Department for Environment Food & Rural Affairs

www.gov.uk/defra

Nobel House
Area 2D
17 Smith Square +44 (0) 208 026 0028
London Nikita.Bhangu@defra.gsi.gov.uk
SW1P 3JR

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)
1 October 2018

Dear Ms Marshall

Re: Decision VI/8k concerning compliance by the United Kingdom with its obligations under the Aarhus Convention

In accordance with paragraph 9 of decision VI8k, the United Kingdom provides the Compliance Committee with an update regarding the recommendations included in decision VI/8k.

4: Recommends the UK ensure its Civil Procedure Rules regarding costs are applied by its courts so as to ensure compliance with the Convention.

6: Recommends the UK review its system for allocating costs in private nuisance proceedings within the scope of article 9, paragraph 3, 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

Recommendations included in paragraphs 4 and 6 of decision VI/8k

England & Wales – overview of the main changes to the environmental costs protection regime

1. In 2013 the Government introduced an Environmental Costs Protection Regime ('ECPR') for England and Wales which fixed the costs that a court could order an unsuccessful claimant to pay to other parties. Following judgments by the UK

Supreme Court and the European Court of Justice1 which clarified the requirements for costs to be "not prohibitively expensive", the Government proposed to amend the ECPR in line with those judgments, and in a manner which allowed claims to be brought without prohibitive expense, whilst not encouraging unmeritorious claims. A public consultation took place between September and December 2015, and the Government published its response on 17 November 2016 2, setting out which changes the Government proposed to implement in light of the responses received. Following consultation, the Government settled on an approach designed to balance the interests of claimants and defendants (including both external bodies and the Government and its agencies) in light of developments in case law.

2. The new rules amended Section VII of Part 45 of the Civil Procedure Rules (CPR), related parts of the CPR and associated Practice Directions. These changes were made by the statutory instrument, the Civil Procedure (Amendment) Rules (SI 2017/95)[3]. The statutory instrument was laid before Parliament on 3 February 2017 and the changes in respect of Aarhus Convention claims came into effect on 28 February 2017.

3. As before, the new arrangements start with a default costs cap on the liability of an unsuccessful claimant in such a case to pay the defendant's costs of £5,000 or £10,000 (depending on whether the claimant is an individual or not), with a cross cap of an unsuccessful defendant's liability to pay the claimant's costs of £35,000. The previous regime had fixed capped costs in these amounts.

4. The February 2017 changes introduced several new provisions, which included:

   (i) extending the scope of the ECPR to cover a wider range of cases - including environmental reviews under statute engaging EU law, as well as judicial reviews;

   (ii) giving courts the power to vary the level of the costs cap from their default levels, provided always that any change does not render the cost of proceedings prohibitively expensive for the claimant. When a claimant begins proceedings, there is a default cap (£5,000 for an individual or £10,000 for a group or organisation), but the court may vary that cap, downwards or upwards, in the light of the schedule of means provided by the claimant. This principle applies similarly to defendants, for whom the default cap is set at £35,000;

   (iii) a provision that when considering an application to vary the cap, the court must take into account the amount of court fees payable by the claimant in determining whether the variation (or a failure to make it) would render the proceedings "prohibitively expensive" for the claimant;

   (iv) a requirement for the Court of Appeal to grant costs protection in appropriate cases;

[1]See *C-530/11 Commission v. United Kingdom* and *C260/11 Edwards*.

[2] https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/
[3] http://www.legislation.gov.uk/uksi/2017/95/article/8/made

(v) requiring the court, when assessing whether proceedings would be prohibitively expensive if the change is or is not made, to take into account a list of factors which mirrors those set out by the CJEU in the *Edwards* case; and

(vi) clarifying certain issues such as: that the ECPR can only be used by claimants who require costs protection because of EU law or the Aarhus Convention; the factors for a court to consider in ECPR cases when deciding whether to require a cross-undertaking in damages for an interim injunction; and that a separate costs cap applies to each claimant or defendant in cases with multiple parties

5. The Government also decided not to extend, at this stage, the scope of the ECPR so that it would apply to reviews under statute which engage Article 9(3) of the Convention or more widely, including private nuisance cases or to other types of cases which could be brought against private individuals. The 2017 changes were intended to address compliance with UK and EU law, including Case C-530/11. We are currently considering other issues covered by the Decision further and continue to engage with key stakeholders to consider options.

6. In July 2017, the High Court heard a judicial review by three NGOs (the Royal Society for the Protection of Birds, Friends of the Earth and Client Earth) challenging limited aspects of the revisions to the ECPR. The claimants, however, did not challenge the court's power to vary the costs cap and had accepted that it was permissible under EU law to have such a model. The Government regards this as an important development given the general concerns raised about the variable costs cap model.

7. Judgment in the judicial review was given on 15 September 2017. In summary, the court concluded that the costs protection regime as amended in February 2017 is compliant with EU law in that claimants are not expected to pay above their means to bring environmental claims, save in one respect (private hearings). The Government also accepted the Court's recommendation that the rules would benefit from clarification to reflect the agreed understanding of how they are intended to operate, thereby providing certainty and minimising any possible "chilling effect".

8. In relation to private hearings, 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.

9. The proposed change to the Practice Direction, which would give effect to the High Court's judgment, was not taken forward immediately because the Civil Procedure Rule Committee - which is chaired by the Master of the Rolls and is responsible for making the rules of court for the Civil Division of the Court of Appeal, the High Court and the County Court - was undertaking a comprehensive open justice review, including examination of the provisions in the Civil Procedure Rules governing when hearings must be held in private. The Government published a consultation on 12 July 2018[4] on changes to Part 39 of the Civil Procedure Rules: '*Miscellaneous provisions relating to* hearings'. The

[4] https://consult.justice.gov.uk/digital-communications/part-39-civil-procedure-rules-proposed-changes/

proposed changes in this consultation have been drawn up to clarify open justice requirements in relation to hearings in private reaffirming the default position that hearings should be in public unless publicity would defeat the object of the hearing. The consultation closed on 23 August 2018 and the Government will consider the appropriate way forward in light of the responses received.

10. Pending the outcome of that review, arrangements have been put in place by the Administrative Court (including the Planning Court), to ensure, and ensure that litigants, lawyers and court staff are aware, that any hearing of an application for variation of costs cap will be heard in private until further notice[5].

11. The Government has accepted the Court's recommendations on clarification and have made amendments to that effect, which are:

    (i) clarifying 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;

    (ii) clarifying that the court may vary a costs cap only on an application made by the claimant or the defendant; and

    (iii) clarifying that an application to vary the costs cap must be made at the outset – either in the claim form (if made by a claimant) or in the acknowledgment of service (if made by a defendant) – and must be determined by the court at the earliest opportunity; and that an application may only be made at a later stage in the process if there has been a significant change in circumstances.

12. As such, the Government laid before Parliament on 28 February 2018 'The Civil Procedure (Amendment) Rules 2018 (No.239/L.3)' 6 SI, which made some further amendments to the ECPR in line with the Court's recommendations. The revised ECPR came in to force on 6 April 2018.

13. Following the April 2018 changes, the Government believes that the policy position is settled for the time being, but we are committed to keeping the ECPR under review and will of course consider any developments in case law. We will formally review the ECPR when we have sufficient data to do so (which is likely to be by April 2020) and will publish its findings at that point.

Northern Ireland

Changes made

14. In Northern Ireland, the regulations already extend costs protection to applicants in statutory reviews as well as judicial reviews to the High Court of decisions within the scope of the Convention. The changes to the costs regime are as follows. On 23

[5] https://www.judiciary.gov.uk/publications/aarhus-convention-costs-capping-arrangements/
[6] http://www.legislation.gov.uk/uksi/2018/239/contents/made

January 2017, the Department of Justice in Northern Ireland made the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017 at http://www.legislation.gov.uk/nisr/2017/27/contents/made). The regulations came into force on 14 February 2017 and apply to proceedings commenced after that date. They made changes to the Costs Protection (Aarhus Convention) (Northern Ireland) Regulations 2013 (the original Regulations) in the following areas;

(a) Level of costs protection

15. The regulations as amended provide that, if an applicant loses, the maximum amount of costs that can be recovered from it will continue to be capped at current levels (£5,000 where the applicant is an individual and £10,000 in other cases) but be capable of being lowered if necessary to avoid prohibitive expense to the applicant. They provide that, if an applicant wins, the amount of costs that can be recovered by it from the respondent can be increased from the current cap of £35,000, again if this is necessary to avoid prohibitive expense to the applicant. The regulations as amended also provide that, in deciding whether a cap is prohibitively expensive, the court should have regard to the *Edwards* principles and any court fee that the applicant is liable to pay.

(b) Costs on appeal

16. The amended regulations apply a separate cap to appeals in Aarhus Convention cases. This is set at the same levels as is applied to first instances cases and the court has the same flexibility to vary the caps on appeal.

(c) Eligibility for costs protection

17. The amended regulations also make it clear (as was always intended) that only applicants that are members of the public (and not public bodies) are entitled to costs protection. The term ‘the public’ is defined with reference to the definition provided by the Aarhus Convention.

(d) Interim injunctions

18. The amended regulations provide that, in deciding whether to require a cross undertaking in damages in an Aarhus case, the court must have regard to the need for the undertaking not to be such that it would make continuing with the case prohibitively expensive. They direct the court to apply the Edwards principles when considering whether continuing with proceedings would be prohibitively expensive. They also make it clear that the provisions they contain in relation to cross undertakings in damages only apply to an applicant for an interim injunction who is a member of the public (as defined by the Convention).

Proposals not progressed

19. The Department of Justice in Northern Ireland did not proceed with the proposals it had made regarding multiple applicants, the disclosure of applicant finances, third party support and costs in unsuccessful status. Unsuccessful challenges to the status

of Aarhus cases in Northern Ireland, therefore, continue to be ordered on the indemnity basis. The amending regulations do not require an applicant to disclose its means or require the court to have regard to third party support or change to the costs position in cases involving multiple applicants or respondents.

20. The regulations apply in the Northern Ireland already extend costs protection to applicants in statutory reviews as well as judicial reviews to the High Court of decisions within the scope of the Convention.

Court fees

21. Regulations made on 16 January 2017 will introduce a phased increase to most civil court fees in Northern Ireland from 1 April 2017 (the first such increase since 2007). The fees applicable to judicial reviews (and statutory reviews) within the scope of the Aarhus Convention will, however, be exempt from the increase and retained at current levels (see Article 4 of the Court of Judicature Fees (Amendment) Order (Northern Ireland) 2017).

Scotland

22. The Scottish Civil Justice Council (SCJC) has responsibility for making court rules. On that basis, as noted in the progress report of 13th November 2015, the Scottish Government asked the SCJC to make the changes described in the progress report. The SCJC considered and agreed the draft rules at its meeting on 16th November 2015 (see paragraph 22 of the minutes[7]). The rules were amended with effect from 11th January 2016[4].

23. We welcome the Committee's view that the rules would enhance the compliance of the Scottish costs protection regime with the Convention and decision V/9n. In the progress report of 13th November 2015 we also advised that the SCJC had agreed that a small working group be established with a remit to consider the practical operation of the rules on PEOs.

24. At its meeting on 16th November 2015, the SCJC considered a short paper setting out the key issues (see paragraphs 23 to 25 of the minutes[8]). The SCJC agreed that key stakeholders would be asked to consider the paper and that there would be a report to the SCJC as a result of the consultations.

25. At its meeting on 3rd October 2016, the SCJC considered draft rules and agreed that there should be a consultation on the draft rules. It agreed that a revised draft of

[7] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-meeting-papers/16-november2015-meeting/minutes-16th-november-2015---approved.pdf?sfvrsn=2 [4] http://www.legislation.gov.uk/ssi/2015/408/pdfs/ssi_20150408_en.pdf

[8] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-meeting-papers/16-november2015-meeting/minutes-16th-november-2015---approved.pdf?sfvrsn=2 [6] http://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/consultation-on-draft-court-rules-in-relation-to-protective-expenses-orders

the rules alongside a consultation paper should be submitted for consideration at the next appropriate Council meeting. The SCJC considered the revised rules and consultation paper at its meeting on 20th March 2017.

26. The rule changes are aimed at addressing concerns that, in the light of experience, it has proved that applications for Protective Expenses Orders can be protracted and expensive. The proposals provide for a simplified and accelerated procedure for the determination of PEO applications and a restriction to be placed upon the liability in expenses for applicants in the event that an application is unsuccessful. The consultation paper issued on 28 March 2017[6].

27. Following the consultation the SCJC has been carefully considering the way forward and approved new court rules at its meeting of 9 July 2018 [9]. http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-meeting-papers/09-july-2018/draft-minutes---scjc-09-july.pdf?sfvrsn=2

28. It is expected that the new rules for Protective Expenses Orders will be brought forward shortly.

29. Separate to this work, the Scottish Government is considering environmental governance in the context of the UK's forthcoming exit from the European Union. A consultation on this is expected later this year.

Recommendations included in paragraph 8(c) of the decision

Northern Ireland:

30. We note the Committee's observations here that the only issue with regard to issue of time limits raised in paragraph 8(c) is in relation to Northern Ireland.

31. As noted by the Committee, following the *Uniplex* case, the 'promptly requirement' is disapplied by the courts in judicial review cases brought on European Union grounds in Northern Ireland. In practice therefore, compliance is achieved through these means.

32. In a consultation issued on 22 June 2015, the Department of Justice in Northern Ireland proposed to remove the requirement for all judicial review cases. The consultation closed on 14 September 2015 and a summary of response to it was published on 7 December 2015. As the proposal impacts on other Northern Ireland Departments, it was considered and agreed by the Northern Ireland Executive on 24 March 2016. This was followed by Assembly elections in May 2016.

33. In September 2016, the Civil and Family Justice Review Group was established to carry out a fundamental review the current procedures for the administration of civil and family justice in Northern Ireland (including those for judicial review). In its report, published in September 2017, the Group recommended that the 'promptly

[9] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-meeting-papers/09-july-2018/draft-minutes---scjc-09-july.pdf?sfvrsn=2

requirement' be abolished. The Rules of the Court of Judicature (Northern Ireland) (Amendment) 2017 amended the Rules of the Court of Judicature (Northern Ireland) 1980 (S.R. 1980 No. 346) from January 2018 to remove the requirement of promptitude from the time limit for making an application for leave to apply for judicial review so that the time limit is three months from the date grounds for the application first arose.

Recommendations included in paragraph 9

Recommends **with respect to the Committee's findings on communication ACCC/C/2012/68 that the Party concerned in future submit plans and programmes similar in nature to NREAPs to public participation as required by article 7, in conjunction with the relevant paragraphs of article 6, of the Convention;**

26. With regard to the recommendation in paragraph 9, we refer to paragraph 31 of our letter of 29 December 2014 (UK response to Decision V/9n)[i].

8: Recommends that the UK put in place a clear requirement to ensure that:

(a) When selecting the means for notifying the public under article 6, paragraph 2, public authorities are required to select such means as will ensure effective notification of the public concerned in the territory outside of the Party concerned, bearing in mind the nature of the proposed activity, and the potential for transboundary impacts. In such a case, the Party concerned may engage other existing applicable treaty regimes, 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;

Recommendations included in paragraph 8(a) and (b) of the decision VI/8k

The UK has put in place an updated procedure on transboundary engagement, building on its commitments under both the UNECE Aarhus Convention and the UNECE Espoo Convention. The procedure applicable for new nuclear power station projects is contained in Planning Advice Note 12, particularly sections 6 and 7, which is available at: https://infrastructure.planninginspectorate.gov.uk/legislation-and-advice/advice-notes/

Under the new procedure, all Espoo and Aarhus states will be informed of applications for a new nuclear power stations, as they have been of the recent application for a project at Wylfa Newydd, Anglesey, North Wales, UK. The project details are available at:

https://infrastructure.planninginspectorate.gov.uk/projects/wales/wylfa-newydd-nuclear-power-station/

Further steps were also taken to inform the public concerned about the Wylfa Newydd project, through local UK Embassies and websites, in states where significant public interest has been established (or where requested). The states in which this was conducted went further than those in which a likely significant effect was identified.

The opportunity is open to all those concerned to participate in the planning process, through registration at the webpage set out above.

Yours sincerely

Nikita Bhangu

United Kingdom National Focal Point to the UNECE Aarhus Convention

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[i] http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/frmPartyV9n_progress_report_29.12.2014.pdf