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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10
Switzerland
(By email only)

Wednesday 30 September 2020

Dear Ms Marshall,

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

Thank you for enclosing the Compliance Committee's second progress review on the implementation of Decision VI/8k concerning compliance by the United Kingdom. I have set out below the United Kingdom's Third Progress Report regarding the recommendations included in paragraphs 2, 4, 6 and 8 of Decision VI/8k.

Yours sincerely,

Danielle Angelopoulou

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

England and Wales

1. Firstly, we would like to express on the record our 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.

2. We note that the Committee has asked for data in a number of areas and/or information about how particular provisions of the ECPR are working in practice. We also note that the Committee expressed its interest in the ECPR review and asked to be kept informed of developments relating to that.

3. It is therefore important to explain that the ECPR review has not yet taken place due to the need to direct resources since March 2020 to urgently responding to, handling and recovering from the unprecedented Covid-19 pandemic. Notwithstanding that, the UK Government has committed to undertaking a review of the ECPR in England and Wales. The Government will set out further details of the review in due course, such as its timing, form and scope, including with regard to the various issues referenced in this response.

Types of claims covered

4. The UK Government has committed to undertaking a review of the ECPR, and the current view is that this is the most appropriate vehicle with which to consider the scope of the ECPR with respect to private nuisance claims.

Eligibility for costs protection

5. We are pleased to note that the Committee finds no evidence that the UK Government 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.

6. The communicant Friends of the Earth and RSPB in their letter to the Committee dated 13 March 2020, under the heading “eligibility for costs protection”, referred to two High Court cases in which an individual has been the claimant in a challenge brought by an unincorporated association. In both cases the court ordered a costs cap of £10,000 rather than £5,000, apparently following submissions from the defendants. It is not clear what point the communicant makes about eligibility for costs protection through these cases. In both cases the unincorporated associations did receive the benefit of the ECPR. Copies of the orders have not been provided nor have we found any published judgment, so we do not have the detailed reasons and evidence upon

which these decisions were made. However, as we previously explained in the second progress report, where an unincorporated association has its own separate finances and funding support, then this will be taken into account by the court since the members of the association have the benefit of those finances and equally will be liable for the debts of the association.

7. We therefore maintain that UK authorities have not been made aware of any instances where unincorporated associations have faced significant problems in bringing legal proceedings or in gaining the protection of the ECPR in Aarhus claims. We consider the Committee will consider this issue satisfied.

Level of costs caps

(a) Default levels of costs caps

8. We note the comments of the Committee and conclude 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.

(b) Variation of costs caps

9. In the second progress report, we set out the provisions of Civil Procedure Rules (CPR) 45.44 with regard to variation of costs caps and explained how these are intended to work.

10. The Committee in its review asked for some data about the number of applications to vary costs caps made in relation to Aarhus Convention claims and about the outcomes of such applications. The data we now provide was provided by the UK Government to Observers 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.

Period	Number of Judicial Review claims issued identified as Aarhus Claims	Total number of applications to vary costs caps made in acknowledgement of service by the defendant	Number of applications to vary cost cap after AOS	Number of applications in which court ordered a variation of the costs caps - to increase
01/06/18-14/05/19 (11.5 months)	119	20	2	4
28/02/17-31/05/18 (15 months)	160	19	0	3

11. The number of applications for judicial review identified as Aarhus Convention Claims on the claim form 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, using data provided by the UK Government)[1].

12. The above table shows that in a period of 27 months, of the 279 applications for judicial review which were identified as Aarhus Convention claims on the claim form, the defendant sought to vary the costs caps in 39 cases (13%) and the court ordered a variation in 7 cases (2.5%).

13. Further, the data shows that of the applications to vary the cost caps made, the clear majority 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 where a variation was ordered, 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.

14. This is a relatively small sample of data and it is difficult to draw definitive conclusions, however, we suggest it is evidence that the rules for applying for a variation of the costs caps are working as intended (explained in the UK's second progress report). This is supportive of our contention that the rules do provide a clear, transparent and consistent framework to ensure that costs are not prohibitively expensive for claimants.

15. 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.

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

16. It is clear in the wording of the CPR that any defendant wanting to seek a variation of the costs caps must do so at the outset of an application for judicial review. The Committee is invited to consider the data provided above in relation to the issue of the whether the rules provide certainty and transparency for claimants around their cost liability. The data shows overwhelmingly that defendants seeking a variation of costs caps do so at the outset as required by the rules. The very small number of applications brought beyond that stage reflect the intention of the rule that it should be *possible* to bring an application later, but it should be a very unusual event.

Costs for procedures with multiple claimants

17. In relation to this issue, the Committee comments on whether the cost caps reflect the actual costs of the other parties, and on whether members of the public should be entitled to share a cost burden. We note those comments but respectfully submit that they are not the measure of compliance with the

[1] Annex A – A Pillar of Justice, Friends of the Earth and RSPB (2019)

Convention. The central issue is whether the provisions made by the Civil Procedure Rules are fair and ensure that the cost of bringing Aarhus Convention proceedings is not prohibitively expensive for a claimant.

18. The Committee has concluded that the provision of default cost caps with a mechanism for varying that default amount up or down, meets the requirements of the Convention and paragraphs 2(a), (b) and (d) and 4 of decision VI/8k. In this way, the rules satisfy the requirement that proceedings are not prohibitively expensive for any one claimant.

19. Where there are multiple claimants we have provided reasons why, within a framework which ensures the cost of proceedings is not prohibitively expensive for any single claimant, we consider it fair to each claimant that a separate cost cap applies. This applies both ways, so where there are three defendants and one claimant, each defendant will have a separate costs cap but the claimant has only one.

20. Further, and for the avoidance of doubt, we do not suggest that the reason for this rule is that where there are two claimants the costs of the defendant are doubled, or tripled with three claimants. However, again, we submit that this is not the measure of whether setting a default level of costs caps for each claimant makes the proceedings prohibitively expensive for the claimant or unfair. Multiple claimants or defendants do increase the administration of proceedings, and can increase the complexity of the legal arguments and matters to be addressed by the defendant and resolved by the court. The outcome in such cases may be equally complex, with the court upholding some claims and not others. The application of individual costs caps from the outset creates certainty and transparency for each claimant, and is fair as some claimants may succeed, and some fail.

Costs protection on appeal

21. We note the Committee's comments regarding costs at the appeal stage of proceedings. CPR Rule 52.19A requires the court to consider whether the costs of the proceedings will be prohibitively expensive for the party who was the claimant, and if so, to limit recoverable costs to the extent necessary to prevent this. For the reasons set out in the second progress report, we consider that the provisions as they stand are currently compliant.

Schedule of claimant's financial resources

22. We do not agree with the Committee's characterisation of CPR 39.2 as "maintaining public hearings for applications to vary costs caps with the possibility to grant an exception in order to protect confidential information". The rule applies to all court hearings, not simply those relating to costs caps in

Aarhus Convention claims. It asserts the fundamental principle of open justice, subject to an *obligation* to hold a private hearing to protect confidential information, including information relating to personal financial information.

23. We note the Committee's comments regarding the wording of CPR 45.42 and in particular the requirement to provide information "in relation to any financial support which any person has provided or is likely to provide to the claimant, the aggregate amount which has been provided and which is likely to be provided".

24. 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. This is the information upon which the claimant themselves make an application to vary the costs caps downwards or the defendant will make an application. The data provided at Paragraph 10 demonstrates that the clear majority of applications to vary cost caps are not dealt with at a hearing but on the papers at the point permission is determined by the court. We have only one court order made following an oral hearing (from the cases in the table at Paragraph 10) and this is not clear on its face whether the hearing was held in private or not.

25. 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. Further we are not aware of, nor have we been provided with any evidence of, any specific instances where claimants have encountered problems in this regard. We note the Committee refers to the Observer's request that we continue to monitor the effectiveness of CPR 39.2. We are unable at this time and for reasons set out above to collect further data in this regard.

Costs protection prior to grant of permission

26. We are pleased to note the Committee has concluded that in the light of information provided in the second progress report that the United Kingdom has demonstrated that it has met the requirements of paragraph 2(a), (b) and (d) and 4 with respect to costs protection prior to the grant of permission.

Costs relating to determination of an Aarhus claim

27. In the second progress report we recognised the *concerns* of parties, such as the Observers, that the change made to the ECPR in February 2017 could lead to defendants bringing more challenges to the assertion that a claim is an Aarhus claim, and could deter claimants from bringing claims. This does not equate to an acknowledgement that the concern is well founded or likely to be borne out. Further, we have seen no evidence of a sustained increase in applications to challenge whether a claim is an Aarhus claim.

Cross-undertakings for damages

28. We are not aware of concerns in practice on this, but the current view is that this is an issue that could be considered as part of the ECPR review.

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

29. We note the Committee's conclusion that as the UK Government has no plans to bring sections 85 and 86 of the Criminal Justice and Courts Act 2015 into force in the foreseeable future, that the requirements of paragraphs 2(a), (b) and (d) and 4 have been met with respect to costs orders against funders of litigation.

30. In respect of interveners the Committee invites clarification regarding two matters. First, 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).

31. In relation to the first point, the wording of CPR 45.41-45 refers only to claimants and defendants and therefore there is no express application of these rules to any intervener. As stated in the UK's second progress report, the default position is that an intervener will not recover their costs of making the intervention from either of the parties unless the court considers there are exceptional circumstances. It is common practice that the issue of any liability of the parties to pay an interveners costs would be raised and agreed between the parties prior to an application to intervene being made. In the absence of agreement the Court would be asked to address the point as part of the order allowing (or not) the intervention. Accordingly, common practice would ensure that the costs liability of an intervener is resolved at the point a party is given permission to intervene.

32. In relation to the second point, the wording of CPR 45.43(1) makes clear that the costs cap relates to the total 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.

Scotland

33. The Scottish Government would expect that the costs cap covers all of the costs of the procedure. There are no immediate developments with respect to amendment to the PEO rules. Court rules are the responsibility of the Scottish

Civil Justice Council. The Scottish Government will draw the Council's attention to the Committee's views but the timing of any further review of the rules is likely to be impacted by the Covid-19 emergency.

34. In response to Paragraph 105 of the Committee's second progress review: The Scottish Government understands that the rationale of the measure at Chapter 58A.5(3)(ii) that requires that the applicant lodge with the motion information concerning the terms on which the applicant is represented, is to enable the court to have the broadest possible understanding of the circumstances of an application and applicants, in order to make a determination as to whether to grant a Protective Expenses Order. We are not aware of any effect arising from this provision to date.

35. In response to Paragraph 106 of the Committee's second progress review: Similarly the Scottish Government understands that the purpose of the measure Chapter 58A.5(3)(iv), requiring evaluation of expenses of each other party for which the applicant may be liable in relation to the proceeding based on estimates, is to enable the court to have an approximation, produced in good faith, of the likely expenses, with a view to having as broad an understanding as possible of the circumstances of an application.

36. In response to Paragraph 107 of the Committee's second progress review: The Scottish Government's understanding accords with the view of the Committee, namely that the costs of interveners do not form part of the cost caps. There is no special provision within the costs regime for interveners.

37. In response to Paragraph 108 of the Committee's second progress review: The Scottish Government would expect that court fees would be included in the costs regime. The Scottish Government is intending to consult about levels of court fees later in 2020.

38. In response to Paragraph 109 of the Committee's second progress review: The Scottish Government is unaware of any PEO applications that have required a written hearing.

39. In response to Paragraph 110 of the Committee's second progress review: The Scottish Government consulted on proposals for reform of Legal Aid in Scotland between June and September 2019. The consultation sought views on developing a user-centered, public service, and analysis of the responses was published on 16 June 2020.[2] The majority of respondents agreed that the current model of provision could be strengthened. Overwhelmingly respondents supported not only retaining the current scope of legal aid but also widening it, specifically referencing legal aid provision for group actions, tribunals and issues relating to Human Rights. The Scottish Government will continue to engage with key stakeholders during the development of a Bill to establish how

[2] Annex B – Consultation Response, Legal Aid Reform Scotland (2020)

best to accommodate supported reforms, where possible. It is intended for a Bill to be introduced in the first session of the next Parliament.

40. The Scottish Government is also considering the possibility of making the Aarhus Convention justiciable within Scots law. The recommendations of the First Minister's Advisory Group on Human Rights Leadership can be found on page 9 of its Final Report[3]. Legislation may follow in the next Parliament.

Northern Ireland

41. While there are no plans to extend the costs protection regime to private nuisance claims, this will be kept under review. We will take into account any developments on this issue in the other UK legal jurisdictions and the views of stakeholders, including the NGOs in the environmental justice field with whom. Northern Ireland ministers engage.

42. We do not have evidence on cross-undertakings for damages as we do not record when applications for injunctions are sought. We will explore the practicalities of our courts recording this information.

Expansion of cost protection to private nuisance (Recommendations in paragraph 6 of Decision VI/8k)

43. The UK Government has committed to undertaking a review of the ECPR, and the current view is that this is the most appropriate vehicle with which to consider the scope of the ECPR with respect to private nuisance claims.

Consulting on plans similar to the National Renewable Energy Action Plan (NREAP) (Recommendation in paragraph 2(e) of Decision VI/8k)

44. As noted previously, the UK's draft National Energy and Climate Plan (NECP) of December 2018 refers to the consultation process in the context of developing energy and climate policy. We have carried out a number of consultations on policy areas that come under the five dimensions of the Energy Union in the NECP; these are listed in Annex J at figure 3, pp.16-18[4].

[3] Annex C - First Minister's Advisory Group on Human Rights, Final Report (2018)
[4] Annex D - UK draft National Energy and Climate Plan (2019)

45. The legal requirement to consult on and submit a NECP comes from the EU's Governance Regulation[5] – which has direct effect in UK law. Therefore, the UK was not required to transpose/legislate the requirement to consult[6] on the NECP as UK Government is legally required to comply with the Governance Regulation.

46. The UK is committed to proper public participation in government policy-making. Our current Consultation Principles, included in the UK government's statement delivered at the open session on decision VI/8k at the Compliance Committee's 66th meeting, and again here[7], show that the UK is committed to enabling scrutiny through informative, targeted and proportionate consultation.

47. In the area covered by the NREAP and NECP, BEIS continually engages with the public on various policies and measures via consultation. An updated list of live and closed BEIS consultations is available online[8] and can be filtered to show climate and energy related interests.

Consulting the public in other States on projects with transboundary impacts (Recommendations in paragraphs 8(a) and 8(b) of Decision VI/8k)

Relevant legal framework

48. All Nationally Significant Infrastructure Projects (NSIP) decisions are made by a Secretary of State on advice from civil servants. The Aarhus requirements in Advice Note 12 are a reflection of the international law obligations on the Secretary of State and those advising him. The UK Government does not therefore accept that it has to bind itself by legislation to ensure that the content of Advice Note 12 are followed by the Secretary of State.

49. In any event, the Courts in the UK have made clear that where the Secretary of State has set out in guidance how he will exercise his powers he must act in accordance with that guidance unless there are good reasons not to. It would be very difficult for a Secretary of State to maintain that there is a good reason for breaching international law. The legal position is set out by Lord Justice Laws in the case of R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363: "*68 … Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition?*

[5] Annex E - Article 3 (Integrated national energy and climate plans), Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action

[6] Annex F - Article 10 (Public consultation), Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action

[7] Annex G - UNECE Consultation Principles 2018

[8] BEIS Consultations: https://beisgovuk.citizenspace.com/

It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public." The Supreme Court restated that position last year in Hemmati v Secretary of State for the Home Department [2019] UKSC 56: "*In broad terms and as Laws LJ explained in R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363, para 68, where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law requires that promise or practice to be honoured unless there is good reason not to do so. Moreover, the court is the final arbiter of what a policy means: Kambadzi, at para 36, per Lord Hope; Mandalia v Secretary of State for the Home Department [2015] UKSC 59; [2015] 1 WLR 4546, para 31, per Lord Wilson of Culworth. It is also well established that compliance with such a policy is enforceable by individuals before the courts*."

50. In response to Paragraph 137 of the Committee's second progress review: There is no such limitation in the first bullet of 7.1.1. The text reads "from the public in EEA States(s) and other relevant states".

51. In response to Paragraph 138 of the Committee's second progress review: Once again, we would highlight that 7.1.1 refers to "other relevant states". The decision on which these states are is decided on a case by case base, taking into account the specific nature of the project, but will always include our closest neighbouring states where we know that the public has an interest. There is no process in the UK infrastructure planning system for individual notification of the public; such notification is carried out by public notice.

52. In response to Paragraph 139 of the Committee's second progress review: A revised Advice Note 12 will shortly be published which reflects the UK's updated process for notifying the public. In addition to the press release published by the Planning Inspectorate on the Embassy website of all Aarhus states, the developer is also asked to publish a press notice in the print media of neighbouring States, as well as any State where a transboundary impact has been identified. We consider our neighbouring states to be Belgium, Denmark, France, Germany, Ireland, Luxembourg, the Netherlands and Norway. We also have an agreement with the Austrian Government that we will inform the Austrian State of all nuclear projects. Consequently, for this purpose they are also treated as a neighbouring state.

53. In response to Paragraph 140 of the Committee's second progress review: As stated above, a revised Advice Note 12 will shortly be published which reflects the UK's updated process for notifying the public. Reference to reasonable efforts has been removed. In addition to the press release published by the Planning Inspectorate on the Embassy website of all Aarhus states, the developer will also be asked to publish a press notice in the print media of

neighbouring States, as well as any State where a transboundary impact has been identified.

Application of Planning Advice Note 12 in practice – notice of the Wylfa Newydd project

54. In response to Paragraph 145 of the Committee's second progress review: The reference to a press release is reference to the press notice issued by the Planning Inspectorate and placed on the Embassy websites of all Aarhus states. Advice Note 12 has been amended to clarify this and will be published shortly.

55. In response to Paragraph 146 of the Committee's second progress review: The UK believes that the provision of the notice in English, French and German was sufficient to reach the public concerned in that matter. However, the press notice issued by the Inspectorate will now be provided in the primary languages of all our neighbouring States (Danish, Dutch, French, German, and Norwegian) as well as any State where a transboundary impact has been identified. Additionally, the developer will also be asked to publish a press notice in the print media of neighbouring States, as well as any State where a transboundary impact has been identified.

56. In response to Paragraph 139 of the Committee's second progress review: Further instructions on how to register have now been included in the press notice itself which has been translated into the primary languages of all our neighbouring states.

57. In response to Paragraph 148 of the Committee's second progress review: The UK is taking a precautionary approach. For each site there is a screening process to assess likely significant transboundary impacts, as required by the EIA Regulations. For Wylfa Newydd that process identified a potential impact only on Ireland. The UK does not accept that, with its robust regulatory regime, there is any likelihood of such an accident. However the UK accepts that it should take a precautionary approach and that there may be public concerned in states where no likely significant environmental effect is assessed, and has set up a process to inform the public concerned in other states where no likely significant effect is identified.

58. In response to Paragraph 144 of the Committee's second progress review: On (a) and (f) we do not have a record of this information. A revised Advice Note 12 will shortly be published which reflects the UK's updated process for notifying the public. In addition to the press release published by the Planning Inspectorate on the Embassy website of all Aarhus states, the developer is also asked to publish a press notice in the print media of neighbouring States, as well as any State where a transboundary impact has been identified.

Promptitude requirement in England and Wales

59. We note the Committee's statement that it will not examine this issue any further within decision VI/8k.

Annexes

- Annex A – A Pillar of Justice, Friends of the Earth and RSPB (2019)
- Annex B – Consultation Response, Legal Aid Reform Scotland (2020)
- Annex C - First Minister's Advisory Group on Human Rights, Final Report (2018)
- Annex D - UK draft National Energy and Climate Plan (2019)
- Annex E - Article 3 (Integrated national energy and climate plans), Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action
- Annex F - Article 10 (Public consultation), Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action
- Annex G - UNECE Consultation Principles 2018