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

29th October 2020

Dear Ms Marshall,

Re: UK's 3rd Progress Report on Aarhus Convention Decision VI/8k

Thank you for your email dated 1st October 2020 inviting our comments on the UK's third (and final) progress report on decision VI/8k. We welcome the opportunity to provide the Committee with views prior to the Seventh Meeting of the Parties to the Convention in 2021.

England and Wales

Cost protection for claimants in environmental court cases (Recommendations in paragraphs 2(a), 2(b), 2(d) and 4 of Decision VI/8k)

1. The UK expresses its appreciation that "*the Committee has recognised the clear progress that the UK Government has made in meeting the requirements of paragraphs 2(a), 2(b), 2(d) and paragraph 4 of Decision VI/8k*". In fact, the Committee welcomed the extension of the cost protection regime to section 288 TCPA 1990 challenges, but concluded that in light of the fact that other types of claims, such as private nuisance claims, are still not covered by the costs protection regime the UK has not yet met the requirements of paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k with respect to the types of claims covered by cost protection in England and Wales[1]. We believe that remains the case for the reasons outlined below and as previously raised in earlier submissions.

2. The UK explains that the proposed review of the Environmental Costs Protection Regime (ECPR) has not yet taken place due to the need to respond to the Covid-19 pandemic and that further details will be provided in due course. We appreciate the Governments of the UK are operating at a time of challenging political and practical circumstances. We look forward to further details about the review, which we assume will involve appropriate stakeholder participation.

3. Notwithstanding the delay to the ECPR review due to the need to respond to the pandemic, the Government did manage to set up an independent panel to examine Judicial Review (JR) more broadly (announced on 31st July 2020).[2] The Independent Review of Administrative Law (IRAL) was established following the Conservative Party's manifesto commitment to guarantee that JR is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct

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1 Compliance Committee's Second Progress Review of the implementation of decision VI/8k on compliance by the UK - see here, para 39

2 The announcement can be found here

politics by another means or to create needless delays. A panel of experts chaired by Lord Faulks QC will consider whether the right balance is being struck between the rights of citizens to challenge executive decisions and the need for effective and efficient government. The review will examine a range of data and evidence, including relevant caselaw, on the development of JR and consider whether reform is justified.[3] It is fair to say that there is wide-spread concern across civil society at the apparent motivations and timing for this review following on from Brexit, and in the middle of a pandemic, not least given the potentially damaging implications for the rule of law and access to justice, in a nation state that does not have a written constitution.

4. On 7th September 2020, IRAL published a call for evidence with a deadline for responses of 26th October 2020.[4] We attach evidence submitted by Wildlife & Countryside Link, Friends of the Earth and the RSPB for the Committee's information. We, and others, have emphasised the importance that the conclusions and recommendations of the Review are based on: (i) the views and experience of not only JR practitioners and public bodies, but also those relying on JR as a remedy of last resort ("the public concerned", as recognised in the Aarhus Convention); and (ii) and that it is based on robust evidence (and not just anecdotal or political views). In this respect, we are concerned that while question 1 seeks the experience of those on the receiving end of claims, the views of claimants are not sought at any stage in the Review. Similarly, question 3 frames JR as a wholly antagonistic process between claimants and public authorities, rather than a situation where it can help clarify the law, improve services from public bodies and ensure good governance. Despite the negative narrative surrounding the review, we hope the panel of experts will adopt an open and balanced approach and will scrupulously hear and reflect in their recommendations the views of those depending on JR as their only real means of correcting unlawful governance.

Types of claims covered

5. The UK maintains that the forthcoming review of the ECPR is the most appropriate vehicle to address non-compliance regarding private nuisance claims. We appreciate the logic of this, but we are conscious that the Compliance Committee adopted its findings in Communications ACCC/C/2013/85 and ACCC/C/2013/86 on 17th June 2015. It is very unfortunate that the UK failed to address prohibitive expense in the context of private nuisance proceedings in the five-year period leading up to the Covid-19 pandemic and thus remains in non-compliance with the Convention in this respect.

Eligibility for costs protection

6. The UK notes the Committee finds no evidence that the UK has not met the requirements of paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k with respect to eligibility for costs protection. The UK also refers to two cases that we had brought to the Committee's attention, in which the High Court ordered a costs cap of £10,000 for cases brought by individuals on behalf of an Unincorporated Association (UA) rather than £5,000, following submissions from the defendants. The UK maintains that it is not clear what point the Communicant makes about eligibility for costs protection through these cases because in both cases the UAs benefitted from costs protection through the ECPR.

7. The point raised was twofold. First, that the position regarding adverse cost exposure for UAs is unclear, which is unhelpful for claimants (and lawyers advising them) in relation to total cost exposure (and so bears on an understanding of whether proceedings may be 'prohibitively expensive', or not). Second, UAs often comprise little more than a small group of local residents, who have come together

3 The Terms of Reference can be found here
4 The Call for Evidence can be found here

to fight a particular planning or environmental matter and, for them, an adverse cap of £10,000 can make a case prohibitively expensive (and it would not be within the spirit of the Convention for those groups to be exposed to the same default costs cap as, say, a large corporation).

8. The position with regard to certainty (or lack thereof) may be informed by *Aireborough Neighbourhood Development Forum v Leeds City Council and (1) Secretary of State for Housing, Communities and Local Government (2) Avant Homes (England) Limited (3) Gallagher Estates Limited*[5], in which Mrs Justice Lieven ruled that, as a matter of principle, UAs have capacity to bring both JR proceedings and statutory challenges in their own name. In particular, she held that while "*… in certain circumstances the addition or substitution of named individuals may be necessary for practical reasons such as security for costs, or where there is uncertainty about membership of the body, the inclusion of named individuals is not necessary for the validity of the claim*".

9. While we welcome the outcome of this case for the standing of UAs, the corollary of the judgment is that defendants may try to argue that a claim must now be brought by a UA in its own right, or by someone acting in a representative capacity, and should therefore automatically attract a cap on adverse costs liability of £10,000 as opposed to £5,000 for a separate individual under CPR 45.43:

> *45.43*
>
> *(1) Subject to rules 45.42 and 45.45, a claimant or defendant in an Aarhus Convention claim may not be ordered to pay costs exceeding the amounts in paragraph (2) or (3) or as varied in accordance with rule 45.44.*
>
> *(2) For a claimant the amount is—*
>
> *(a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;*
>
> *(b) £10,000 in all other cases.*

10. While UAs can apply for a reduction in the adverse costs cap on the basis of financial information submitted when applying for JR or statutory review, we are concerned that some groups may be put off from embarking on JR with an automatic cap of £10,000 on adverse costs in the first place (partly due to the uncertainty around when a downward variation may be permitted). This would apply particularly to small, recently formed UAs unfamiliar with legal proceedings. Secondly, addressing prohibitive expense in this way will depend entirely on the exercise of judicial discretion, thereby providing no predictability or clarity to those of more limited means before deciding whether to embark on legal proceedings. The reality is that for many of these groups an adverse costs cap of £10,000 is a significant amount of money to raise at short notice and to have as a default starting point. Our view is that if a group must have an individual to act in a representative capacity on its behalf for costs enforcement purposes, then that should attract the £5,000 cap.

11. In light of the above, we would ask the Committee to refrain from reaching a conclusion on this point until the ECPR review has been conducted and we have some experience of how this situation is operating in practice for potential and actual claimants.

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[5] Case CO/3279/2019, judgment on the preliminary issue as to whether the Forum had the capacity to bring the claim was handed down on 14th January 2020 (attached).

Level of costs caps

(a) Default levels of costs caps

12. In its Second progress review of the implementation of decision VI/8k on compliance by the UK, the Compliance Committee considered that the default levels of £5,000 for individuals and £10,000 in other cases, would only be acceptable if there would be measures enabling the costs caps to be varied downwards in order to take into account the financial capacity of individuals or organizations[6]. The UK maintains that since there are measures enabling the costs caps to be varied downwards in order to take account of the financial capacity of individuals or organisations, that the default level is not something which requires any further comment.

13. Compliance with provisions of the Convention regarding prohibitive expense is not a theoretical matter - what matters is *actual* compliance. The UK has provided no data to confirm the number of applications (and outcomes) in which the default cap has been varied downwards. Similarly, it has not provided any information as to why the default caps are the correct starting points, when clearly £5,000 and £10,000 is a lot of money for some people or organisations to cover and then argue for more protection (instead of more protection to start with). It is not clear why the complete data set on all variations cannot be supplied and the UK has provided no explanation on this point. This is precisely the sort of issue that a review of the ECPR would have clarified. We understand the reasons why such a review has not yet proven possible, but in its absence we see no basis to conclude the ECPR is working effectively and that compliance with Article 9(4) of the Convention is assured in every case.

14. We would also like to reiterate that the outcome of any application for variation is not reasonably predictable. The process is inherently uncertain and a range of other factors can have a chilling effect on the willingness of claimants to take claims in the first place. These other factors include: (i) the fact that the starting point/default cap can be prohibitively expensive in itself; (ii) additional practical barriers are engaged, such as the costs of making the application and possibly paying a court fee; and (iii) uncertainty around the legal process regarding variation (including the highly adversarial approach taken by defendant public bodies, and the exercise of judicial discretion). In our experience to date we are not aware of a single successful variation downwards by a claimant.

(b) Variation of costs caps

15. Paragraph 10 of the UK's third report refers to data provided to the RSPB and Friends of the Earth in October and December 2019 pursuant to a request to provide the total number of applications in which the defendant sought to vary the costs caps. We summarise below the UK's observations about this data:

- The number of applications for JR for these two years is not unusually high or low as an annual total (see for example, numbers from years 2013 – 2017 set out on page 31 of A Pillar of Justice by Friends of the Earth[7], using data provided by the UK Government);

- In a period of 27 months, of the 279 JR applications, the defendant sought to vary the costs caps in 39 cases (13%) and the court ordered a variation in 7 cases (2.5%);

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6 See paragraph 45

7 The *joint* report by Friends of the Earth and the RSPB can be found here

- The majority of applications made to vary the cost caps were made at the earliest stage in the proceedings, i.e. with the Defendant's Acknowledgment of Service;

- In all but one of these cases, the court considered the variation application at the same time as whether to grant permission to seek judicial review, and the decisions were made on the papers rather than at an oral hearing;

- It is difficult to draw definitive conclusions from this relatively small sample of data, but the rules are working as intended and provide a clear, transparent and consistent framework to ensure that costs are not prohibitively expensive for claimants; and

- The observers' requests for data did not include the number of applications in which claimants sought to vary the default cost cap downwards, and what the outcomes were.

16. We make the following points in response:

(1) Focusing on only the last two years of data gives a misleading impression of a report examining the trend in the number and success rates of cases since 2013 (see Graph 1A *Number of applications for JR identified as AC claims*).

(2) We consider the figure of 13% (being the proportion of cases in which the defendant sought to vary the cap) is relatively high. While it is reassuring to note the court subsequently ordered a variation of the cap in only a small (2.5%) proportion of cases, we are concerned that defendants would appear to be incorrectly applying for the caps to be increased (in 11.5% of cases). We would also point out that the fact that defendants are applying to vary the caps at these levels could, in itself, deter claimants from applying for JR. It can also add expense and complexity in these cases where claimants have to respond to such applications after they have filed their claims.

(3) We assume that one of the two cases in which the application was made to vary the cap after the Acknowledgment of Service was *R (oao Friends of the Earth Limited) v SSHCLG*,[8] a case seeking to challenge the Government's failure to conduct a Strategic Environmental Assessment (SEA) on the National Planning Policy Framework (NPPF). The Government reserved its position in the Acknowledgment of Service, and then sought to challenge the claimant's cap much later in proceedings after permission stage, with the result that the matter was only resolved by the Court less than a month before the substantive hearing. The Government then sought to challenge the claimant's cap again – after judgment had been given.

In another case that we are aware of, *R (Bennett) v Cumbria County Council and West Cumbria Mining*[9], the Interested Party applied for the cap to be varied at a Directions hearing and well after permission had been granted. The application was on the basis that the Claimant was not an individual, because a large group of campaigners wished to attend the hearing, so the Interested Party sought to argue that the higher cap should apply. This was despite the Claimant making it abundantly clear in her schedule of financial resources that she was acting in a representative capacity on behalf of a UA. The Interested Party subsequently abandoned that application in light of those submissions from the Claimant, yet this serves as an example of how parties can pursue the variation provisions to make litigation difficult for the Claimant.

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8 [2019] EWHC 518 (Admin)

9 Case No: 4880/2019

These cases demonstrate that the rules do not provide certainty and reasonable predictability for claimants and allow an unprincipled approach. They permit late applications to vary on purported grounds that there has been a change in position – notably, the second variation attempt in the NPPF case was based in part on the "change of position" which the Government alleged was created by the Judgment itself being handed down. Responding to spurious and ultimately unsuccessful attempts to vary the Claimant's cost protection increased the cost and complexity of the proceedings significantly. It would clearly be helpful for the UK to provide more comprehensive information about applications to vary cost caps that it has been involved in or the Ministry of Justice holds data on.

(4) This may be a small sample of data, but we must work with what we have in the absence of a review of the ECPR.

(5) The Rules may be working "as intended" but that is not the requisite measure here – what matters is whether they are working to ensure legal review mechanisms are clear, consistent, fair, timely and not prohibitively expensive in accordance with Articles 3(1) and 9(4) of the Convention.

(6) We agree that it would be helpful to have data on the number of applications in which claimants sought to vary the default cost cap downwards, and what the outcomes were. We invite the UK to provide comprehensive data at its earliest convenience.

(c) and (d) Trigger for variation and procedural stage at which a variation can be sought

17. We refer the Committee to comments made in paragraph 10(3) above.

18. Finally, we refer the Committee to *R (Finch) v Surrey County Council & others*[10], in which the Interested Party, following a contested renewal hearing, applied for its costs of the Acknowledgment of Service in addition to the Defendant. At that stage, the Court had capped the Claimant's costs at £5,000 when refusing permission on the papers. However, on renewal, the Court increased the cap to £10,000 in order to accommodate the Interested Party's application for costs, even though the Defendant's and Interested Party's costs combined were only marginally over the £5,000 cap. This is considered to be an abuse of the rules by third parties, and a misapplication of the variation provisions by the Court. This decision is under appeal.

Costs for procedures with multiple claimants

19. The UK maintains that it is fair to each claimant that a separate cost cap applies and that this applies both ways, i.e. where there are three defendants and one claimant, each defendant will have a separate costs cap but the claimant has only one. Moreover, the UK asserts that multiple claimants or defendants increase the administration of proceedings, can increase the complexity of the legal arguments and matters to be addressed by the defendant and resolved by the court and that outcomes may be complex, with the court upholding some claims and not others.

20. We acknowledge there may be situations in which multiple claimants are addressing the same underlying legal point but there may be differences in the factual circumstances surrounding them. We are aware of one such case (which is due to be issued imminently) in which three claimants are challenging the same point of law but each case has factual differences. It is recognised in this situation

[10] CO/4441/2019

that the outcome may not be the same for each claimant and they have accepted that the £10,000 adverse cap attaches to each of them.

21. However, that is quite different to a situation in which numerous organisations have come together for the purpose of making an application for JR on an entirely common legal basis and with no distinguishing factual circumstances. In that situation, there is no increase in the administration of proceedings, no increased complexity of argument and one common outcome. In this situation there should be one adverse costs cap for all of them.

22. The UK has accepted that multiple parties can increase the administrative and financial burden in a case. That is true for all parties involved. The UK also maintains that where there are three defendants and one claimant, each defendant will have a separate costs cap (see paragraph 18 above). This may be true but there are circumstances in which it may fail to provide compliance with the Convention. CPR 45.43(4) (below) operates as a presumption against varying the reciprocal cap that protects defendants, subject to judicial discretion: "*the amounts…may not be exceeded, irrespective of the number of receiving parties*". Where there is one defendant but more than one Claimant in a single claim (as explained can happen at 20 and 21 above) this risks cases being "too expensive to win" for claimants. The default starting point will be no additional liability for the defendant without variation but the claimants' aggregate costs could easily exceed £35,000 (which, in fact, can also be the case even if there is only one claimant):

> *45.43*
>
> *(1) Subject to rules 45.42 and 45.45, a claimant or defendant in an Aarhus Convention claim may not be ordered to pay costs exceeding the amounts in paragraph (2) or (3) or as varied in accordance with rule 45.44.*
>
> *(2) For a claimant the amount is—*
>
> *(a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;*
>
> *(b) £10,000 in all other cases.*
>
> *(3) For a defendant the amount is £35,000.*
>
> *(4) In an Aarhus Convention claim with multiple claimants or multiple defendants, the amounts in paragraphs (2) and (3) (subject to any direction of the court under rule 45.44) apply in relation to each such claimant or defendant individually and may not be exceeded, irrespective of the number of receiving parties.*

As the Committee has previously noted, there is no basis in the Convention to protect defendants in this way. Doing so potentially inhibits claimants from recovering their costs such that prohibitive expense can occur, because fairness is to be understood by what is fair to the claimant.[11] Whilst it is true that variation – if it were agreed to by the court – can remove the problem, this entails an additional and uncertain procedural obstacle (which can be and often will be contested by the defendant) that can create additional cost and unwelcome complexity for the claimant to engage with.

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[11] See the Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, paragraph 135, available here

We are unaware of any cases in which the reciprocal cap has been increased[12] (and we submit that this is another point the ECPR Review could usefully examine). The starting point should simply be that there is no reciprocal cap for the defendant, and this problem would then not exist and greater compliance with the Convention would be achieved. At the very least, the starting point in the rules should not be onerous for claimants, and specifically provide for multiple claimants recovering from a single defendant without the need for additional procedural hurdles and variations.

Costs protection on appeal

23. We confirm that our comments on this issue in the UK's Second Progress Report[13] still apply.

Schedule of claimant's financial resources

24. The UK maintains there is no evidence that the requirements of CPR 45.42, to provide a schedule of the claimant's financial resources with the claim form have had any chilling effect. Moreover, that if the data from 2017-2019 is typical, there will be very few applications to vary a cost cap which are determined at an oral hearing (and that the UK is not aware of any evidence or any specific instances where claimants have encountered problems in this regard).

25. Unless we have direct experience of claimants who have decided not to issue proceedings because of the requirement to provide a schedule of financial resources, it is patently difficult to prove this is a problem. However, we refer the Committee to the observation in *A Pillar of Justice* that the number of overall claims is decreasing, which could be broadly indicative of that. Moreover, the requirement to provide a schedule of financial resources should not be divorced from the fact that the statement provides a basis for the defendant to apply for an increase in the cap – which we know, from the data provided by the UK, happens in a disproportionate number of instances (see para 16(2), above).

Costs relating to determination of an Aarhus claim

26. The UK maintains that it has seen no evidence of a sustained increase in applications to challenge whether a claim is an Aarhus claim. We assume the reference to "sustained" is because there would appear to have been a large increase in the number of challenges in the period between 28 February 2017 to 31 May 2018 (following the implementation of the new Civil Procedure Rules relaxing the financial consequences for defendants when making unsuccessful challenges) and then an unexplained steep fall, as shown in *A Pillar of Justice*[14] (see Dataset 6 at page 24). We would point out there was a clear increase in the number of challenges to the status of Aarhus Convention claims by defendant public bodies seeking to remove costs protection from claimants in Datasets 3, 4 and 5, which merits investigation. Pending a review of the ECPR, we see no reason to assume the fall in Dataset 6 is anything more than a likely data anomaly. We would also emphasise that the UK may not have seen any evidence, but neither has it conducted any proper review into the matter and presented its own informed conclusions.

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12 Moreover, we are aware of a case in Northern Ireland in which the claimants, after consulting with counsel, decided it would be too difficult and too big a diversion of energy and resources to try and apply for the reciprocal cap of £35,000 plus VAT to be raised. They ended up having to bear a major part of their own costs despite winning. As objectors, after winning, may then face further similar development proposals this depletion of available funds may result in a further challenge being unaffordable.

13 See here

14 See Graph 2A: % of the total applications identified as AC claims that were successfully challenged by defendant

Cross-undertakings for damages

27. Pending a review of the ECPR, we remain of the view that few applications for interim relief are made. We are, however, aware of two cases in 2020. The first was *Christopher Packham CBE v (1) Secretary of State for Transport (2) The Prime Minister (3) HS2 Ltd*[15] concerning the Government's decision to proceed with the construction of Phase 1 of the HS2 Railway following the Oakervee Review. In this case, Lord Justice Coulson and Mr Justice Holgate (sitting as a Divisional Court) refused permission for JR on all four grounds and held that there was "*no justification for the grant of any interim injunction*". In the second, on 28th August 2929, Mr Justice Holgate again refused an application for temporary interim relief to suspend the coming into effect of two Statutory Instruments sanctioning a wide range of Permitted Development Rights in an application for JR brought by *Rights: Community: Action v Secretary of State for Housing, Communities and Local Government*[16] on the basis that it was misconceived:

> *(1) In this case the application for urgent interim relief on paper is misconceived. The orders were laid before Parliament and publicised as long ago as 21 July. It was then widely known that the statutory instruments would come into effect on 31 August. No justification has been advanced for the time taken by the Claimant, even allowing for Covid 19, not to send a pre-action protocol letter until 21 August and for setting a peremptory deadline for the Defendant's reply. Given the nature of the challenge to the legislation and the implications of the interim relief sought, it is obvious that the claim for that relief, and to that extent for judicial review, should have been brought substantially earlier so that an inter partes hearing could take place sooner. Plainly the Defendant was entitled to have a proper opportunity to respond and to be heard before the court could be asked to consider granting interim relief of this nature. The time period before the legislation comes into force was ample for that proper course to be followed.*

28. It remains our experience that interim relief is rarely granted. Pending a review of the ECPR we would assume that this may be because of the high thresholds that need to be met – the claimant must be able to demonstrate that there is the threat of significant environmental damage and that an injunction is required to preserve the factual basis of the proceedings. Moreover, the rules as they are currently operating imply an additional financial burden in addition to the default cap.[17]

Costs orders against or in favour of interveners and funders of litigation

29.The Committee sought clarification from the UK in two matters. Firstly, whether if making a cost order against an intervener in an Aarhus Convention claim, the court would have regard to the default costs caps applicable to the parties under CPR 45.43(2). Second, whether if an unsuccessful claimant is ordered to pay costs of an intervener, the claimant's maximum costs liability remains the capped level provided in CPR 45.43(2).

30. The UK confirmed that CPR 45.41-45 only refers to claimants and defendants and that interveners will not recover their costs from either of the parties unless the court considers there are exceptional circumstances. However, the UK points out that common practice would ensure that the costs liability of an intervener is resolved at the point a party is given permission to intervene. The UK also confirmed that CPR 45.43(1) confirms that the costs cap relates to the total

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15 [2020] EWHC 829 (Admin)

16 Crown Office Reference: CO/3024/2020

17 See CPR PD 25 available here

costs that a claimant or defendant may be ordered to pay. This would therefore include any costs of an intervener an unsuccessful claimant was ordered to pay.

31. It is our experience that JR interventions (certainly in support of the claimant) are now rare[18] following the passage of the Criminal Justice and Courts Act 2015.[19] Section 87 of the Act requires the Court to order the intervener to pay any costs that the court considers have been incurred by a party as a result of the intervener's involvement in that stage of the proceedings if one of the conditions below are met:

(a) the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;
(b) the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court;
(c) a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings;
(d) the intervener has behaved unreasonably.

Scotland

32. As the Committee is aware, the Scottish Government, on behalf of the UK as party to the Convention, purports to meet the requirements of Article 9 within Scotland through court rules on protected expenses orders ("the PEO rules"). We are disappointed, therefore, that paragraphs 33 to 37 of the party's final progress report ("the Report") generally give the impression that it has little or no responsibility for the contents of the PEO rules: the Scottish Government "would expect that" the rules have a certain meaning (paragraphs 33 & 37 of the Report), and "understands that" they have a certain purpose (paragraphs 34, 35 & 36). Its explicit justification for this evasive approach, at paragraph 33, is that "Court rules are the responsibility of the Scottish Civil Justice Council". In this respect, we refer the Committee to Article 27 of the 1969 Vienna Convention on the Law of Treaties, which states that "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*".

33. There is no evidence to support the Scottish Government's expectation "*that the costs cap covers all of the costs of the procedure*" (paragraph 33). In *Martin James Keatings v The Advocate General for Scotland, The Lord Advocate, The Scottish Ministers*,[20] the applicant made a common law PEO application, as opposed to one under the PEO rules (which are specific to Aarhus claims), and the Court observed that "*So far, PEOs in Scotland appear only to have regulated legal expenses, and have not extended to an exemption from court fees*." The court declined to decide whether it can competently include court fees in a PEO. If anything, this case suggests that the costs cap might not cover all costs of the procedure.

34. Paragraph 33 of the Report also states that there are no immediate developments with respect to amendment to the PEO rules. The party's failure to take adequate steps to reform the regime, despite repeated findings of non-compliance by the Committee, is relevant both in terms of the potential

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18 The only case we are aware of is *Plan B Earth and Others v. Secretary of State for Transport* [2020] EWCA Civ 214, in which WWF-UK intervened in support of the claimants. We invite the Government to include this issue in its forthcoming review of the ECPR

19 See here

20 2020 CSOH 75 at paragraph 36

'chilling effect' from recent adverse changes to the PEO rules and in terms of the party's reliance on absence of evidence of such an effect, which is of course not the same as evidence of no effect.

35. We would also draw the Committee's attention to *Martin James Keatings v The Advocate General for Scotland, The Lord Advocate, The Scottish Ministers,*[21] (which concerned the Scottish Parliament's power to legislate for a second independence referendum) for the additional reason that this judgment could create some difficulties for PEO applicants relying on the use of crowdfunding to finance litigation.

36. We note the Committee's comment in its second progress review at paragraph 92 in relation to the types of claims covered by the PEO rules, and are disappointed that the Report includes no response to this comment. It is our understanding that rules of court on qualified one way costs shifting in personal injury cases will be introduced under section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018[22], and that some but not all private Aarhus claims will be covered under this new costs regime.

37. We also agree with the Committee's comments in the second progress review at paragraphs 94-96 regarding the new flexibility of PEO costs caps in favour of the respondent, and are again disappointed that the Report includes no response to these comments. In summary, we believe that some of the changes made to the PEO rules in 2018 have moved Scotland further away from compliance with the Convention: (i) default PEO caps can be moved in either direction "*on cause shown"* (a low test), which leads to increased uncertainty for litigants, exacerbating the "*chilling effect*"; and (ii) PEOs are not carried over if litigants appeal, only if respondents appeal, and then the cap set is inflexible despite the inevitable incurrence of greater costs by the litigant.

38. It is not clear if the UK's comment in the Report that "*the Scottish Government would expect that the costs cap covers all of the costs of the procedure*" (paragraph 33) refers to the Committee's points regarding downward flexibility of PEO caps or to its comments at paragraph 98 of the second progress review inviting clarification on whether the costs-caps includes all costs of the procedure.

39. However, given the limited case law on PEOs it is not sufficient for the Scottish Government to 'expect' that costs caps cover all the costs of the procedure: we consider that this should be made clear within the PEO rules. Regarding the level of caps, the rules should be changed to revert to the previous version where costs caps could only be varied in a way that is favourable to the PEO applicant, i.e. decreased in the case of liability for the other side's costs, and increased in terms of the cross-cap. Furthermore, we note that the Party concerned has not responded to the Committee's finding (in paragraphs 99 & 100 of the second progress review) that it is not in compliance in relation to PEOs at appeal for claimants.

40. We agree with the Committee's comments at paragraph 105 of the second progress review, note the party's response at paragraph 34 of the Report – namely that it is "not aware of any effect arising from this provision to date" – and observe that the very nature of the chilling effect (which the new requirement described there increases) means that evidence of an adverse effect arising from this provision would be difficult to come by. Moreover, there are fewer cases in Scotland than in England/Wales, which means that it takes much longer to demonstrate effect or lack of effect. However, we would suggest the complete absence of any reported applications under the PEO rules since the introduction of the new rules in 2018 is evidence of the chilling effect of those new provisions.

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21 *Ibid*

22 https://www.legislation.gov.uk/asp/2018/10/section/8 - not yet in force

41. We agree with the Committee's comments at paragraph 106 of the second progress review and consider there is no justification to require such an evaluation by the litigant of other parties' expenses. If the Court requires that information, it can ask those other parties to provide it, rather than adding to the applicant's risk – provided such an evaluation is binding on those parties.

42. With regard to the Committee's comments at paragraph 107 of the second progress review and the UK's response at paragraph 36 of the Report, we note the Scottish Government's admission that the costs of interveners do not form part of the cost caps (i.e. that there is no special provision within the costs regime for interveners). Even if granted a PEO, an applicant has no protection against paying the adverse expenses of a 3rd party intervener, which could be prohibitive by themselves. We would refer the Committee to the case of *The John Muir Trust v The Scottish Ministers,*[23] in which the third-party intervener Scottish and Southern Energy initially sought expenses of £350K, reduced to £50K on negotiation.[24] This seems to completely undermine the PEO system.

43. With further regard to the Committee's comments at paragraph 107, we consider that to improve compliance in Scotland in relation to interventions:

- Consideration should be given to improving public information about upcoming and current cases;
- The Court of Session Rules on interventions in judicial reviews should be amended to give interveners the right to receive court papers; and
- The Rules should provide expressly for PEOs in public interest interventions, in line with the UK Supreme Court rules on interventions, such that orders for expenses will not normally be made either in favour of or against interveners.

We note these recommendations are put forward in a report on Barriers to Public Interest Litigation co-published by a number of civil society organisations (including FoES) in Scotland.[25]

44. The Scottish Government states that it would "expect" that court fees would be included in the costs regime (paragraph 37 of the UK's final report responding to paragraph 108 of the Committee's second progress review). As stated above, there is no evidence to support this expectation, and this uncertainty could be prevented by explicitly including court fees within the scope of expenses which are covered by the PEO rules. We also refer the Committee to comments in relation to the *Keatings* case (above), which suggests that court fees may not be covered.

45. At paragraph 109 of its second progress review, the Committee asked what measures are provided to protect financial information where a public hearing is needed as part of a PEO application (having noted that the potential absence of confidentiality for financial information may have a chilling effect). The Scottish Government maintains that it is unaware of any PEO applications that have required a written hearing. It is not clear what this means. Furthermore, we note that the Scottish Government has not responded to the Committee's request. We are not aware of any measures which could be used to protect financial information in a public hearing.

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23 [2016] CSIH 61

24 The settlement for legal expenses is reported here - https://tfn.scot/news/charitys-50k-pay-out-to-energy-firm

25 Report available here

46. Regarding the Committee's comments at paragraph 110 of the second progress review and the party's response at paragraph 39 of the Report, we welcome the Scottish Government's commitment to legal aid reform. We note, however, that it has not responded to the Committee's invitation to comment on any of the three specific points that we raised following the party's previous progress report. There are no publicly available plans to suggest that Regulation 15 of the Civil Legal Aid Regulations will be amended, but we hope that the Scottish Government takes the opportunity in the forthcoming legislation to address our longstanding concerns regarding that Regulation, in order to ensure that litigants in public interest environmental cases can access legal aid and to open up legal aid to community groups, as well as addressing our concerns about legal aid caps.

47. We welcome the Scottish Government's consideration of incorporating the right to a healthy and safe environment and, as part of this, the provisions of the Aarhus Convention into Scots Law, and urge Ministers to commit to doing so. Friends of the Earth Scotland and the RSPB are involved in the work of the National Taskforce for Human Rights Leadership that is now taking forward the recommendations of the advisory group mentioned at paragraph 40 of the Report. However, as a general point we would add that there is no guarantee that the incorporation of the Convention into Scots law alone will resolve the longstanding problems with access to justice and non-compliance with Article 9. This process should not be used as an excuse to further delay the reforms which are required in this area.

Northern Ireland

48. The Committee raised two issues, as recorded in paragraphs 112-118 of its Second progress Review, namely:
(a) the types of claim covered; and
(b) cross-undertakings for damages in case involving applications for injunctive relief.
In its Third Progress Report the UK Government has responded to these two issues, respectively, in paragraphs 41 and 42.

49. With reference to paragraph 41, the UK Government's response does not set out or explain the basis on which private law claims concerning the legality of activities which may have a significant effect on the environment are excluded from the statutory cost protection regime. To say that they will take into account any developments in the other UK legal jurisdictions and the views of stakeholders indicates that there is little or no current intention, on the Government's part, to actively address this issue and no acceptance that it should be addressed.

50. Regarding paragraph 42, the 2013 Regulations in Northern Ireland (see below) continue to regard the question of cross-undertakings as to damages in Aarhus Convention cases, which involve an injunction application, as a matter of wide judicial discretion. The Court is required to have particular regard to avoiding rendering the case prohibitively expensive for the applicant. Cross-undertakings, as to the respondent's losses resulting from the injunction, may have a place in commercial litigation but it is hard to see what justification there is for such a requirement in proceedings aimed at the protection of the environment and where the Court has determined, on the facts of that case, that an injunction is appropriate. Due implementation of the Convention, it is submitted, requires that such undertakings are not required in Aarhus Convention cases or, at least, the Court is required not to impose them where that is liable to have the effect of rendering the proceedings prohibitively expensive or the court's procedures unfair or inequitable as between the parties.

"Injunctions

5. If in an Aarhus Convention case the court is satisfied that an injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court shall, in considering both whether to require an undertaking by the applicant to pay any damages which the respondent or any other person may sustain as a result and the terms of any such undertaking—

(a) have particular regard to the need for the terms of the order overall not to be such as would make continuing with the case prohibitively expensive for the applicant; and
(b) make such directions as are necessary to ensure that the case is heard at the earliest opportunity."

51. Apart from these two issues, we refer the Committee to our comments on the UK's Second Progress Report raising our concerns about the impacts of cross caps in more significant environmental challenges and the unavailability of mechanisms, such as legal aid, to assist with the applicant's own legal costs – the effect of which can render legal challenges to the High Court prohibitively expensive – as evidenced by the number of cases brought by unrepresented litigants in Northern Ireland, in recent years.

Concluding remarks

Please do not hesitate to contact us should the Committee have any questions arising from this submission.

Yours sincerely,

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