ensure that cases engaging Article 9(3) of the Aarhus Convention are not prohibitively expensive for claimants.[1]

[1] Costs Protection in Environmental Claims',
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/569588/costs-protection-in-environmental-claims-govt-response.pdf

The UK Government has now reflected fully on the issue of cost protection in planning challenges brought under s.288 of the Town and Country Planning Act 1990 and concluded that the preferred route would be a legislative amendment to bring reviews under statute which concern national law relating to the environment engaging Article 9(3) within the ECPR. In doing so the same procedures, limitations and cost caps would apply to Article 9(3) statutory reviews as currently applies in respect of Article 9(1), 9(2) and 9(3) judicial reviews and Article 9(1) and 9(2) statutory reviews.

In consideration of the first ground of this communication the Committee is asked to note therefore that the UK Government intends to make a request of the Civil Procedure Rule Committee (CPRC), an advisory non-departmental public body sponsored by the Ministry of Justice which is responsible for making the Civil Procedure Rules (CPR), to bring forward the necessary amendments to the ECPR. It is anticipated that this change would take place later in 2019. If it would assist the Committee, the UK can make a further update when the amendment comes into force.

In respect of the second ground of this communication, the CPRC has now completed its open justice review which considered the principle of open justice and the provisions governing when hearings must, by way of exception to that principle, be held in private.

The Civil Procedure (Amendment) Rules 2019 (hereafter "the 2019 Amendment Rules") were laid before Parliament on 25 February 2019 and make, as usual for such instruments, various technical changes to civil practice and procedure. The 2019 Amendment Rules include new provisions on open justice arising from the open justice review.

The open justice amendments reflect the CPRC's agreed position following the review in relation to the overarching principle of open justice and when hearings must as an exception to that principle be heard in private. The rules as amended apply to all proceedings, and so have a bearing in relation to Aarhus Convention claims. 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.

The decision of the Administrative Court in *Royal Society for the Protection of Birds and others vs Secretary of State for Justice* in 2017[2] was explicitly referred to in the open justice review consultation document, and was taken into account by the CPRC when it considered what in its view was the right way forward to ensure that the rules balance 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. The CPRC concluded that the balance would be appropriately maintained by the provision now in the 2019 Amendment Rules, so that any hearing of an application to vary costs caps in Aarhus Convention claims will (as with any other hearing) not necessarily be held in private without regard to the criteria for holding a hearing in private, but must be held in private if the court is satisfied that those criteria are fulfilled. Those criteria are in rule 39.2(3) of the CPR which, as amended, provides that—

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

"(3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice;

(a) publicity would defeat the object of the hearing;

(b) it involves matters relating to national security;

(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;

(d) a private hearing is necessary to protect the interests of any child or protected party;

(e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;

(f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or

(g) the court for any other reason considers this to be necessary to secure the proper
administration of justice."

I have attached the relevant papers for ease of reference.

Yours sincerely,

Nikita Bhangu

United Kingdom National Focal Point to the UNECE Aarhus Convention