Compliance Committee to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters (Aarhus Convention)

First progress review of the implementation of decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention

Contents

I. Introduction

1. At its sixth session (Budva, Montenegro, 11-13 September 2017), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) adopted decision VI/8k on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention (see ECE/MP.PP/2017/2/Add.1).

II. Summary of follow-up

2. Prior to the adoption of decision VI/8k, several statements were submitted to the Committee. Specifically, statements were sent on 1 August 2017 by an observer, Mr. Murphy; on 3 August 2017 by ClientEarth, one of the communicants of communication ACCC/C/2008/33, together with observers RSPB and Friends of the Earth; on 10 August 2017 from the communicants of communications ACCC/C/2013/85 and 86; and on 11 August 2017 a further statement by ClientEarth on its own. The secretariat informed those submitting the foregoing statements that their statements would be considered in the follow up procedure on the implementation of decision VI/8k.

3. On 20 September 2017, ClientEarth, together with observers RSPB and Friends of the Earth, submitted further information concerning the implementation of decision VI/8k.

4. On 5 March 2018, an observer, Environment Links UK, submitted a written statement that it had in parallel submitted to the eleventh meeting of the Convention's Task Force on Access to Justice (Geneva, 27-28 February 2018).

5. On 6 March 2018, the communicant of communication ACCC/C/2013/91 submitted a written statement.

6. On 13 March 2018, the communicants of communications ACCC/C/2013/85 and 86 submitted a joint statement.

7. At its sixtieth meeting (Geneva, 12-15 March 2018), the Committee reviewed the implementation of decision VI/8k in open session with the participation by audio conference of representatives of the United Kingdom, the communicants of communications ACCC/C/2008/23, ACCC/C/2008/33, ACCC/C/2010/53, ACCC/C/2012/68, ACCC/C/2013/85 and ACCC/C/2013/86, and RSPB as an observer.

8. On 15 March 2018, observers RSBP, Friends of the Earth UK and Friends of the Earth Scotland submitted their statement to the Committee's sixtieth meeting in written form.

9. On 22 March 2018, the United Kingdom submitted its statement to the Committee's sixtieth meeting in written form.

10. On 1 October 2018, the United Kingdom submitted its first progress report on decision VI/8k on time.

11. On 5 October 2018, the secretariat forwarded the first progress report to the communicants of communications ACCC/C/2008/23, ACCC/C/2008/27, ACCC/C/2008/33, ACCC/C/2010/53, ACCC/C/2011/64, ACCC/C/2011/65, ACCC/C/2012/68, ACCC/C/2012/77, ACCC/2013/85, ACCC/C/2013/86, and ACCC/C/2013/91, and registered observers, inviting their comments by 1 November 2018.

12. On 31 October 2018, ClientEarth, together with observers RSPB and Friends of the Earth, submitted comments on the United Kingdom's first progress report. On 1 November 2018, ClientEarth on its own submitted further comments on the United Kingdom's first progress report.

13. On 9 November 2018, the communicant of communication ACCC/C/2013/91 submitted comments on the United Kingdom's first progress report.

14. On 29 November 2018, observer RSPB provided further information regarding recent legislative developments relevant to the United Kingdom's first progress report.

15. After taking into account the information received, the Committee prepared its first progress review and adopted it through its electronic decision-making procedure on 24 February 2019. The Committee thereafter requested the secretariat to forward the first progress review to the United Kingdom, the communicants of communications ACCC/C/2008/23, ACCC/C/2008/27, ACCC/C/2008/33, ACCC/C/2010/53, ACCC/C/2011/64, ACCC/C/2011/65, ACCC/C/2012/68, ACCC/C/2012/77, ACCC/2013/85, ACCC/C/2013/86, and ACCC/C/2013/91 and registered observers.

III. Considerations and evaluation by the Committee

16. In order to fulfil the requirements of paragraph 2 of decision VI/8k, the United Kingdom would need to, as a matter of urgency, take the necessary legislative, regulatory, administrative and practical measures to:

(a) Ensure that the allocation of costs in all court procedures subject to article 9 is fair and equitable and not prohibitively expensive;

(b) Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;

(c) Further review its rules regarding the time frame for the bringing of applications for judicial review in Northern Ireland to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework;

(d) Establish a clear, transparent and consistent framework to implement article 9(4) of the Convention;

(e) Ensure that in future, plans and programmes similar in nature to national renewable energy action plans, if prepared, are submitted to public participation as required by article 7, in conjunction with the relevant paragraphs of article 6, of the Convention.

17. In order to fulfil the requirements of paragraph 4 of decision VI/8k, the United Kingdom would need ensure that its Civil Procedure Rules regarding costs are applied by its courts so as to ensure compliance with the Convention.

18. In order to fulfil the requirements of paragraph 6 of decision VI/8k, the United Kingdom would need to review its system for allocating costs in private nuisance proceedings within the scope of article 9(3) of the Convention and undertake practical and legislative measures to overcome the problems identified in paragraphs 109 to 114 of the Committee's findings on communications ACCC/C/2013/85 and ACCC/C/2013/86 to ensure that such procedures, where there is no fully adequate alternative procedure, are not prohibitively expensive.

19. In order to fulfil the requirements of paragraph 8 of decision VI/8k, the United Kingdom would need to put in place a clear requirement to ensure that:

(a) When selecting the means for notifying the public under article 6(2) public authorities are required to select such means as will ensure effective notification of the public concerned in the territory outside of the United Kingdom, bearing in mind the nature of the proposed activity, and the potential for transboundary impacts. In such a case, the United Kingdom may engage other existing applicable treaty regimes (for example, the Convention on Environmental Impact Assessment in a Transboundary Context), provided that the procedures meet the requirements under the Aarhus Convention;

(b) When identifying who is the public concerned by the environmental decision-making on ultra-hazardous activities, such as nuclear power plants, public authorities will apply the precautionary principle and consider the potential extent of the effects if an accident would indeed occur, even if the risk of an accident is very small.

General comments

20. Through paragraph 9(a) of decision VI/8k, the Meeting of the Parties requested the United Kingdom "to submit to the Committee detailed progress reports on 1 October 2018, 1 October 2019 and 1 October 2020 on the measures taken and the results achieved in the implementation of the above recommendations."

21. The Committee considers that the report submitted by the United Kingdom on 1 October 2018 fails to meet the requirements of paragraph 9(a).

22. Specifically, the United Kingdom's first progress report entirely fails to report on paragraph 2 (a), (b), and (d) of decision VI/8k. It does not expressly report on paragraph 2 (c) and (e) either. It does, however, report upon a "paragraph 8 (c)" and "paragraph 9" (there is no paragraph 8(c) in decision VI/8k) which, given the information provided, are presumably incorrect references to paragraphs 2 (c) and 2 (e) of decision VI/8k, respectively.

23. Moreover, the first progress report provides very little new information, and consists overwhelmingly of information already provided, often word for word, to the Committee in the last intersessional period. Thus, the last sentence of paragraph 1,[1] the entirety of paragraphs 2,[2] 3,[3] and paragraph 4(v) [4] and (vi), 5,[5] 14[6], 15,[7] 16, [8] 17,[9] 18,[10] 19,[11] 20,[12] 21, [13] and 22,[14] 24,[15] 25,[16] and 26,[17] 30, [18] 31, [19] 32, [20] and much of paragraph 33[21] have been repeated word-for-word. Only paragraphs 6-13, 27-29, the last sentence of 33, and a few brief unnumbered paragraphs at the end of the first progress report provide new information. Accordingly, out of a total of 38 paragraphs, the United Kingdom has provided less than 15 paragraphs of new information. This total is generously counted; paragraphs are often a single sentence.

24. The first progress report also fails to provide the Committee with all the texts of the legislative and other developments referred to in the report. As the United Kingdom should be aware, the submissions of such texts are a basic minimum for the Committee to be in a position to examine whether the developments referred to in the report do in fact meet the requirements of the decision. The Committee makes clear that the United Kingdom's failure to do so has significantly hampered the Committee's task to review the United Kingdom's progress in implementing decision VI/8k.

25. The Committee expresses its disappointment concerning the marked shortcomings in the United Kingdom's first progress report, as well as its surprise considering that the Committee has been working closely with the United Kingdom with respect to follow-up on decisions of the Meeting of the Parties since decision IV/9i was adopted by the fourth session of the Meeting of the Parties in 2011. The United Kingdom thus has extensive experience in preparing such progress reports and by this time should be well-aware of the level of detail

[1] Party's third progress report on decision V/9n, 3 April 2017, para. 2, first sentence.
[2] Ibid., para. 3.
[3] Ibid., para. 4.
[4] Ibid., para. 5(f).
[5] Ibid., para. 5(h).
[6] Ibid., para. 10.
[7] Ibid., para. 11.
[8] Ibid., para. 12.
[9] Ibid., para. 13.
[10] Ibid., para. 14.
[11] Ibid., para. 15.
[12] Ibid., para. 16.
[13] Ibid., para. 17.
[14] Ibid., para. 18.
[15] Ibid., para. 20.
[16] Ibid., para. 21.
[17] Ibid., para. 22.
[18] Ibid., para. 23.
[19] Ibid., para. 24.
[20] Ibid., para. 25.
[21] Ibid., para. 25.

required, the issues that need to be addressed and evidence to be provided. If at any point, the United Kingdom had any queries on such matters, it should have immediately directed them to the Committee through the secretariat. Alternatively, it would have been welcome to have raised them at the audio conference on decision VI/8k held at the Committee's sixtieth meeting, as invited by the Committee to do so.

26. The Committee reminds the United Kingdom of its obligation to submit by 1 October 2019 a comprehensive second progress report with clear and detailed information on the measures taken and the results achieved in the implementation of each of the recommendations in paragraphs 2(a)-(e), 4, 6 and 8(a) and (b) of decision VI/8k. The Committee invites the United Kingdom to structure its second progress report in a format that clearly explains what measures have been taken, or are being taken, to address each of the above recommendations.

Paragraphs 2 (a), (b) and (d) and paragraph 4 of decision VI/8k

27. Paragraphs 2 (a), (b) and (d) of decision VI/8k are carried over from paragraph 8(a), (b) and (d) of decision V/9n, since the United Kingdom failed to meet the requirements of those paragraphs during the last intersessional period. Accordingly, in examining the progress made by the United Kingdom in England and Wales, Scotland and Northern Ireland to fulfil paragraphs 2 (a), (b) and (d) of decision VI/8k, the Committee will focus on those aspects which it identified in the previous intersessional period as meriting particular attention in each jurisdiction.

28. The Committee considers that the recommendation in paragraph 4 of decision VI/8k, which stems from the Committee's findings on communication ACCC/C/2014/77, does not impose any additional substantive obligation beyond those already contained in paragraphs 2(a), (b) and (d) of the decision. The Committee will thus examine the implementation of paragraph 4 in the context of its review of the implementation of paragraph 2(a), (b) and (d).

England and Wales

29. With respect to England and Wales, in its examination of paragraph 8(a), (b) and (d) of decision V/9n, the Committee had identified the following aspects as requiring its particular attention:

(a) Type of claims covered;

(b) Eligibility for costs protection;

(c) Level of the costs caps (including default levels; the possibility to vary the caps; who may request a variation; and the procedural stage at which a variation may be sought);

(d) Costs for procedures with multiple claimants;

(e) Costs protection on appeal;

(f) Privacy concerns regarding applications for costs protection;

(g) Costs protection prior to grant of permission;

(h) Costs relating to determination of an Aarhus claim;

(i) Cross-undertakings for damages;

(j) Costs orders against or in favour of interveners and funders of litigation.

30. The Committee examines the information provided by the United Kingdom in its first progress report with respect to each of the above matters, together with relevant comments provided by communicants and observers, below.

Type of claims covered

31. The United Kingdom does not report that any progress has been made to ensure the requirement in article 9(4) of the Convention that procedures not be prohibitively expensive applies to all court procedures in England and Wales within the scope of article 9. It reiterates that in 2017 it elected not to expand costs protection to include statutory reviews under article

9(3) of the Convention or more widely to include private nuisance cases or other types of cases which can be brought by individuals.[22] It reports that it is "currently considering other issues covered by the decision further and continue to engage with key stakeholders to consider options."[23]

32. Based on the above, the Committee has no evidence that the United Kingdom has made any progress towards meeting the requirements of paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k with respect to the type of claims covered by cost protection in England and Wales.

Eligibility for costs protection

33. In its first progress report, the United Kingdom does not address the issue of who is eligible for costs protection in England and Wales. In their comments of 31 October 2018, ClientEarth, RSPB and Friends of the Earth submit that problems persist with regard to unincorporated associations and residents' groups which have no formal legal personality and require an individual to bring the case on their behalf.[24]

34. In the light of the above, the Committee invites the United Kingdom in its second progress report due on 1 October 2019 to clarify whether, if an unincorporated association or residents' groups has standing to bring a claim within the scope of article 9, that entity is eligible in its own right for cost protection under article 9(4), and if so, which cost cap (£5,000 or £10,000) would apply. If it would not be eligible for cost protection, the Committee invites the United Kingdom in its second progress report to explain why not.

Level of the costs caps

(a) Default levels of costs caps and cross caps

35. In its report on decision IV/9i to the fifth session of the Meeting of the Parties, the Committee expressed concern that the (then fixed) costs caps of £5000 and £10,000 may be prohibitively expensive for many individuals and organizations.[25]

36. In its first progress report on decision VI/8k, the United Kingdom reports that the default costs cap for claimants remains £5,000 for individuals, £10,000 for others, with a cross cap on an unsuccessful defendant's liability to pay the claimant's costs of £35,000.[26]

37. The Committee accordingly considers that the United Kingdom has not demonstrated that it has made any progress with respect to meeting the requirements of paragraphs 2(a), (b) and (d) and 4 of decision VI/8k regarding the level of the default cost caps.

(b) The possibility to vary the costs caps

(i) Varying the costs caps upwards or downwards

38. The United Kingdom's first progress report reiterates that, under the amendments to England and Wales' Civil Procedure Rules (CPR) introduced in February 2017, the default levels for costs caps and cross caps may be varied upwards or downwards.[27]

39. The Committee notes the situation accordingly remains unchanged from that examined in its report on decision V/9n to the sixth session. In that report, the Committee had observed that the possibility of the court to lower a claimant's costs cap below the default level, based on the specific circumstances including the claimant's financial resources, could contribute to fulfilling paragraphs 8(a), (b) and (d) of decision V/9n.[28] However, the Committee had at the same time expressed concern that this provision may be used more

[22] Party's first progress report, 1 October 2018, para. 5.
[23] Ibid.
[24] Comments from the communicant of ACCC/C/2008/33, ClientEarth, and observers RSPB and Friends of the Earth on the Party's first progress report, 31 October 2018, p. 5.
[25] ECE/MP.PP/2014/23, para. 47.
[26] Party's first progress report, 1 October 2018, para. 3.
[27] Ibid., para. 4(ii).
[28] ECE/MP.PP/2017/46, para. 34.

often to increase, rather than decrease, the caps. It also considered that the uncertainty concerning the actual level of the cap in any particular case due to the possibility of variation may also be contrary to the requirement in article 3(1) to establish a clear, transparent and consistent framework to implement the Convention.[29] Since at the time of the United Kingdom's first progress report the possibility to vary the costs caps both upwards and downwards remains unchanged, the Committee continues to hold these concerns.

(ii) Trigger for varying the costs caps

40. In its first progress report, the United Kingdom reports that, in the light of the September 2017 judgment of the High Court in *RSPB, Friends of the Earth Ltd. & ClientEarth v. Secretary of State for Justice the Lord Chancellor*,[30] the CPR were amended to be in line with the recommendations regarding clarifications made by the Court in that judgment.[31] As a result, a court may now vary a costs cap only upon the application of the claimant or defendant.[32] Prior to that, the court could vary the costs caps at its own initiative also.[33]

41. While welcoming the above clarification, since the defendant will still be able to seek a variation to the costs caps, the Committee is not convinced that the amendment will significantly enhance certainty for claimants in practice.

(iii) Procedural stage at which a variation can be sought

42. In its first progress report, the United Kingdom reports that the amendments to the CPR made in the light of the High Court's judgment have clarified that an application to vary the costs cap must be made at the outset of litigation, either in the claim form if the claimant seeks the variation, or in the acknowledgement of service, if made by a defendant.[34] The court must make its determination at the earliest opportunity thereafter.[35] An application to vary may only be made at a later stage in the process if there has been a significant change in circumstances.[36]

43. The Committee welcomes the change in the CPR concerning the procedural stage at which applications to vary the costs may be brought and decided upon and considers if properly applied in practice, this should help to enhance legal certainty for applicants regarding their potential costs exposure.

44. However, the Committee takes note of the claim made by ClientEarth, RSPB and Friends of the Earth in their comments of 31 October 2018 that, despite the High Court's judgment, the CPR is not operating as envisaged. They cite to pending litigation in which Friends of the Earth is challenging the government's decision to adopt a revised National Planning Policy Framework without undertaking a strategic environmental assessment and thereby not consulting the public. ClientEarth, RSPB and Friends of the Earth claim that the defendant "reserved its position" as to the Aarhus costs cap when acknowledging service, rather than applying to vary when doing so or confirm the default costs cap. The court then decided not to make an order as to the costs cap when deciding that the case should go to a "rolled up" hearing, which would deal with permission and full trial at the same time in December 2018.[37]

45. The Committee invites the United Kingdom in its second progress report to comment on the above submissions in the light of the reported amendments to the CPR requiring the

[29] Ibid., paras. 35 and 36.
[30] [2017] EWHC 2309 (Admin), 15 September 2017.
[31] Party's first progress report, 1 October 2018, para. 11.
[32] Ibid., para. 11(ii).
[33] ECE/MP.PP/2017/46, para. 33.
[34] Party's first progress report, 1 October 2018, para. 11(iii), and comments from the communicant of ACCC/C/2008/33, ClientEarth, and observers RSPB and Friends of the Earth on the Party's first progress report, 31 October 2018, p. 3.
[35] Ibid.
[36] Ibid.
[37] Comments from the communicant of ACCC/C/2008/33, ClientEarth, and observers RSPB and Friends of the Earth on the Party's first progress report, 31 October 2018, p. 4.

application to vary the costs cap to be made at the outset of the litigation and determined by the court at the earlier opportunity thereafter.

Costs for procedures with multiple claimants

46. In its first progress report, the United Kingdom does not report upon the costs for procedures with multiple claimants. In the absence of any information to the contrary, the Committee therefore understands that the situation examined in its report on decision V/9n to the sixth session of the Meeting of the Parties, namely that the CPR provides for a separate costs cap for each claimant, remains unchanged.

47. In its report to the sixth session, the Committee had observed that it could see no basis for the rule requiring separate costs caps for each claimant. In particular, it noted it had been provided with no evidence that one additional claimant would double a defendant's costs; two additional claimants would triple the costs etc. The Committee had moreover expressed concern that the rule removed the possibility for members of the public to defray the costs of the proceeding by sharing cost burdens and would also increase the likelihood of satellite litigation, thereby increasing uncertainty.[38] The Committee continues to hold these concerns.

48. The Committee notes the submissions by ClientEarth, RSPB and Friends of the Earth in their comments of 31 October 2018 concerning the combined effect of the rules for multiple claimants and cross-caps. They refer to currently ongoing litigation seeking judicial review of the Airports National Policy Statement (which envisages a new runway at Heathrow airport), in which five separate claims have been joined. They claim that, should the claimants win, the cross cap to be paid by the defendant to the claimants will still be capped at £35,000 total for the joined proceedings, which will not cover the legal costs of the five legal teams involved.[39] The Committee invites the United Kingdom in its second progress report to comment on the above situation in the light of the requirement in article 9(4) for procedures under article 9 to not only be prohibitively expensive, but also fair.

49. Based on the information before it, the Committee considers that the United Kingdom has not demonstrated that it has made progress towards meeting the requirements of paragraphs 2(a), (b) and (d) and 4 with respect to procedures with multiple claimants.

Cost protection on appeal

50. In its report on decision V/9n to the sixth session of the Meeting of the Parties, the Committee had welcomed that rule 52.19A implicitly recognizes that the requirement not to be prohibitively expensive applies to the procedure as a whole, encompassing all stages of the proceedings subject to article 9 of the Convention, including the appeal stage. The Committee, however, expressed concern that rule 52.19A still did not set any maximum caps with regard to the costs to be ordered, thus leaving claimants with considerable uncertainty. The Committee accordingly found that, while a positive step, rule 52.19A did not ensure sufficient clarity or cost protection for claimants in appeals regarding Aarhus Convention claims and that the United Kingdom consequently did not yet fulfil paragraphs 8 (a), (b) and (d) of decision V/9n in England and Wales with respect to cost protection on appeal.[40]

51. In its first progress report, the United Kingdom does not report upon any measures it has taken with respect to costs protection on appeal.

52. Based on the information before it, it is the Committee's understanding that the situation with respect to cost protection on appeal remains unchanged since the time of its report to the sixth session of the Meeting of the Parties. Accordingly, the Committee considers that the United Kingdom has not demonstrated any progress in meeting the requirements of paragraphs 2(a), (b) and (d) and 4 with respect to costs protection on appeal.

[38] ECE/MP.PP/2017/46, para. 39.
[39] Comments from the communicant of ACCC/C/2008/33, ClientEarth, and observers RSPB and Friends of the Earth on the Party's first progress report, 31 October 2018, p. 6.
[40] ECE/MP.PP/2017/46, para. 42.

Schedule of claimant's financial resources

53. In its report on decision V/9n to the sixth session, the Committee had examined the then-in effect CPR 45.42(1)(b).[41] This rule provided that a claimant seeking costs protection needed to file and serve "a schedule of the claimant's financial resources", which included any financial support which third parties have provided to the claimant or are likely to provide in the future.[42] The Committee considered this could limit the financial resources available to members of the public, as not all persons who would otherwise be willing to provide financial support may wish to have either the fact of their support, or the amount of that support, declared publicly. Moreover, the Committee considered the phrase "support likely to be provided in the future" to be vague and ambiguous.[43]

54. In its first progress report, the United Kingdom reports that the Government had accepted the recommendations made by the High Court in its September 2017 judgment in *RSPB, Friends of the Earth Ltd. & ClientEarth v. Secretary of State for Justice the Lord Chancellor*[44] and had amended the CPR accordingly. The resulting amendments clarified the financial information that a claimant has to provide in order to have the benefit of the costs cap and, in particular, making it clear that in relation to any financial support provided by third parties, it is only the aggregate amount that must be provided, rather than a breakdown of individuals' donations.[45]

55. In their comments of 31 October 2018, ClientEarth, RSPB and Friends of the Earth claim that in practice defendants have challenged the amount of information provided by the claimant and pressed for more information than that now specified in CPR Practice Direction 46 PD 10.1. They submit that this can be intrusive and intimidating.[46] They report that CPR 46 PD 10.1 provides that, unless a court directs otherwise, the summary of the applicant's financial resources must provide details of:

(a) the applicant's significant assets, liabilities, income and expenditure; and

(b) in relation to any financial support which any person has provided or is likely to provide to the applicant, the aggregate amount –

(i) which has been provided; and

(ii) which is likely to be provided.[47]

56. The Committee welcomes the amendment to the CPR to clarify that only the aggregate amount of support provided by third parties need be provided. At the same time the Committee notes the submissions by ClientEarth, RSPB and Friends of the Earth that more information has been requested by defendants on some occasions.

57. The Committee moreover notes that based on the information before it, it is not clear whether the CPR as amended would still require the provision of information on the identity of third-party supporters or enable defendants to insist on the provision of such information. The Committee notes in this regard the observations of the High Court in its 2017 judgment, which considered that changing the rules to require only information on the aggregate amount of third party support that has been provided or is likely to be provided would not directly address the question of the identity of the sources of third party support.[48] The Committee points out that, if the CPR require the identity of supporters to be disclosed, this would not address the concern it had voiced in its report on decision V/9n to the sixth session that fewer

[41] Ibid., para. 43.
[42] ECE/MP.PP/2017/46, para. 43.
[43] Ibid., para. 47.
[44] [2017] EWHC 2309 (Admin), 15 September 2017.
[45] Party's first progress report, 1 October 2018, para. 11(i).
[46] Comments from the communicant of ACCC/C/2008/33, ClientEarth, and observers RSPB and Friends of the Earth on the Party's first progress report, 31 October 2018, p. 5.
[47] Ibid.
[48] *RSPB, Friends of the Earth Ltd. & ClientEarth v. Secretary of State for Justice the Lord Chancellor* [2017] EWHC 2309 (Admin), 15.09.2017, para. 55 and 57.

financial resources would be available to applicants because not all persons wish to have the fact of their support publicly declared.[49]

58. In addition, the Committee reiterates the concern expressed in its report to the sixth session that the reference to financial support "which is likely to be provided" is vague and ambiguous and accordingly reduces certainty for claimants.[50]

59. In the light of the above, while welcoming the amendment to the CPR requiring that only the aggregate amount of third party support need be provided in the schedule of finances as a move in the right direction, the Committee considers that the United Kingdom has not yet demonstrated sufficient progress towards meeting the requirements of paragraph 2(a), (b), and (d) and 4 with respect to the schedule of finances needed to support an application for costs protection. The Committee invites the United Kingdom, together with its second progress report, to provide the relevant provisions of the CPR and Practice Directions and to explain how those provisions address the Committee's concerns in paragraphs 57-58 above.

60. On a related issue, in its first progress report, the United Kingdom reports that in its September 2017 judgment, the High Court concluded that the rules determining that a hearing should be held in public should be changed because having public hearings relating to disputes over costs could have a chilling effect. The United Kingdom reports that the High Court concluded that the Government needed to amend the environmental costs protection regime, so that the default position is that any hearing of an application to vary costs caps in an Aarhus Convention claim is to be held in private in the first instance.[51]

61. The United Kingdom reports, however, that the proposed change to the Practice Direction which would give effect to the High Court's judgment, was not taken forward because the Civil Procedure Rule Committee was undertaking a comprehensive open justice review.[52] Pending the outcome of this review, the Administrative Court put in place arrangements to ensure that litigants, lawyers and court staff are aware that any hearing of an application for variation of costs cap are to be heard in private until further notice.[53]

62. While acknowledging these arrangements, ClientEarth, RSPB and Friends of the Earth in their comments of 31 October 2018 submit that the United Kingdom's ongoing failure to remedy the unlawfulness confirmed by the High Court judgment and argue this in danger of breaching article 3(1) of the Convention.[54]

63. The Committee regrets that the United Kingdom did not make the proposed changes to its rules governing hearings in the course of its other amendments to the CPR in 2018, as the Committee is indeed of the view that holding public hearings for varying the cost caps in Aarhus cases could have a chilling effect, compounding the above concerns regarding the nature of the information to be provided.

64. In light of the above, the Committee considers that the United Kingdom has not demonstrated that it has made progress in meeting the requirements of paragraphs 2(a), (b), and (d) and 4 of decision VI/8k with regards to hearings on variations to costs caps. The Committee invites the United Kingdom in its second progress report to report on its progress to ensure that such hearings in Aarhus cases are held in private, as well as to provide the texts of the relevant provisions of the CPR and Practice Directions as then in force.

Costs protection prior to grant of permission

65. In its first progress report, the United Kingdom does not report upon the issue of costs incurred prior to the grant of permission to apply.

[49] ECE/MP.PP/2017/46, para. 47.
[50] Ibid.
[51] Party's first progress report, 1 October 2018, paras. 7-8.
[52] Ibid., para. 9.
[53] Ibid., para. 10.
[54] Comments from the communicant of ACCC/C/2008/33, ClientEarth, and observers RSPB and Friends of the Earth on the Party's first progress report, 31 October 2018, p. 2.

66. The Committee takes note of the statement by ClientEarth, RSPB and Friends of the Earth in their comments of 31 October 2018 that, at a hearing for the joined cases concerning the expansion of the Heathrow Airport (see para. 48 above), the defendant served the court with a pre-permission Statement of Costs of £619,382.80.[55]

67. The Committee accordingly reiterates its invitation to the United Kingdom to provide a clear direction either in the CPR or the accompanying guidance to make clear that the costs caps apply also to such costs.[56] If in fact, such clarification has already been inserted in the CPR or accompanying guidance, this should be provided to the Committee together with the United Kingdom's second progress report.

Costs relating to determination of an Aarhus claim

68. In its report on decision IV/9i to the fifth session, the Committee had welcomed the inclusion in the CPR of a rule that, if a defendant is not successful in challenging the claimant's assertion that the claim is an Aarhus claim, the court will normally order the defendant to pay the claimant's costs regarding that challenge on an indemnity basis.[57] However, in its report on decision V/9n to the sixth session, the Committee had expressed concern that, following the February 2017 amendments, defendants who unsuccessfully challenged the status of the claim as an Aarhus claim would now normally be ordered to pay the costs of those satellite proceedings on the standard basis only. The Committee had observed that by decreasing defendants' potential costs exposure, this amendment would likely 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.[58]

69. In its first progress report, the United Kingdom does not report upon the issue of the costs relating to the determination of an Aarhus claim. The Committee accordingly has no evidence before it that the United Kingdom has made progress towards meeting the requirement of paragraphs 2(a), (b) and (d) and 4 in this respect.

Cross-undertakings for damages

70. With respect to cross-undertakings for damages in England and Wales, in its report on decision V/9n to the sixth session of the Meeting of the Parties, the Committee took the view that, while the 2017 amendments to the CPR may provide for some greater clarity as regards how the court should determine what would be prohibitively expensive for the applicant, they do not give any further clarity to applicants as to: (a) whether a cross-undertaking will be required, and (b) if a cross-undertaking is required, what its level will be.[59] As the Committee explained in its review of decision V/9n, this situation fails to meet the requirement in article 3(1) of the Convention for a clear, transparent and consistent framework to implement the provisions of the Convention.[60]

71. In its first progress report on decision VI/8k, the United Kingdom has provided no information with respect to either of the above matters.

72. In their statement of 3 August 2017, ClientEarth, RSPB and Friends of the Earth submit that CPR Practice Direction 25A results in a lack of prior certainty for claimants as to whether a cross-undertaking in damages will be required and, if so, the level at which it will be set.[61]

73. Based on the above, the Committee has no evidence before it that the United Kingdom has made progress towards meeting the requirements of paragraphs 2(a), (b) and (d) and 4 with respect to cross-undertakings for damages. The Committee invites the United Kingdom

[55] Ibid., p. 4.
[56] ECE/MP.PP/2014/23, para. 45.
[57] Ibid., para. 46.
[58] Ibid., para. 51.
[59] ECE/MP.PP/2017/46, para. 54.
[60] Ibid.
[61] Statement to the sixth session of the Meeting of the Parties from the communicant of ACCC/C/2008/33, ClientEarth, and observers RSPB and Friends of the Earth, 3 August 2017, p. 1.

to provide the text of CPR Practice Direction 25A, or its current equivalent, along with its second progress report.

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

74. In its first progress report, the United Kingdom does not report on the issue of costs orders against or in favour of interveners and funders of litigation. In their statement of 3 August 2018, ClientEarth, RSPB and Friends of the Earth submit generally that the rules expose interveners in judicial review proceedings to potential costs orders. Observer Environment Links makes the same point in its statement of 5 March 2018.[62]

75. The Committee accordingly has no information before it on whether section 87 of the Criminal Justice and Courts Act or its successor provision still allows courts to make a costs order against or in favour of an intervener or whether it has by now been amended in a manner that would address the concerns expressed by the Committee in its report on decision V/9n to the sixth session of the Meeting of the Parties.[63] Nor has the Committee been informed if the proposals consulted upon in 2015 to amend rules 85 and 86 of the Criminal Justice and Courts Act have been adopted. These proposals would require judicial review applicants to provide the court with information about the financing of the application so that the Court could consider whether to order costs to be paid by potential funders identified in that information.[64]

76. The Committee accordingly invites the United Kingdom in its second progress report to attach the text of section 87 of the Criminal Justice and Courts Act and to clarify whether it has in fact been amended to take into consideration the Committee's concerns. Similarly, the Committee invites the United Kingdom to indicate whether the proposed amendments to rules 85 and 86 of the Criminal Justice and Courts Act have occurred and if so, to attach the text thereof along with its second progress report.

Final remarks regarding England and Wales

77. In light of paragraphs 31-75 above, the Committee finds that the United Kingdom has not yet met the requirements of paragraphs 2(a), (b) and (d) and 4 of decision VI/8k with respect to England and Wales.

Scotland

78. With regard to Scotland, in its examination of paragraph 8(a), (b) and (d) of decision V/9n in its report to the sixth session, the Committee had identified that the following aspects would still require its further attention going forward:

(a) Type of claims covered;

(b) Level of the costs caps (including default levels of costs caps and cross caps and the possibility to vary them);

(c) Costs protection on appeal.

79. Since paragraphs 2(a), (b) and (d) of decision VI/8k carry over the outstanding recommendations in paragraphs 8(a), (b) and (d) of decision V/9n, the Committee examines the information provided by the United Kingdom in its first progress report with respect to each of the above matters, together with relevant comments provided by communicants and observers.

80. In its first progress report, the United Kingdom reports that the Scottish Civil Justice Council approved new court rules at its meeting of 9 July 2018. It also reports that it is expected that the new rules for Protective Expenses Orders (PEOs) will be brought forward

[62] Ibid., and statement to the Task Force on Access to Justice from observer Environment Links UK, p. 3.
[63] See ECE/MP.PP/2017/46, para. 55.
[64] Ibid., para. 56.

shortly.[65] Finally, it reports that separate to this work the Scottish Government is considering environmental governance in the context of the United Kingdom's forthcoming exit from the European Union and that a consultation was expected later in 2018.[66] The United Kingdom has not submitted to the Committee either the text of the new court rules nor an overview of their content.

81. In their comments of 31 October 2018, ClientEarth, RSPB and Friends of the Earth attach the comments submitted in June 2017 during the course of consultations on the draft amendments to Chapter 58A by Scottish Environment Link (SEL), a forum for Scotland's voluntary environmental organizations, including RSPB Scotland and Friends of the Earth Scotland. A number of the issues addressed in those submissions are mentioned below.

82. In its further information of 29 November 2018, observer RSPB informed the Committee that the Scottish Government had published the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018, which amends Chapter 58A of the Court of Session Rules (Chapter 58A).[67]

Type of claims covered

83. In its report on decision V/9n to the sixth session, the Committee found that the PEO regime's exclusion of private law claims within the scope of the Convention did not satisfy paragraph 8(a), (b) and (d) of that decision.[68] The United Kingdom does not report on whether this gap in the scope of the PEO regime's application would be addressed through the 2018 amendments.

84. The Committee accordingly has no evidence that the United Kingdom has made progress towards meeting paragraphs 2(a), (b) and (d) and 4 of decision VI/8k with respect to the type of claims covered.

Level of the costs caps

(a) Default levels

85. In its first progress report, the United Kingdom does not report on the default levels of the costs caps in Scotland and the Committee has no information before it to indicate that these have changed since its report on decision V/9n to the sixth session.

(b) The possibility to vary the level of the costs caps

86. In its first progress report, the United Kingdom does not report on any developments regarding the rules concerning the variation of cost caps. However, in their comments of 31 October 2018, ClientEarth, RSPB and Friends of the Earth report that the proposed amendments to the rules for PEOs would change the then-existing system, under which the default cost caps could only be decreased for a claimant, to enable the costs caps for the applicant to be increased above the £5,000 cap "on cause shown".[69]

87. The Committee considers that such an amendment would move the United Kingdom significantly further away from fulfilling the requirements of paragraphs 2(a), (b) and (d) and 4 of decision VI/8k. The Committee already conveyed in its review of decision V/9n that £5,000 should be the maximum amount of costs payable by a claimant in proceedings covered by article 9 of the Convention, with the possibility for the court to lower that amount if the circumstances of the case mean that it is reasonable to do so.[70] Moreover, the Committee had specifically welcomed the possibility to vary the costs caps in a manner favourable to claimants, in contrast to the regime in England and Wales.[71] The Committee

[65] Party's first progress report, 1 October 2018, paras. 27-28.
[66] Ibid., para. 29.
[67] Further information from observer RSPB, 29 November 2018.
[68] ECE/MP.PP/2017/46, para. 67.
[69] Comments from the communicant of ACCC/C/2008/33, ClientEarth, and observers RSPB and Friends of the Earth on the Party's first progress report, 31 October 2018, p. 11.
[70] ECE/MP.PP/2017/46, para. 65.
[71] Ibid., para. 69.

points out that introducing the possibility for costs caps to be increased would neither ensure that claimants' costs will not be prohibitive nor ensure the needed certainty.

Cost protection on appeal

88. In its first progress report, the United Kingdom does not report on any developments regarding costs protection on appeal. However, in their comments of 31 October 2018, ClientEarth, RSPB and Friends of the Earth refer to proposals to amend the PEO rules in this respect.[72] They submit the proposal to allow PEO to continue to apply for appeals brought by the respondent is a positive development. They however disagree with the proposal to require a new PEO if the applicant appeals, as well as proposals to double the applicant's costs-cap.

89. While taking note of the above, having not received the text of the proposed amendments, the Committee is not in a position to conclude on whether that United Kingdom has made progress towards meeting the requirements of paragraphs 2(a), (b) and (d) and 4 with regard to the cost protection on appeal.

Final remarks regarding Scotland

90. The Committee expresses its concern that the United Kingdom did not provide the Committee with either the text of the proposed amendments to its rules on PEOs or even a description of the content of the proposed changes.

91. The Committee notes that in their comments of 31 October 2018, ClientEarth, RSPB and Friends of the Earth raise a number of other concerns regarding the proposed amendments to the PEO rules. These include the definition of what is "prohibitive expensive", the procedure for applying for a PEO, the costs cap on the application for a PEO, the relevance of whether applicants for PEOs are represented pro bono, the use of an estimate of expenses to assess what would be prohibitively expensive, liability for interveners costs, court fees, and the confidentiality of applicants' financial information. Since the Committee does not have the text of either the proposed amendments or the amended rules as adopted, it is not in a position to examine these issues further in the context of the present progress review. However, it will do so in the context of its second progress review.

92. Based on the above, the Committee considers that the United Kingdom has not yet met the requirement of paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k with respect to Scotland. The Committee requests the United Kingdom to submit with its second progress report the text of the amended rules for PEOs as well as an explanation of how the amended rules will address the points noted in paragraphs 83-89 and 91 above.

Northern Ireland

93. With regard to Northern Ireland, in its examination of paragraph 8(a), (b) and (d) of decision V/9n in its report to the sixth session, the Committee had identified that the following aspects would still require its further attention going forward:

(a) Type of claims covered;

(b) Cross-undertakings for damages;

94. Since paragraphs 2(a), (b) and (d) of decision VI/8k carry over the outstanding recommendations in paragraphs 8(a), (b) and (d) of decision V/9n, the Committee examines the information provided by the United Kingdom in its first progress report with respect to each of the above matters, together with relevant comments provided by communicants and observers, below.

[72] Comments from the communicant of ACCC/C/2008/33, ClientEarth, and observers RSPB and Friends of the Earth on the Party's first progress report, 31 October 2018, pp. 10-11, and annex 2, pp. 6-7.

Type of claims covered

95. In its first progress report, the United Kingdom merely restates what it had already reported in the last intersessional period,[73] namely that the Cost Protection Regulations in Northern Ireland extend costs protection to applicants in statutory reviews as well as judicial reviews within the scope of the Convention.[74] It does not report on any extension of cost protection to private law claims.

96. The Committee thus understands that the situation is unchanged from that in its report on decision V/9n to the sixth session of the Meeting of the Parties.[75] Accordingly, by excluding private law claims from the scope of costs protection, the United Kingdom has not demonstrated any progress towards meeting the requirements of paragraphs 2(a), (b) and (d) and 4 with regard to the type of claims covered.

Cross-undertakings for damages

97. With respect to cross-undertakings for damages in Northern Ireland, in its report on decision V/9n to the sixth session of the Meeting of the Parties, the Committee took the view that, while the 2017 amendments to the Cost Protection Regulations may provide for some greater clarity as regards how the court should determine what would be "prohibitively expensive for the applicant, they do not give any further clarity to applicants as to (a) whether a cross-undertaking will be required and (b) if a cross-undertaking is required, what its level will be.[76] In its first progress report on decision VI/8k, the United Kingdom has provided no information with respect to either of the above matters. It is the Committee's understanding, based on the information provided in the United Kingdom's first progress report, that the situation remains unchanged. As the Committee explained in its review of decision V/8n, this situation fails to meet the requirement in article 3(1) of the Convention for a clear, transparent and consistent framework to implement the provisions of the Convention.[77]

98. The Committee accordingly considers that the United Kingdom has failed to demonstrate that it has made progress towards meeting the requirements of paragraphs 2(a), (b) and (d) and 4 with regard to cross-undertakings for damages in Northern Ireland.

Final remarks regarding Northern Ireland

99. The Committee considers that, in light of paragraphs 95-98 above, the United Kingdom has not yet met the requirement of paragraphs 2(a), (b) and (d) and 4 of decision VI/8k with respect to Northern Ireland.

Paragraphs 2(c) and (d) of decision VI/8k

100. With regard to paragraph 2(c) and (d) of decision VI/8k, the United Kingdom in its first progress report indicates that the Rules of the Court of Judicature (Northern Ireland) were amended in 2017 with effect from January 2018 to remove the requirement of promptitude.[78] In their comments of 31 October 2018, ClientEarth, RSPB and Friends of the Earth confirm and welcome this change.[79]

101. The Committee welcomes the progress reported by the United Kingdom and invites the United Kingdom to submit the text of the relevant rule as amended with its second progress report.

102. The Committee also invites the United Kingdom to clarify in its second progress report at what point the time limit for bringing a claim for judicial review in Northern Ireland

[73] Party's third progress report on decision V/9n, para. 16.
[74] Party's first progress report, 1 October 2018, para. 20.
[75] ECE/MP.PP/2017/46, para. 80.
[76] Ibid., para. 91.
[77] Ibid., para. 91.
[78] Party's first progress report, 1 October 2018, para. 33.
[79] Comments from the communicant of ACCC/C/2008/33, ClientEarth, and observers RSPB and Friends of the Earth on the Party's first progress report, 31 October 2018, p. 12.

now starts to run. In this regard, the Committee points out that, in order to meet the requirement of paragraph 2(d) of decision VI/8k, the United Kingdom will need to demonstrate that any such time limit only starts to run from the date on which a claimant knew, or should have known of the act, or omission, at stake.[80]

103. In light of the above, while welcoming the progress reported, the Committee finds the United Kingdom has not yet met the requirements of paragraph 2(c) and (d) of decision VI/8k with regards to time limits.

Paragraph 2(e) of decision VI/8k

104. With regard to paragraph 2(e) of decision VI/8k, the United Kingdom's first progress report contains nothing more than a bare reference to paragraph 31 of its letter of 29 December 2014, in which it merely stated that it is aware of its obligations under article 7.[81] The Committee points out that the United Kingdom made identical statements during the last intersessional period and the Committee made clear at that time that such bare assertions were not enough to fulfil the requirements of the decision.[82]

105. In order to fulfil the requirements of paragraph 2(e) of decision VI/8k, the United Kingdom must provide evidence to show that plans and programmes similar in nature to national renewable energy action plans are submitted to public participation meeting the requirements of article 7 of the Convention. The Committee is aware from the information submitted by the European Union in the context of request ACCC/M/2017/3 that new European Union legislation was expected to be in place by the end of 2018 which would require each European Union member State to submit an integrated national energy and climate plan (NECP) by the end of 2018. Once in place, the NECP would supersede the NREAP. The Committee accordingly invites the United Kingdom in its second progress report to provide relevant evidence to demonstrate that it met the requirements of article 7 of the Convention in the preparation of its NECP.

106. The Committee finds that the United Kingdom has not met paragraph 2(e) of decision VI/8k and expresses its extreme disappointment at the lack of any effort by the United Kingdom to report upon any measures it has taken to fulfil the requirements of paragraph 2(e).

Paragraph 6 of decision VI/8k

107. With respect to paragraph 6 of decision VI/8k, in its first progress report the United Kingdom does not report any progress as regards the allocation of costs in private nuisance proceedings, but only that it continues to engage with key stakeholders to consider options.[83] The communicants of communications ACCC/C/2013/85 and 86 in their comments on the first progress report submit that the United Kingdom fails to address and report on the recommendations in the decision relating to private nuisance proceedings.[84] In this regard, the communicants recall the proposal they have submitted to the United Kingdom and the Committee on how CPR 44.13 could be amended to address the non-compliance at issue.[85]

108. The United Kingdom has not provided the Committee with any evidence that it has taken practical or legislative measures to ensure that procedures in private nuisance proceedings, where there is no fully adequate alternative procedure, are not prohibitively expensive. Consequently, the Committee finds that the United Kingdom has not yet met paragraph 6 of decision VI/8k.

[80] ECE/MP.PP/C.1/2010/6/Add.3, para. 138.
[81] Party's first progress report, 1 October 2018, p. 8, referring to the Party's first progress report, 29 December 2014, para. 31.
[82] ECE/MP.PP/2017/46, para. 101.
[83] Party's first progress report, 1 October 2018, para.5.
[84] Comments from the communicants of communications ACCC/C/2013/85 and 86 on the Party's first progress report, 24 October 2018, p. 1.
[85] Ibid., and statement to the Committee's 60th meeting, including annex 1, by the communicants of communications ACCC/C/2013/85 and 86, 13 March 2018.

Paragraph 8(a) and (b) of decision VI/8k

Relevant legal framework

109. With respect to paragraph 8 of decision VI/8k, in its first progress report the United Kingdom refers to a procedure it submits is contained in its Planning Advice Note 12, which was issued in March 2018, particularly sections 6 and 7.[86] It claims that, under this new procedure, "all Espoo and Aarhus states will be informed of applications for new nuclear power stations".[87]

110. The Committee welcomes the reported development of a new procedure regarding nuclear power stations but, on the basis of the information provided in the United Kingdom's first progress report, is not convinced that the reported new procedure is sufficient to ensure that the requirements of paragraph 8(a) and (b) of decision VI/8k are met.

111. Firstly, the United Kingdom has not explained how Planning Advice Note 12 establishes a "clear requirement" to ensure that the requirements of paragraph 8 of decision VI/8k are met. The Committee invites the United Kingdom, in its second progress report to provide the text of Planning Advice Note 12 and to clarify the following:

(a) Are the Planning Inspectorate and other public authorities involved in the decision-making procedure legally required to comply with Planning Advice Note 12? If so, in what legal text (e.g. legislation or court decision) is that obligation laid down? The United Kingdom is invited to provide the relevant legal text together with its second progress report.

(b) If either the Planning Inspectorate or other public authorities involved in the decision-making procedure fail to exactly follow the advice in Planning Advice Note 12, could this failure be successfully challenged through judicial or administrative review? The United Kingdom is invited to provide relevant decisions by courts or other review bodies with its second progress report to substantiate its reply.

112. Secondly, the Committee highlights that paragraph 8 of decision VI/8k does not apply only to "new nuclear power stations" as the United Kingdom in its first progress report apparently seems to believe.[88] Paragraph 8(a) of decision VI/8k applies to <u>all</u> activities within the scope of article 6 that have "the potential for transboundary impacts". In turn, paragraph 8(b) of decision VI/8k applies to any ultra-hazardous activity within the scope of article 6 of the Convention, not just nuclear power plants.

113. Thirdly, the Committee makes clear that neither paragraph 8 of decision VI/8k nor article 6(2) is limited to the public concerned of "Espoo and Aarhus States" as the United Kingdom in its first progress report would appear to understand.[89]

114. As a Party to the Aarhus Convention, the United Kingdom has obligations under article 2(5) and article 6 of the Convention to ensure the effective participation of the public "affected or likely to be affected by, or having an interest in, the environmental decision-making",[90] irrespective of whether those persons reside in an Aarhus signatory state or not. The Committee reminds the United Kingdom that article 1 of the Convention expressly conveys the rights under the Convention to every person, not every citizen of a party to the Convention. Likewise, article 3(9) of the Convention makes clear that the public has the right to participate in decision-making without discrimination as to citizenship, nationality or domicile. Moreover, the right to participate applies to the public concerned from affected countries that are not Party to either the Aarhus Convention or Espoo Convention is explicitly stated in paragraph 23 of the Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters.[91]

[86] Party's first progress report, 1 October 2018, p. 8.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] See article 2(5) of the Convention.
[91] Available at https://www.unece.org/index.php?id=49142.

115. Bearing in mind the points in paragraphs 112-114 above, the Committee invites the United Kingdom in its second progress report to clarify which provisions of Planning Advice Note 12 (or other legal text) requires public authorities:

(a) When selecting the means for notifying the public under article 6(2) of the Convention to select such means as will ensure effective notification of the public concerned in the territory outside of the United Kingdom, bearing in mind the nature of the proposed activity and the potential for transboundary impacts.

(b) When identifying who is the public concerned by the environmental decision-making on a nuclear power plant or other ultrahazardous activity, to apply the precautionary principle and consider the potential extent of the effects if an accident would indeed occur, even if the risk of an accident is very small.

Application of Planning Advice Note 12 in practice

116. In its first progress report, the United Kingdom states that the new procedure established by Planning Advice Note 12 in March 2018 has been implemented for the Wylfa Newydd nuclear power plant project.[92] Specifically, it states that all States party to the Espoo or Aarhus Conventions were informed of the Wylfa Newydd application and that "further steps" were taken to inform the public concerned about the project through its embassies and websites in States where significant public interest had been established (or where requested). The United Kingdom states that the number of States in which this was conducted was higher than those in which a likely significant effect was identified.[93]

117. According to a letter of the United Kingdom's Planning Inspectorate of 14 September 2018, the entity responsible for carrying out the Wylfa Newydd permitting procedure, to the communicant of communication ACCC/C/2013/91:[94]

> "the British Embassies located in States that registered an interest in participating in the transboundary EIA consultation procedures issued a press notice on 6 July 2018. The notice explained how members of the public in those States could register as an Interested Party to the examination. The decision as to whether or not the press notice should be translated (and if/how it should be cascaded to the press) was left to the discretion of each Embassy on the basis that they are best placed to determine the level of public interest in the application in the States concerned."

The Planning Inspectorate's letter furthermore indicates that the British Embassy in Berlin chose to translate the press notice for the Wylfa Newydd nuclear power plant into German.[95]

118. The Committee welcomes the United Kingdom's statements in its first progress report that "the public concerned was informed about the Wylfa Newydd project through local UK Embassies and websites, in States where significant public interest has been established (or where requested)" and that "the States in which this was conducted went further than those in which a likely significant was identified."[96]

119. However, the Committee considers that the Planning Inspectorate's letter of 14 September 2018 raises a number of questions regarding how the notification of the public concerned in other States was actually carried out in practice.

120. Firstly, according to the Planning Inspectorate's letter of 14 September 2018, "the British Embassies located in States that registered an interest in participating in the EIA transboundary consultation procedures issued a press notice on 6 July 2018". From this statement it would appear that only the public in those States that had themselves registered an interest to participate in the transboundary procedure were notified of their opportunity to participate. The Committee reminds the United Kingdom that the rights of the public under

[92] Party's first progress report, 1 October 2018, p. 8.
[93] Ibid., pp. 8-9.
[94] Annex 2 to the comments from the communicant of communication ACCC/C/2013/91 on the Party's first progress report, 29 November 2018, p. 2.
[95] Ibid.
[96] Party's first progress report, 1 October 2018, pp. 8-9.

the Aarhus Convention are free-standing and do not depend upon whether the government of the State in which they live exercises its own rights under a different international instrument.

121. Secondly, in its letter of 14 September 2018, the Planning Inspectorate stated that British embassies were given the discretion as to "if/how" the press release should be cascaded to the press "on the basis they were best able to assess the level of public interest".

122. Based on the points in paragraphs 120 and 121 above, the Committee invites the United Kingdom in its second progress report to provide the text of the press release of 6 July 2018 and to clarify:

(a) What instructions or other guidance was provided by the Planning Inspectorate to the British embassies with respect to how the public concerned should be identified and notified of the Wylfa Newydd project? The United Kingdom is invited to provide the text of these instructions or guidance, together with its second progress report.

(b) Does the United Kingdom consider that the issuance of the press release on 6 July 2018 in itself fulfilled the requirement in article 6(2) of the Convention to inform the public concerned in an adequate and effective manner? If not, what further steps were taken to ensure that the public concerned was informed in an adequate and effective manner?

(c) Which States had the United Kingdom identified to be potentially affected States for the purposes of the transboundary EIA procedure?

(d) Which States registered an interest in participating in the transboundary EIA procedure?

(e) In which States was the public concerned informed about the Wylfa Newydd project by the local British embassy?

(f) For each State in which the public concerned was informed about the Wylfa Newydd project by the local British embassy, through which mediums were the public concerned in that State informed (e.g. embassy website, local newspaper, national newspaper, public notice board in local libraries etc.) and in which language(s)?

123. Finally, the Committee notes that in her letter of 7 August 2018 to the United Kingdom's Secretary of State for Business, Energy and Industrial Strategy concerning the Wylfa Newydd project,[97] the communicant of communication ACCC/C/2013/91 requested translation into German of the Planning Inspectorate's Planning Advice Note 8.2, which relates to the procedure for a member of the public to register as interested party, and the online registration form for doing so.[98] In its reply of 14 September 2018, the Planning Inspectorate indicated that, given the deadline for registration as an interested party for the Wylfa Newydd project had passed, it did not intend to translate Planning Advice Note 8.2 or the online registration form.[99] It noted, moreover, that the communicant had successfully registered as an interested party, along with other members of the public and NGOs in Germany.[100] The Planning Inspectorate stated that it would "continue to consider reasonable requests to translate documents in respect of the application made by affected EEA State(s) and/or other relevant state(s) including their public in accordance with Planning Advice Note 12."[101]

124. The Committee points out that, while the Secretary of State's reply of 14 September 2018 was sent after the registration deadline of 13 August had passed, the communicant's request was made on 7 August, i.e., prior to the expiry of the registration deadline. The Committee finds it concerning that the United Kingdom relied on its own delay

[97] Annex 1 to the comments from the communicant of communication ACCC/C/2013/91 on the Party's first progress report, 29 November 2018.
[98] Comments from the communicant of communication ACCC/C/2013/91 on the Party's first progress report, 29 November 2018, and annex 1, pp. 2-3.
[99] Annex 2 to the comments from the communicant of communication ACCC/C/2013/91 on the Party's first progress report, 29 November 2018, p. 1.
[100] Ibid.
[101] Ibid.

in replying to justify why it would not translate the requested registration form and Planning Advice Note on how to register to participate. Moreover, just because the communicant and some other members of the public and NGOs in Germany were able to complete the registration form in English, it cannot be presumed that all, or even most, members of the public concerned in Germany would have been able to do so.

125. The Committee considers that it goes without saying that the requirement for public authorities to "select such means as will ensure effective notification of the public concerned in the territory outside of the Party concerned" in paragraph 8(a) of decision VI/8k includes not only the mediums through which the notice is to be conveyed (e.g. newspapers, websites etc.) but also the language(s) in which this is done. The Committee also considers that information on how to register to participate clearly falls within the required content of notification regarding the opportunities to participate in accordance with article 6(2)(d)(ii).

126. However, having not been provided with the press release dated 6 July 2018 and the United Kingdom's replies to the questions in paragraph 122 above, the Committee is not in a position to ascertain whether that press release can be considered to have already adequately and effectively notified the public concerned of its opportunities to participate in accordance with article 6(2)(d)(ii) and thus whether or not any further translation would have been required at that point. The Committee will thus examine this point further in its second progress review once it has received the United Kingdom's replies to the questions raised in paragraph 122 above.

127. In light of the above, whilst noting the developments reported by the United Kingdom in its first progress report, the Committee finds that the United Kingdom has not yet demonstrated that it has fulfilled the requirements of paragraphs 8(a) and (b) of decision VI/8k.

Other matters – the promptitude requirement in England and Wales

128. In their comments of 31 October 2018, ClientEarth, RSPB and Friends of the Earth state that it is erroneous to think that the requirement that claims be "promptly" filed is no longer a problem in England and Wales. They claim that the requirement still applies to environmental cases brought under domestic law in England and Wales, for example, a judicial review based on the Climate Change Act 2008.[102]

129. The Committee notes that the above, if correct, would put into question the Committee's finding in its report to the sixth session of the Meeting of the Parties that the United Kingdom had met the requirement of paragraph 8(c) and (d) of decision V/9n with respect to time limits for judicial review in England and Wales.

130. That finding was based on the United Kingdom's statement in its second progress report on decision V/9n that, with respect to England and Wales:[103]

> "In practice, following the *Uniplex* decision courts will not apply the "promptly" limit and will regard the point at which time starts to run for challenging a decision or action as being the date of the decision or action or its communication, and of a continuing omission or other continuing state of affairs as being when the claimant knew or ought to have known that there were grounds for challenge."

131. The Committee accordingly invites the United Kingdom together with its second progress report to comment on the above assertion and clarify whether the "promptly" requirement is still applicable in environmental cases brought under domestic law in England and Wales.

[102] Comments from the communicant of ACCC/C/2008/33, ClientEarth, and observers RSPB and Friends of the Earth on the Party's first progress report, 31 October 2018, p. 7.
[103] Party's second progress report on decision V/9n, 13 November 2015, para. 20.

IV. Conclusions

132. The Committee finds that the United Kingdom has not yet met the requirements of paragraphs 2(a)-(e), 4, 6 and 8(a) and (b) of decision VI/8k.

133. The Committee reminds the United Kingdom of its obligation to submit by 1 October 2019 a comprehensive second progress report with clear and detailed information on the measures taken and the results achieved in the implementation of each of the recommendations in paragraphs 2(a)-(e), 4, 6 and 8(a) and (b) of decision VI/8k.

134. With respect to paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k, the Committee invites the United Kingdom in its second progress report to:

(a) Provide the texts of all legislative, regulatory, administrative and practical measures it has by then taken to fulfil paragraphs 2 (a), (b) and (d) and 4 of decision VI/8k, clearly indicating when each measure entered into force, as well as to provide the texts of any such measures then in draft form together with the expected timeline for their adoption.

(b) To structure its second progress report in a format that clearly addresses:

(i) For England and Wales, each of the matters listed in paragraph 29 above;

(ii) For Scotland, each of the matters listed in paragraphs 78 and 91 above;

(iii) For Northern Ireland, each of the matters listed in paragraph 93 above.

(c) In addition, comment on the points in paragraphs 33, 4445, 59, 64, 67, 76 and 92.

135. With respect to paragraphs 2(c) and (d) of decision VI/8k, the Committee invites the United Kingdom, in its second progress report to:

(a) To submit the text of the relevant measure removing the requirement for promptitude in the Rules of the Court of Judicature (Northern Ireland);

(b) To clarify at what point the time limit for bringing a claim for judicial review in Northern Ireland now starts to run.

136. With respect to paragraph 2(e) of decision VI/8k, the Committee invites the United Kingdom, in its second progress report to provide relevant evidence to demonstrate that it met the requirements of article 7 of the Convention in the preparation of its integrated national energy and climate plan.

137. With respect to paragraph 6 of decision VI/8k, the Committee invites the United Kingdom, in its second progress report to provide the texts of all legislative measures and an explanation of all practical measures it has by then taken to fulfil paragraph 6, clearly indicating when each measure entered into force, as well as to provide the texts of any such measures then in draft form together with the expected timeline for their adoption.

138. With respect to paragraph 8(a) and (b) of decision VI/8k, the Committee invites the United Kingdom, in its second progress report:

(a) To provide the text of Planning Advice Note 12 and to clarify the following:

(i) Is the Planning Inspectorate and other public authorities involved in the decision-making procedure legally required to comply with Planning Advice Note 12? If so, in what legal text (e.g. legislation or court decision) is that obligation laid down? The United Kingdom is invited to provide the relevant legal text together with its second progress report.

(ii) If either the Planning Inspectorate or other public authorities involved in the decision-making procedure fail to exactly follow the advice in Planning Advice Note 12, could this failure be successfully challenged through judicial or administrative review? The United Kingdom is invited to provide relevant decisions by courts or other review bodies with its second progress report to substantiate its reply.

(b) To clarify which provision of Planning Advice Note 12 (or other legal text) requires public authorities:

(i) When selecting the means for notifying the public under article 6(2) of the Convention, to select such means as will ensure effective notification of the public concerned in the territory outside of the United Kingdom, bearing in mind the nature of the proposed activity and the potential for transboundary impacts?

(ii) When identifying who is the public concerned by the environmental decision-making on a nuclear power plant or other ultrahazardous activity, to apply the precautionary principle and consider the potential extent of the effects if an accident would indeed occur, even if the risk of an accident is very small?

(c) To provide the text of the press release of 6 July 2018 and to clarify:

(i) What instructions or other guidance was provided by the Planning Inspectorate to the British embassies with respect to how the public concerned should be identified and notified of the Wylfa Newydd project? The United Kingdom is invited to provide the text of these instructions or guidance together with its second progress report.

(ii) Does the United Kingdom consider that the issuance of the press release on 6 July 2018 in itself fulfilled the requirement in article 6(2) of the Convention to inform the public concerned in an adequate and effective manner? If not, what further steps were taken to ensure that the public concerned was informed in an adequate and effective manner?

(iii) Which States had the United Kingdom identified to be potentially affected States for the purposes of the transboundary EIA procedure?

(iv) Which States registered an interest in participating in the transboundary EIA procedure?

(v) In which States were the public concerned informed about the Wylfa Newydd project by the local British embassy?

(vi) For each State in which the public concerned were informed about the Wylfa Newydd project by the local British embassy, through which mediums were the public concerned in that State informed (e.g. embassy website, local newspaper, national newspaper, public notice board in local libraries etc.) and in which language(s)?

139. Finally, the Committee invites the United Kingdom, together with its second progress report, to clarify whether the "promptly" requirement is still applicable in environmental cases brought under domestic law in England and Wales.
