



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

24<sup>th</sup> April 2017

Dear Ms Marshall,

**Re: Decision V/9n concerning compliance by the UK with its obligations under the Aarhus Convention**

Thank you for your email enclosing the United Kingdom's Reply to the Compliance Committee's Second Progress Report. We welcome the opportunity to comment on the UK's Reply dated 3<sup>rd</sup> April 2017.

We note the Committee's request to be concise and focused. We do not, therefore, repeat the content of joint Statements submitted to the ACCC following recent conferences to discuss Decision V/9n (attached to this letter for ease of reference):

- *UK compliance with Decision V/9n of the Meeting of the Parties - Statement to the Aarhus Convention Compliance Committee (2<sup>nd</sup> March 2017);*
- *UK compliance with Decision V/9n of the Meeting of the Parties - Further statement by Friends of the Earth, Royal Society for the Protection of Birds and ClientEarth (7<sup>th</sup> March 2017); and*
- *Environment Links UK Statement: Access to Justice in the UK (submitted to the UNECE Task Force on Access to Justice (February 2017)*

**Recommendations included in paragraphs 8(a), 8(b) and 8(d): of Decision V/9n**

**England & Wales**

The UK continues to assert that amendments to the Civil Procedure Rules effected in February 2017 characterise an approach designed to balance the interests of claimants and defendants (including both external bodies and the Government and its agencies) in light of developments in case law as set out in cases *C-530/11 Commission v UK* and *C260/11 Edwards*. It also maintains that it is difficult to say much more to the Committee at present as the changes are subject to Judicial Review (JR).

We have summarised the basis of our case against the Secretary of State for Justice in our further Statement to the Compliance Committee dated 7<sup>th</sup> March 2017 (*UK compliance with Decision V/9n of the Meeting of the Parties - Further statement by Friends of the Earth,*

Royal Society for the Protection of Birds and ClientEarth). We do not repeat our reasoning here. However, the Committee may wish to note the attached Order of the Honourable Mr Justice Dove dated 12<sup>th</sup> April 2017, granting permission for both grounds on the basis that they are properly arguable. Moreover, in light of the practical significance of the arguments raised to other environmental cases, the Judge has ordered that the case be expedited and listed before a judge with significant experience of environmental cases.

There are also a number of other recent developments and information that we wish to draw to the attention of the Compliance Committee in considering the UK's Reply.

#### 1. **The effect of the Amendment Rules – an intervention in the Judicial Review**

The new Costs Rules are already having a chilling effect on the ability of claimant's to pursue JR in England and Wales, as demonstrated by the case below.

The Liverpool Green Party (LGP) is seeking to intervene in the JR brought by the RSPB, Friends of the Earth and ClientEarth. LGP's decision to intervene was precipitated by its recent experience of the new rules.

LGP is an unincorporated association, which means it has no separate legal personality and can only bring a claim through an individual who acts on behalf of its members. It was advised by counsel that it had a strong claim for JR against a recent decision of Liverpool City Council to grant planning permission for a 333 car car-park in an Air Quality Management Area without undertaking an air quality assessment. LGP sent a letter in accordance with the Judicial Review Pre-Action Protocol outlining their grounds of claim. The Council's response did not properly engage with the substance of those grounds. In relation to costs, however, it stated: *"Please note that any claim for a cost protection order will be carefully examined. In particular it is noted that the court now has discretion under CPR 45.44 to vary the limits on maximum costs liability for Aarhus Claims and the Council will therefore require confirmation of the financial resources of your client in the event that it seeks a protective costs order."*

In light of this correspondence, LGP was unable to find an individual prepared to act as claimant in that claim for a JR of the Council's decision. The requirement to submit their personal financial resources for scrutiny and the risk of a potentially large order for costs against them (as an individual) has deterred anyone from bringing a claim on behalf of the unincorporated association. The Defendant's approach to the new rules as quoted above highlights the uncertainty now created for Claimants, in that the real possibility of their costs cap being varied (upon application by proactive Defendants) makes the eventual financial burden that could arise unclear. In particular, for unincorporated associations the costs limit may be different depending on which individual agreed to represent the group and what their financial resources were.

In its intervention, LGP seeks to draw the Court's attention to the chilling effect the Amendment Rules have on public interest environmental judicial reviews brought by unincorporated associations. It also seeks to argue that the words "*claimant's financial resources*" (a schedule of which a claimant is now required to file and serve with their claim for JR if they wish to benefit from costs protection<sup>1</sup>) must refer to the financial resources available to finance the litigation if the rules are to be compliant with the Convention, and not to all of a claimant's financial resources. It argues that proceedings which equate to an individual's net wealth will always be prohibitively expensive and that no-one could sensibly

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<sup>1</sup> Pursuant to CPR 45.43 and the cost of which a PCO should not exceed pursuant to CPR 45.44(3)(a)

suggest that individuals should be expected to sell their home to fund public interest litigation. This current ambiguity in the drafting is having a deterrent effect, because there is currently a risk that it could be interpreted and applied as referring to an individual's full net worth, which – as explained above - is a potential financial burden that most individuals are not prepared to take.

LGP also reinforces concerns that the more intrusive the investigation into the means of those who seek costs protection and the more detail that is required of them, the more likely it is that there will be a chilling effect on the willingness of ordinary members of the public (who need such protection) to challenge the lawfulness of environmental decisions<sup>2</sup>. CPR 45 should not therefore be interpreted as requiring an overly intrusive investigation into the means of those who seek PCOs. To do so would run contrary to the provisions of the international treaty to which CPR 45.41-45 was indented to give effect. In particular, individuals bringing claims on behalf of groups would be required to subject their personal financial information to scrutiny. The effect of which, as LGP's experience demonstrates, is to prevent meritorious claims being brought.

This case also illustrates the effect of section 87 Criminal Justice and Courts Act 2015 on parties wishing to intervene in JR (an issue raised in the Committee's Second Progress Report<sup>3</sup>). As part of the application to intervene, LGP has asked the Secretary of State for Justice, Lord Chancellor and the Civil Procedure Rules Committee to agree in advance not to make applications for costs against them pursuant to s.87 of the above Act. In particular, they argue that given the factual background to LGP's proposed intervention and the subject matter of our claim, it would be unfortunate if they were dissuaded from seeking permission to intervene by the potential for costs to be awarded against them a second time. This would place the group in a difficult position and would ultimately deny them access to justice in this environmental case, and where they seek to constructively highlight an important issue to assist the Court. The MoJ's response to LGP's application is awaited.

## 2. Letter from the European Commission expressing concern

The RSPB and Friends of the Earth were members of the Coalition for Access to Justice for the Environment (CAJE) and, as such, were original complainants in the infraction proceedings leading to Case C-350 (*Commission v UK*). We received the attached letter from the European Commission dated 28<sup>th</sup> March 2017. In its letter, the Commission confirms that it has yet to undertake a full assessment of the Amendment Rules. However, it makes a number of preliminary remarks that the Committee may wish to take into consideration. This initial view highlights similar concerns to those that we have previously expressed to the Committee, and identified by the Committee at paragraphs 83 to 85 of its second progress review<sup>4</sup> of the 24<sup>th</sup> February 2017.

The first issues concerns the timing of any decision to vary away from the default caps. The Amendment Rules allow the court to exercise this discretion at any point in the proceedings, including more than once, and including after the defendant or other party in the case has incurred costs well above the default cap limits (which it might then seek to recover from the claimant). In our view, that opens up the very real risk of a claimant being unexpectedly exposed to costs at a level which they would not have been willing to risk had they known of them; and of that creating a chilling effect on environmental claims (which precisely goes

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<sup>2</sup> See Sullivan LJ in *Garner v Elmbridge LBC* [2010] EWCA Civ 1006 at [52]

<sup>3</sup> See paragraph 90

<sup>4</sup>

[http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n\\_United\\_Kingdom/Second\\_progress\\_review\\_on\\_V.9n\\_UK\\_final.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/Second_progress_review_on_V.9n_UK_final.pdf)

against the principle of wide access to environmental justice which the Directive and Convention are seeking to ensure). In this respect, the Commission emphasized that: *“...preserving any rule that would run explicitly or implicitly against the judgment [in Commission v UK] would obviously not be acceptable. For instance, in line with paragraph 58 of the judgment, the possibility of questioning set cost caps, in particular with an emphasis on them being raised for applicants above their level of £5,000 would undermine the predictability of the likely costs for environmental litigants before embarking on legal action.”* [own emphasis added]

Secondly, with respect to the requirement for hearings in respect of an application to vary the cap to be listed in private “where the claimant/s is or are private individuals”, the Commission states: *“... a requirement for litigants to provide information of their own personal means is also likely to result in a chilling effect with many individuals not wanting to make their personal finances publicly known. This was an element of the former costs regime which was criticised by Sullivan LJ in ex parte Garner and was a matter which was drawn to the attention of the Court of Justice of the EU by the European Commission during the litigation of the case concerning the UK.”*

Finally, in relation to the possibility that “own costs” may be considered in any assessment as to prohibitive expense, the Commission states: *“The Court [in Commission v UK] was clear in its judgment that the assessment of whether costs in a given action were prohibitive should include all costs, i.e. not just exposure to costs of the other party and court fees, but also own legal costs where the legal process necessarily and reasonably entails such costs...”*

### 3. Parliamentary concerns

The Committee’s attention has also been drawn to concerns expressed by the House of Lords Secondary Legislation Scrutiny Committee in February 2017, which concluded that: *“While asserting that the changes are to “discourage unmeritorious claims”... [and] the MOJ states that its policy objective is to introduce greater certainty into the regime, the strongly negative response to the consultation and the submission received indicate the reverse outcome, and that as a result of the increased uncertainty introduced by these changes, people with a genuine complaint will be discouraged from pursuing it in the courts...”*<sup>5</sup> (underlining added).

We would also highlight the following measures in Parliament expressing concern about the Amendment Rules:

- On 14<sup>th</sup> March 2017, Lord Marks of Henley-on-Thames laid a Motion of Regret in the House of Lords<sup>6</sup> *“that this House regrets that the Civil Procedure (Amendment) Rules 2017 have been laid with insufficient regard to the overwhelmingly negative response to the proposed Rules during the consultation and to the lack of evidence that significant numbers of unmeritorious environmental claims are currently brought; that they may escalate claimants’ legal costs and act against the intention of the Aarhus Convention that the cost of environmental litigation should not be prohibitive; and that they are likely to have the effect of deterring claimants from bringing meritorious environmental cases (SI 2017/95 (L. 1)). 25th Report from the Secondary Legislation Scrutiny Committee”*. A subsequent debate in the House of Lords will now not be held until after the General Election on 8<sup>th</sup> June 2017.

<sup>5</sup> See <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldsecleg/114/11403.htm>

<sup>6</sup> See <https://publications.parliament.uk/pa/ld201617/minutes/170314/ldordpap.pdf>

- On 31<sup>st</sup> March 2017, the 26<sup>th</sup> Report of the Joint Committee on Statutory Instruments (JCSI) drew the Amendment Rules to the special attention of both Houses on the grounds that they require elucidation in respect of consultation carried out by the Rule Committee under Section 2 (6) (a) of the Civil Procedure Act 1997<sup>7</sup>. In light of our invitation to the Rule Committee to consult appropriate bodies before adopting the Rules (which it declined), we have written to the Ministry of Justice and the Rule Committee to request clarification on consultation conducted by the CPRC prior to the Rules being adopted.

#### **4. In respect of other matters raised by the Committee's Second Progress Report**

- While we welcome the extension of the costs protection regime to statutory reviews falling within Article 9(2) of the Convention, we concur that the requirement that procedures not be prohibitively expensive applies to all procedures within the scope of Articles 9(1), (2) and (3) of the Convention and, as such, the amendment fails to meet paragraph 8(a), (b) and (d) of Decision V/9n.
- We also agree that decreasing the defendants' potential costs exposure in unsuccessfully challenging the status of a claim as an "Aarhus case", is likely to increase the likelihood of such challenges, and as a result, increase rather than decrease the potential costs and uncertainty for claimants in proceedings subject to Article 9 of the Convention, in contrast to the requirements of paragraphs 8(a), (b) and (d) of Decision V/9n.
- With respect to paragraph 8(b) of the Decision and the need to further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers, we note that the UK's progress report does not set out any further detail in response to this. We would consider it necessary in meeting the requirements of the Convention in this regard that the UK clarifies what consideration has been given and potential solutions formulated in order to give claimants the required assistance. In particular, taking into account the fact that financial barriers can result from the practical implications for claimants when complying with the new rules (for example, the lack of guidance accompanying the rules, in producing and submitting a schedule of financial resources, or in the production of other paperwork such as large trial bundles), as well as the purely financial aspects such as payment of court fees.

#### **Northern Ireland**

The UK's Reply summarises recent developments in Northern Ireland, including the coming into force of the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017 on 14<sup>th</sup> February 2017<sup>8</sup>. The amended Regulations provide that if an applicant loses, the maximum amount of costs that can be recovered from it will continue to be capped at current levels ((£5,000 where the applicant is an individual and £10,000 in other cases) but be capable of being lowered if necessary to avoid prohibitive expense to the applicant. Similarly, the amended Regulations provide that, if an applicant wins, the amount of costs

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<sup>7</sup> See [https://www.publications.parliament.uk/pa/jt201617/jtselect/jtstatin/152/15203.htm#\\_idTextAnchor014](https://www.publications.parliament.uk/pa/jt201617/jtselect/jtstatin/152/15203.htm#_idTextAnchor014)

<sup>8</sup> <http://www.legislation.gov.uk/nisr/2017/27/contents/made>

that can be recovered by it from the respondent can be increased from the current cap of £35,000, again if this is necessary to avoid prohibitive expense to the applicant.

We believe that this approach (as also explained in the Committee's Second Progress Report<sup>9</sup>) is a correct interpretation of the *Edwards* criteria, i.e. the subjective assessment as to what is prohibitively expensive for the claimant can only serve to reduce the adverse cap on the basis that: (1) EU law confirms that claimants must have predictability and certainty as to the extent of their financial liability at an early stage of the proceedings; and (2) that while adverse caps of £5,000 and £10,000 may be prohibitively expensive for some claimants, the figures generally satisfy the objective assessment as to what is prohibitively expensive following the case of *Garner*.

The Department of Justice (DoJ) in Northern Ireland conducted an almost identical consultation to the Ministry of Justice between 25<sup>th</sup> November 2015 and 17<sup>th</sup> February 2016<sup>10</sup>. In responding to the public consultation, the DoJ noted "... *widespread opposition amongst respondents to the proposals made and a general consensus that they were a retrograde step in terms of the protection offered to environmental litigant*"<sup>11</sup>.

As a result, a number of adverse proposals were withdrawn, including the mandatory disclosure of financial details and third party support, the possibility for the respondents to apply for adverse caps to be increased or removed altogether, multiple applicants attracting individual caps and changing the award of costs in challenges to the status of Aarhus cases from an indemnity basis to a standard basis. Additionally, we welcome the retention of the fees applicable to JRs (and statutory reviews) within the scope of the Aarhus Convention being retained at current levels (Article 4 of the Court of Judicature Fees (Amendment) Order (Northern Ireland) 2017) as well as the extension of the High Court Costs Protection regime to the Court of Appeal.

We remain of the view that the £35,000 cross cap on the amount of costs that can be recovered from the public authority respondent is not compliant with the Convention (any requirement for fairness relates to the position of the claimant not the defendant<sup>12</sup>). The level of costs will primarily be a function of the complexity of the case. The applicant will in any event only be entitled to a reasonable amount for its costs where reasonably incurred.

Finally, the point bears repeating that these rules only address half the problem of prohibitively expensive access to environmental justice – liability for the respondent's legal costs.

## **Scotland**

The UK's Second Progress Report summarises welcome amendments to the Protective Expenses Order (PEO) regime introduced in 2016 including extending the scope of the Rules to cover cases falling under Article 9(1) and 9(3) of the Convention and modifying the categories of persons eligible for a PEO to include Members of the Public and Members of the Public Concerned. It is hoped that community groups will now be able to benefit from

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<sup>9</sup> See [https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n\\_United\\_Kingdom/Second\\_progress\\_review\\_on\\_V.9n\\_UK\\_final.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/Second_progress_review_on_V.9n_UK_final.pdf), paragraph 81

<sup>10</sup> See <https://www.justice-ni.gov.uk/consultations/consultation-proposals-revise-costs-capping-scheme-certain-environmental-challenges>

<sup>11</sup> See <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/costs-protection-inenvironment-cases-responses.pdf>

<sup>12</sup> As confirmed in Communications C33 (paragraph 135) and C77 (paragraph 72)

costs protection and that the Scottish Government has established a scheme to evaluate the impact of these changes, but this has yet to be demonstrated.

The UK also reports that the Scottish Civil Justice Council (SCJC) published a *Consultation on Draft Court Rules in relation to Protective Expenses Orders* on 28<sup>th</sup> March<sup>13</sup>. The UK reports that the rule changes are aimed at addressing concerns that applications for PEOs can be protracted and expensive and that the proposals provide for a simplified and accelerated procedure for the determination of PEO applications and a restriction to be placed upon the liability in expenses for applicants in the event that an application is unsuccessful.

The proposal for a presumption in dealing with applications for a PEO by written submissions, and for capping the applicants liability for costs in applying for a PEO at £500 are welcome, and should go some way to making the procedure more accessible. Proposals for changing the draft rules in relation to appeals are also welcome, at least in part. The new draft rules would ensure that the applicant for a PEO would continue to be protected by the cap set by it in the event that the opponent appealed the case; however, should the applicant appeal they would need to apply for a new PEO, as is the case at present under the rules. We note that the prospect of a further £5,000 liability for an appeal (in addition to the applicants own legal costs) could be a deterrent, although the improved application process and application cap would mitigate against this to some degree. It remains to be seen whether these changes will be implemented, but on the whole we would welcome them.

Notwithstanding these changes in the PEO application process, which are welcome to the extent described above, we remain concerned at the apparent variable and, at times, opaque manner by which PEOs are determined. We are aware of a number of PEO applications, where the decision has been published but also others that have not been. From the published decisions and information from the applicants, in others, we continue to perceive that the application of the criteria for PEO can be extremely variable, and tend to be argued at some length. This acts as a “chilling factor” as much as the costs of application.

We also further note that it is very disappointing that the Scottish Government has failed to publish an analysis of responses to and its own response to the findings of the consultation on *Development in Environmental Justice* which ended in June 2016. The consultation itself listed various reforms in recent years, only one of which was directly aimed at improving access to justice in environmental matters – that is the introduction of PEOs. Responses to the consultation – available on the Scottish Government’s website<sup>14</sup> – are broadly critical of the limited approach to matters of environmental justice taken in the paper.

### **Recommendations included in paragraph 8(c) of the decision**

#### **Northern Ireland**

Following the Uniplex case, the ‘promptly’ requirement is dis-applied by the courts in JRs brought on European Union grounds in Northern Ireland. However, this vague requirement is still applied by the Courts in all other non-EU law environmental JRs and is frequently argued by respondents and notice parties, causing confusion and contention, where cases involve both EU and no EU grounds or grounds which overlap. The UK Report also notes

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<sup>13</sup> See <http://www.scottishciviljusticouncil.gov.uk/consultations/scjc-consultations/consultation-on-draft-court-rules-in-relation-to-protective-expenses-orders>

<sup>14</sup> See <https://consult.scotland.gov.uk/courts-judicial-appointments-policy-unit/environmental-justice/>

that the Civil and Family Justice Review Group (established in 2016) has conducted a review of the procedures for the administration of civil and family justice in Northern Ireland (including those for JR) and recommended that the ‘promptly’ requirement be abolished in October 2016. It is expected to issue its final report soon. Subject to the outcome of that report and the views of any incoming administration (following the further recent Assembly election and current political impasse), the Court of Judicature Rules Committee (the body responsible for making the relevant court rule changes) will be invited to consider the matter. However, this issue should be kept under review given the attempt with the support of the two largest political parties in the Planning (NI) Bill 2013 (clause 15) to: (a) reduce the period for bringing JRs to 6 weeks, which is regarded as much too restrictive given what is involved for applicants in bringing such cases; and (b) abolish the remedy of JR in its entirety, save where points of EU and Human Rights law were involved.

### **England and Wales**

The situation in England and Wales is that following the Uniplex case the requirement to bring JR’s promptly is dis-applied in cases that raise EU law points. However, all other non-EU law environmental judicial reviews are still subjected to this vague requirement. Furthermore, with the UK’s impending departure from the EU, the “promptitude” requirement is likely to be reinstated for all environmental JRs, however, the situation remains unclear.

We maintain that the 6 week timeframe for bringing JRs in planning related cases is unduly demanding and unfair to Claimants.

### **Recommendations included in paragraph 9**

With regard to the recommendation in paragraph 9, the UK refers the Committee to paragraph 31 of correspondence dated 29<sup>th</sup> December 2014<sup>15</sup>. However, we note that the UK has failed to explain what steps it has taken to comply with this recommendation.

### **Conclusion**

We remain deeply concerned that the Ministry of Justice in England and Wales has progressed damaging amendments to the costs regime for environmental cases, notwithstanding Decision V/9n concerning the UK’s compliance with Articles 9(4) and (5) of the Convention on prohibitive expense as well as the Committees clear view as expressed in the second progress review. These proposals were made in the absence of evidential justification and effected in the face of overwhelming public opposition. They take England and Wales in the opposite direction of travel from other jurisdictions of the UK and are already having a chilling effect on the ability of claimants to bring JR.

In light of the above, we call upon the Compliance Committee to consider additional constructive measures to bring the UK back into compliance with the Convention. We believe this is proportionate given the intentional and informed decision to effect these adverse changes, and the long period of time over which the UK has been out of compliance.

These measures may include recommending that the Sixth Meeting of the Parties to the Aarhus Convention issues the UK with a caution. It may also include inviting the UK to accommodate an expert mission, with the involvement of Committee members and other experts, as appropriate, to provide expert opinion on possible ways to implement the

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See

[https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n\\_United\\_Kingdom/firmPartyV9n\\_progress\\_report\\_29.12.2014.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/firmPartyV9n_progress_report_29.12.2014.pdf)



measures referred to in Decision V/9n and address non-compliance. We would be pleased to assist the Compliance Committee further in its on-going consideration of this issue.

Please do not hesitate to contact us if you require any further information about the points made in this submission.

Yours sincerely,

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