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### Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

#### **Fifth session**

Maastricht, the Netherlands, 30 June and 1 July 2014

Item 5 (b) of the provisional agenda

#### **Procedures and mechanisms facilitating the implementation of the Convention: compliance mechanism**

## **Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention\***

### **Report by the Compliance Committee**

#### *Summary*

The present document was prepared by the Compliance Committee pursuant to the request set out in paragraph 10 of decision IV/9 of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (see ECE/MP.PP/2011/2/Add.1) and in accordance with the Committee's mandate set out in paragraphs 13 (b), 14 and 35 of the annex to decision I/7 on review of compliance (ECE/MP.PP/2/Add.8).

The document reviews the progress made by the United Kingdom in the intersessional period in implementing decision IV/9i of the Meeting of the Parties on compliance by the United Kingdom with its obligations under the Convention (see ECE/MP.PP/2011/2/Add.1).

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\* The present document has been submitted late due to the short interval between the forty-fourth meeting of the Compliance Committee and the deadline for the submission of documents to the fifth session of the Meeting of the Parties, and the need for further consultation on the document before its submission.



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## I. Introduction — decision IV/9i of the Meeting of the Parties

1. At its fourth session (Chisinau, 29 June–1 July 2011), 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 IV/9i on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention (see ECE/MP.PP/20011/2/Add.1).<sup>1</sup>

2. Through the decision, the Meeting of the Parties (MOP) endorsed the findings of the Committee on three communications — ACCC/C/2008/23 (ECE/MP.PP/C.1/2010/6/Add.1); ACCC/C/2008/27 (ECE/MP.PP/C.1/2010/6/Add.2); and ACCC/C/2008/33 (ECE/MP.PP/C.1/2010/6/Add.3)<sup>2</sup> — and welcomed the recommendations contained therein. It invited the Party concerned to submit to the Committee periodically, in February 2012 and February 2013, and six months before the fifth session of the MOP (MOP-5) (i.e., by 30 December 2013), information on its progress in implementing the Committee's recommendations.

3. On communication ACCC/C/2008/23, the Committee found that, in respect of the requirements of article 9, paragraph 4, of the Convention for procedures referred to in article 9, paragraph 3, to be fair and equitable, related to the fact that in the circumstances of the case the communicants had been ordered to pay the whole of the costs while the operator had not been ordered to contribute at all, that that constituted *stricto sensu* non-compliance with article 9, paragraph 4, of the Convention. Taking into consideration that no evidence had been presented to substantiate that the non-compliance with article 9, paragraph 4, was due to a systemic error, the Committee refrained from presenting recommendations in that case.

4. With regard to communication ACCC/C/2008/27, the Committee found that the communicant's judicial review proceedings were within the scope of article 9, paragraph 3, of the Convention and thus were also subject to the requirements of article 9, paragraph 4 and that the quantum of costs awarded in that case, £39,454, rendered the proceedings prohibitively expensive and the manner of allocating the costs was unfair, within the meaning of article 9, paragraph 4, and thus, amounted to non-compliance. It recommended that the Party concerned review its system for allocating costs in applications for judicial review within the scope of the Convention and undertake practical and administrative measures to ensure that the allocations for costs in such cases was fair and not prohibitively expensive.

5. Finally, on communication ACCC/C/2008/33, the Committee found that:

(a) By failing to ensure that the costs for all court procedures subject to article 9 were not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to that effect, the Party concerned failed to comply with article 9, paragraph 4, of the Convention;

(b) The system as a whole was not such as "to remove or reduce financial ... barriers to access to justice", as article 9, paragraph 5, of the Convention required a Party to the Convention to consider;

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<sup>1</sup> Decisions of the MOP concerning compliance by Parties and documents related to their follow-up can be found on the Convention website at <http://www.unece.org/env/pp/ccimplementation.html>.

<sup>2</sup> Communications and other documents related to them, including the findings and recommendations of the Committee, where applicable, are accessible on the Convention website from <http://www.unece.org/env/pp/pubcom.html>.

(c) By not ensuring clear time limits for the filing of an application for judicial review, and by not ensuring a clear date from when the time limit started to run, the Party concerned failed to comply with article 9, paragraph 4, of the Convention;

(d) By not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4, the Party concerned also failed to comply with the article 3, paragraph 1, of the Convention.

6. In its findings on communication ACCC/C/2008/33, the Committee recommended that the Party concerned:

(a) Review its system for allocating costs in environmental cases within the scope of the Convention and undertake practical and legislative measures to overcome the problems identified in paragraphs 128–136 of the findings to ensure that such procedures:

- (i) Were fair and equitable and not prohibitively expensive;
- (ii) Provided a clear and transparent framework;

(b) Review its rules regarding the time frame for the bringing of applications for judicial review identified in paragraph 139 of the findings to ensure that the legislative measures involved were fair and equitable and amounted to a clear and transparent framework.

#### **Summary proceedings**

7. On 10 September 2010, the Compliance Committee received communication ACCC/C/2010/45 concerning compliance by the United Kingdom (England and Wales) with provisions of the Convention on access to justice. At its twenty-ninth meeting (Geneva, 21–24 September 2010), it determined on a preliminary basis that the communication was admissible, but that the legal issues raised had already been dealt with by the Committee in its deliberations on previous communications concerning compliance by the United Kingdom (i.e., ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33), and decided that summary proceedings would apply, according to the procedural decision adopted at its twenty-eighth meeting (Geneva, 15–18 June 2010) (ECE/MP.PP/C.1/2010/4, paras. 45–46).

8. By letter of 27 March 2011, the communicant challenged the Committee's decision to apply its summary proceedings procedure, and in response to the Committee's request at its thirty-second meeting (Geneva, 11–14 April 2011) to substantiate its allegations, the communicant on 12 June 2011 submitted additional information including new allegations of non-compliance by the United Kingdom with provisions of the Convention on public participation and access to justice.

9. At its thirty-third meeting (Geneva, 27–28 June 2011), the Committee confirmed that it would not deal with any issues already dealt with in its findings on communications ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33. Regarding the new allegations made in the communicant's letter of 12 June 2011, the Committee observed that a new communication ACCC/C/2011/60 (United Kingdom) (see below) raised some similar issues.

10. On 28 March 2011, the Compliance Committee received communication ACCC/C/2011/60 concerning compliance by the United Kingdom (England and Wales) with provisions of the Convention on public participation and access to justice. At its thirty-third meeting, the Committee determined on a preliminary basis that the communication was admissible and that the allegations made by the ACCC/C/2011/60 communicant presented similarities to the new allegations made by the ACCC/C/2010/45 communicant.

The Committee decided that it would apply its summary proceedings procedure to the following issues raised by the two communications:

(a) Whether the procedure for judicial review available in the courts of the Party concerned met the standards of substantive legality set out in article 9 of the Convention, because the Committee had already dealt with that matter in its findings on communication ACCC/C/2008/33, and no new information had been submitted to the Committee which would trigger reconsideration of its findings;

(b) Whether the cost of judicial review procedures in the Party concerned were prohibitively expensive, because the Committee had already dealt with that matter in its findings on communications ACCC/C/2008/27 and ACCC/C/2008/33, and no new information had been submitted to the Committee which would trigger reconsideration of its findings. The Committee recalled that it would continue to closely monitor the progress by the Party concerned on that issue through its follow-up on the implementation of decision IV/9i.

The Committee agreed to deal with certain other allegations raised by the communicants in ACCC/C/2010/45 and ACCC/C/2011/60 in accordance with its ordinary procedure.

11. On 28 November 2011, the Committee received communication ACCC/C/2011/64 concerning compliance by the United Kingdom (England and Wales) with provisions of the Convention on public participation and access to justice in respect of the implementation of national planning policy statements and environmental regulations before Parliament. At its thirty-sixth meeting (Geneva, 27–30 March 2012), it decided that the allegations concerning public participation were not admissible, because it was too early for the Committee to review a national instrument that had not yet been adopted. With respect to the allegations concerning access to justice, while the Committee found the communication was admissible on a preliminary basis, it decided to apply its summary proceedings procedure, because the legal issues raised had already been dealt with in the context of previous communications (i.e., ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33) and decision IV/9i.

12. On 3 January 2012, the Compliance Committee received communication ACCC/C/2012/65 concerning compliance by the United Kingdom (England and Wales) with provisions of the Convention on access to justice in relation to imposition of cross-undertakings regarding injunctions in environmental judicial review. At its thirty-sixth meeting (Geneva, 27–30 March 2012), the Committee decided that the allegation concerning security for costs was not admissible on the ground of not meeting the *de minimis* requirement. With respect to the allegations on cross-undertakings on damages, while the Committee found the communication was admissible on a preliminary basis, it decided to apply its summary proceedings procedure, because the allegations raised related to systemic legal issues that had already been dealt with in its findings and recommendations on communication ACCC/C/2008/33 and decision IV/9i.

## II. Summary of follow-up action

13. On 9 February 2012, the Coalition for Access to Justice for the Environment (CAJE), a coalition of non-governmental organizations (NGOs) and a regular observer of communication ACCC/C/2008/33, informed the Committee that in October 2011, the Ministry of Justice had published a consultation paper in England and Wales: “Costs Protection for Litigants in Environmental Judicial Review Claims: Outline proposals for a costs capping scheme for cases which fall within the Aarhus Convention”. While acknowledging that the proposals were a positive step forward, CAJE informed the

Committee that they did not adequately address the problem of prohibitive expense. In particular:

(a) The proposed cap on the claimant's liability for adverse costs of £5,000 remained prohibitively expensive for the vast majority of individuals and civil society groups;

(b) The proposed cap, when combined with the applicants own costs for bringing the application (estimated by the Ministry of Justice to be in the region of £30,000 for an average case), rendered the unsuccessful claimant liable for costs totalling £35,000, a sum which was clearly prohibitively expensive for all but the wealthiest claimants;

(c) Both figures were subject to challenge on the basis of information in the public domain, thus prohibiting certainty and risking continuing satellite litigation;

(d) No provision was made for injunctive relief;

(e) No provision was made for statutory appeals or private civil law cases.

14. Additional information was provided by CAJE on 3 April 2012, including the comments it had submitted in response to a consultation paper issued by the Party concerned with respect to Northern Ireland in December 2011 on "Costs protection for litigants in environmental judicial review applications: outline proposals to limit costs for judicial review applications which fall under the Aarhus Convention", and the comments it had submitted in response to the consultation paper issued by the Scottish Government in January 2012 on "Legal challenges to decisions by public authorities under the Public Participation Directive 2003/25/EC".

15. The Party concerned submitted its report, due under paragraph 6 of decision IV/9i in February 2012, on 15 June 2012. It explained that the late submission was owing to the ongoing consultations aiming at remedying the issue of non-compliance. In its report, the Party reported on the planned changes in the regime for protective cost orders (PCOs) in the Civil Procedure Rules (CPR) in England and Wales, following public consultations and further considerations upon the outcome of the consultations. In summary, the proposals were as follows:

(a) The rules would apply to judicial review cases falling under the Aarhus Convention, including those matters covered by the European Union (EU) Public Participation Directive,<sup>3</sup> and to all claimants (natural or legal persons) in the same way;

(b) A PCO would be obtained by making an application without the need for supporting grounds and evidence unless an order other than the standard "default order" was sought;

(c) A PCO would be granted if the permission to apply for judicial review was granted;

(d) The application for the PCO should be made at the same time as the application for permission and would be considered on the papers;

(e) The PCO would limit the liability of the claimant to pay the defendant's costs to £5,000 and the liability of the defendant to pay the claimant's costs to £30,000 (cross-cap);

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<sup>3</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

(f) As an exception, where there was information publicly available about the claimant's resources, the defendant could challenge the cap of £5,000 on the grounds that the claimant was not in need of costs protection, because it had resources for litigation and access to justice was not at issue;

(g) Costs of the PCO application would not be payable by either party if the PCO sought was the standard "default order" and was granted on those terms.

16. In its report, the Party concerned also mentioned that it was considering what changes to the rules regarding the time frames for bringing applications for judicial review would be necessary to ensure compliance.

17. CAJE provided comments on the Party concerned's report on 19 June 2012. It reiterated its concern that the proposed changes to the PCO regime were not sufficient to effectively address the major problems related to costs, and expressed concerns regarding the application of the new rules in Scotland and cross-undertakings for damages.

18. The Committee deliberated on the matter at its thirty-seventh meeting (Geneva, 26–29 June 2012). It expressed concern, *inter alia*, regarding how the amounts proposed under the revised PCO regime were to be calculated and whether those PCOs would apply to all stages of procedures for judicial review (first instance and appeals). The Committee's views were subsequently communicated to the Party concerned and the communicant. The Party concerned was also invited to submit further information on time frames as well as the proposed changes.

19. In the meantime, ClientEarth, the communicant of ACCC/C/2008/33, had sent a letter to the Committee on 8 June 2012, which reached the Committee only on 15 August 2012, together with its subsequent letter of 14 August 2012. ClientEarth expressed its concern over the slow progress demonstrated by the Party concerned and the flawed approach of the Party's proposals.

20. On 17 September 2012, the Party concerned submitted the information requested by the Committee at its thirty-seventh meeting. It reported on the proposals which would be put before the CPR Committee for its consideration with a view to amending the CPR rules in December 2012, including:

(a) A fixed recoverable costs regime to apply in all judicial review cases, irrespective of permission having been granted, where the claimant stated in the claim form that the case was an Aarhus case and provides reasons why that was so, subject only to the court determining that the case was not in fact an Aarhus case;

(b) The liability of the claimant to pay the defendant's costs under the fixed recoverable costs regime would be capped at £5,000 if the claimant was an individual and £10,000 if the claimant was an organization; the cross-cap would be £35,000 (including value added tax (VAT));

(c) The fixed recoverable costs for both the claimant and the defendant could not be challenged, but the fixed costs regime would not apply if the claim is not an "Aarhus claim";

(d) The judge considering whether to give permission to appeal would at the same time determine the appropriate cost limit or limits.

21. The Party concerned also noted that it intended to monitor the application of the proposed changes, once in force, on a regular basis and to consider whether, in the light of experience, any other changes to the procedure for such cases should be made.

22. With respect to time limits for bringing a challenge, the Party concerned informed the Committee that it was considering whether there was a need to amend the CPR rules

governing time limits in judicial review applications so as to reflect recent court practice in England and Wales, and also Northern Ireland, following the decision by the Court of Justice of the European Union (CJEU) in *Uniplex*.<sup>4</sup>

23. By letter of 19 September 2012, CAJE submitted that the proposed changes were improvements in two respects: that the costs protection would apply from the time the claim was issued as opposed to from the grant of permission; and that there would be no ability to challenge the figures on the basis of information in the public domain. However, there were a number of issues that the revised proposals still failed to address, including: the high caps set for individuals and organizations (£5,000 and £10,000, respectively), which would be a significant deterrent to NGOs, and the cross-cap of £35,000; the fact that the CPO would only apply at first instance; the limited scope of “Aarhus claims” under the proposal, excluding statutory challenges or private law environmental cases; the fact that the proposals were silent as to the costs of interested third parties; and the lack of any proposals in relation to cross-undertakings for injunctive relief.

24. CAJE also informed the Committee of the ongoing preliminary ruling proceedings before CJEU in the *Edwards* case,<sup>5</sup> and the infringement proceedings initiated by the European Commission.

25. On 24 September 2012, ClientEarth provided comments on the report submitted by the Party concerned on 17 September 2012, reiterating its concerns, including the scope of the claims covered by the proposals, which seemed not to apply to private law claims and statutory review; the failure of the proposals to address cross-undertakings in damages when injunctive relief was sought; the level of the caps, which were prohibitively expensive for both individuals and organizations, and that a higher cap for organizations was unfair and unjustified; the unnecessary and problematic imposition of a cross-cap on the costs a successful claimant might recover; and the complete failure of the proposals to address costs in appeal procedures. ClientEarth also updated the Committee on the *Edwards* case, at the time pending before CJEU; commented on the Party concerned’s failure to address the Committee’s concerns regarding the limited availability of review for substantive legality; and informed the Committee that, while the courts could in practice apply the *Uniplex* case regarding time limits for seeking judicial review, to avoid confusion and uncertainty, the CPR should be amended accordingly.

26. The Committee deliberated on the matter at its thirty-eighth meeting (Geneva, 25–28 September 2012). At that meeting, the Committee took note of the information submitted since its previous meeting, on the basis of which it considered that there were concerns with respect to the manner in which the Party concerned was proposing to implement the findings in communication ACCC/C/2008/33. The Committee agreed to send additional questions to the Party concerned and to review the situation at its fortieth meeting, after it had received the report due from the Party concerned in February 2013.

27. On 28 February 2013, the Party concerned submitted its progress report due under paragraph 6 of decision IV/9i, and addressed the questions raised by the Committee at its thirty-eighth meeting. The proposed changes in the CPR for England and Wales would come into force on 1 April 2013, while similar changes were to be implemented in Northern Ireland on the same date and shortly thereafter also in Scotland. In reply to the Committee’s questions, the Party concerned provided the following clarifications:

(a) The new PCO rules would apply to all Aarhus-related cases, as defined in rule 45.41, paragraph 2, i.e., “a claim for judicial review of a decision, act or omission all or

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<sup>4</sup> Case C-406/08, *Uniplex (UK) Ltd v. NHS Business Services Authority* [2010] ECR I-0817.

<sup>5</sup> Case C-260/11, *R (Edwards and another) v. Environment Agency*, judgement of 11 April 2013.



part of which is subject to the [Aarhus Convention], including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject”;

(b) The amendments on PCOs codified court practice in the context of judicial review, and not for third party appeals in planning decisions;

(c) The costs limits applied in the first instance only; on appeal, the case would enter a costs-shifting (“loser pays”) regime under new CPR rule 52.9A, whereby the court at the outset of the appeal would determine what the costs position should be and would order a recoverable costs limit, on the basis of the means of the parties, the circumstances and the need to facilitate access to justice;

(d) It was for the defendant to argue before a court that a claim was not an Aarhus claim. If the court upheld the defendant’s argument, the court would not make an order for costs (new rule 45.44, para. 3);

(e) The caps of £5,000 and £10,000 for individuals and organizations, respectively, were included in the public consultation for the proposals and were taken up from developed court jurisprudence, notably the *Garner* case,<sup>6</sup> while the £35,000 cross-cap was seen as a reasonable limit on the amount of costs that might be recovered by a successful claimant of an Aarhus claim;

(f) Cross-undertakings in damages in case of injunctive relief would remain in place; however, the amendments to the Practice Direction of the CPR would make specific provision for Aarhus Convention cases so as ensure compliance with article 9, paragraph 4, of the Convention;

(g) The overall time limit for judicial review was three months from when the cause of action arose, while the requirement, over and above the three-month limit, that the application be made “promptly” was not applied in cases where a remedy for breach of an obligation or right under EU law was sought, including in many Aarhus cases.

28. Also on 28 February 2013, CAJE responded to the questions raised by the Committee at its thirty-eighth meeting, attaching a copy of the Civil Procedure (Amendment) Rules 2013 and Practice Direction 45. In its submissions, CAJE welcomed the changes in general, but indicated it still had a number of serious concerns.

29. On the same date, CAJE made supplementary submissions to stress that, as shown by recent jurisprudence in *Evans v. Secretary of State for Communities and Local Government*,<sup>7</sup> there was no sufficient judicial review mechanism in place for challenging the substantive and procedural legality of decisions under article 6 of the Convention, as required by article 9, paragraph 2, and thus that the Committee’s previous concerns had not been sufficiently or properly addressed by the Party concerned.

30. The changes entered into force in England and Wales on 1 April 2013, in Northern Ireland on 15 April 2013 and in Scotland on 25 March 2013.

31. On 21 May 2013, CAJE welcomed the commitment of the Party concerned and the April 2013 CJEU judgement in the *Edwards* case, but expressed its disappointment at recent developments in England and Wales regarding judicial review. It provided a summary table of the new costs regimes in England and Wales, Northern Ireland and Scotland, and its opinion on the implications of the CJEU judgement in the *Edwards* case for each of the new regimes.

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<sup>6</sup> *R. (Garner) v. Elmbridge Borough Council*, [2010] EWCA Civ 1006.

<sup>7</sup> [2012] EWHC 1830 Admin.

32. At its forty-first meeting (Geneva, 25–28 June 2013), the Committee discussed the matter with representatives of the Party concerned, CAJE and the communicants of communications ACCC/C/2008/23 and ACCC/C/2008/33, as well as with observers. In its oral statement, the Party concerned informed the Committee with respect to costs that:

(a) In England and Wales, Part 45 of the CPR was amended on 1 April 2013 to introduce a new Section VII dealing with costs limits in Aarhus Convention claims. Where a claimant indicated on their claim form that it was an Aarhus Convention claim, the parties could not be ordered to pay costs exceeding the amounts prescribed in Practice Direction 45: £5,000 where the claimant was claiming only as an individual and £10,000, when claiming as or on behalf of a business or other legal person. If the defendant was ordered to pay costs, the prescribed amount was £35,000. It was open for the defendant to challenge whether the claim was an Aarhus Convention claim. Where such an argument was raised the court would determine that issue at the earliest opportunity. Where it was found not to be an Aarhus Convention claim the court would not normally make an order for costs in relation to those proceedings. Where it was found to be an Aarhus Convention claim, the court would normally order the defendant to pay the claimant's costs of those proceedings. That might be ordered even where it could increase the costs payable by the defendant beyond the £35,000 prescribed in Practice Direction 45;

(b) In Northern Ireland, the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 came into operation on 15 April 2013. They set similar limitations to England and Wales on costs awarded in relation to Aarhus Convention cases, which included applications for judicial review and reviews under statute to the High Court of decisions, acts or omissions;

(c) In Scotland, changes to the Rules of the Court of Session came into force on 25 March 2013. A new chapter 58A provided that protective expenses orders could be applied for by a petitioner in an application or an appellant in an appeal which involved a challenge to a decision, act or omission that was subject to, or said to be subject to the Public Participation Directive. That applied to applications to the supervisory jurisdiction of the court and appeals under statute;

(d) With respect to the time frame for the bringing of applications for judicial review, for cases concerning the assertion of rights under EU law, the requirement of "promptness" was, in practice, disappplied, in the light of CJEU case law.

33. The observers noted that while the progress achieved was significant, there were still concerns as to the compliance by the Party concerned with the Convention because of the limited scope of application of the new measures to judicial review only, the still prohibitively expensive caps set for individuals and organizations and the introduction of new measures in planning processes that would create new obstacles to access to justice. The Party concerned observed that the measures taken should be evaluated by the Committee in the context of the recommendations of the decision only, and not beyond the scope of the communications that had initially triggered review of compliance, which in the view of the Party concerned did not include costs in private nuisance cases.

34. Also at its forty-first meeting, the Committee considered the preliminary admissibility of communication ACCC/C/2013/86, received on 28 February 2013. The communication alleged non-compliance by the Party concerned with the provisions of the Convention on access to justice for failing to consider that private nuisance cases fell within the scope of those provisions and that therefore the Convention's requirements for non-prohibitive costs applied. The Committee decided that the communication was admissible on a preliminary basis. It considered that, further to its discussion with representatives of the Party concerned with regard to decision IV/9i (see above), the Party concerned appeared to interpret the Committee's recommendations as not relevant to

private nuisance proceedings. The Committee stressed that the recommendations in decision IV/9i concerned costs in all court procedures and it therefore did not agree with the position of the Party concerned that costs in private nuisance proceedings were outside its scope. In the light of the position of the Party concerned, however, the Committee decided to admit the communication and to consider communication ACCC/C/2013/86 under the ordinary proceedings procedure.

35. On 17 September 2013, at the invitation of the Party concerned, and in the context of the follow-up to decision IV/9i and in accordance with paragraph 25 (b) of the annex to decision I/7, the Chair of the Committee undertook a one-day mission to the United Kingdom. He met first with representatives of a number of ministries and agencies of the Party concerned and then with both public officials and representatives of NGOs. The Chair reported that the mission had provided a useful opportunity for exchange between the representatives of the Party concerned, the NGOs taking part and the Committee.

36. At its forty-second and forty-third meetings (Geneva, 24–27 September and 17–20 December 2013), the Committee commenced preparation of its draft report to the MOP regarding the implementation of decision IV/9i.

37. On 20 December 2013, the Party concerned provided its final progress report due in accordance with decision IV/9i six months before MOP-5. The report detailed recent developments concerning the *Edwards* litigation and also the Opinion of the Advocate General in infraction proceedings<sup>8</sup> related to the EU Public Participation Directive. In April 2013, CJEU in its preliminary ruling on *Edwards*, held that there was an objective and subjective element to the criteria for deciding costs. The United Kingdom Supreme Court applied that ruling in its judgement of 11 December 2013, and found that the figure of £25,000 was neither subjectively nor objectively excessive. The Party reported that the infraction proceedings against it before CJEU under the Public Participation Directive were still ongoing, and it would review its position in the light of the CJEU decision, once received, and would continue to update the Committee on developments until the finalization of the Committee's report on the implementation of decision IV/9i.

38. Following receipt of the Party concerned's final progress report, the Compliance Committee completed its draft report on the implementation of decision IV/9i through its electronic decision-making procedure. The draft report was sent on 28 February 2014 to the Party concerned and the communicants of communications ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33 for their comments by 21 March 2014. The Party concerned provided its comments on 24 March 2014 and the communicants of communications ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33 on 21 March, 17 March and 21 March 2014, respectively. Taking into account the comments received on the draft report, at its forty-fourth meeting (Geneva 25–28 March 2014), the Committee finalized its report for submission to the MOP at its fifth session.

### III. Considerations and evaluation by the Committee

39. In order to have fulfilled the requirements of decision IV/9i, prior to the fifth session of the Meeting of the Parties the Party concerned would need to provide the Committee with evidence that:

(a) It had taken measures to effectively ensure that the costs for all court procedures subject to article 9 are not prohibitively expensive, including clear legally binding directions from the legislature or judiciary to this effect (article 9, para. 4);

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<sup>8</sup> Case C-530/11, *Commission v. United Kingdom*, judgement of 13 February 2014.

(b) The system as a whole is sufficient “to remove or reduce financial ... barriers to access to justice” (article 9, para. 5);

(c) It had taken measures to effectively ensure clear time limits for the filing of an application for judicial review, including a clear date from when the time limit starts to run (article 9, para. 4);

(d) It had taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4 (article 3, para. 1).

## **A. Measures to ensure that costs for all court procedures subject to article 9 are not prohibitively expensive**

40. Through paragraph 3 (a) of decision IV/9i, the MOP endorsed the Compliance Committee’s finding on communication ACCC/C/2008/33 that, by failing to ensure that the costs for all court procedures subject to article 9 were not prohibitively expensive, the Party concerned failed to comply with article 9, paragraph 4, of the Convention. The Committee welcomes the efforts by the Party concerned to address decision IV/9i through the introduction of provisions on PCOs and cross-undertakings for damages in the civil procedure rules applicable in England and Wales, Scotland and Northern Ireland. The new provisions are considered below.

### **1. PCOs in the civil procedure rules**

41. The new provisions on PCOs introduced into the civil procedure rules in the three legal jurisdictions of the Party concerned may be briefly summarized as follows:

(a) In England and Wales, Practice Direction 45 to the CPR provides for a PCO in “Aarhus Convention claims” of “£5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person; in all other cases, £10,000”.<sup>9</sup> The liability of the defendant for a successful claimant’s costs is capped at £35,000. The sum of recoverable costs for both the claimant and the defendant cannot be challenged;

(b) In Northern Ireland, regulation 3, paragraph 2, of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 provides that “in an Aarhus Convention case, the court shall order that any costs recoverable from an applicant shall not exceed £5,000 where the applicant is an individual and £10,000 where the applicant is a legal person or an individual applying in the name of a legal entity or unincorporated association”. Regulation 3, paragraph 3, caps the liability of the defendant for a successful claimant’s costs at £35,000, as in England and Wales;

(c) In Scotland, chapter 58A of the Court of Session Rules provides for a protective expenses order of £5,000 and the court may, on cause shown by the applicant, lower the sum mentioned. In return, the respondent’s liability to pay the costs of a successful applicant is capped at £30,000, though the court may, on cause shown by the applicant, raise the sum mentioned. In order to make the order, the Court must be satisfied that the proceedings are prohibitively expensive for the applicant, which is considered to be

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<sup>9</sup> See <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs/practice-direction-45-fixed-costs>. The changes to the Practice Direction relating to Aarhus Convention claims came into force on 1 April 2013.

so if the applicant could not reasonably proceed with the proceedings in the absence of a protective expenses order.<sup>10</sup>

42. Having reviewed the amended civil procedure rules for each jurisdiction in quite some detail, the Committee remarks on the aspects set out below.

*Types of claims covered*

43. While the amendments made to the civil procedure rules of England and Wales, Scotland and Northern Ireland each address some of the court procedures subject to article 9, none of them address all such court procedures. In England and Wales, the new provisions apply to claims for “judicial review of a decision, act or omission all or part of which is subject to the [Aarhus Convention]”, but do not address statutory review.<sup>11</sup> The new Scottish provisions address judicial review and appeals under statute, but only regarding decisions, acts or omissions that are subject to the EU Environmental Impact Assessment (EIA)<sup>12</sup> and Integrated Pollution Prevention and Control (IPPC)<sup>13</sup> Directives. The Scottish rules thus do not apply to appeals under any provision of national law relating to the environment that is not derived from EU law.<sup>14</sup> Lastly, while the new provisions applicable in Northern Ireland apply to both judicial and statutory review of a decision, act or omission subject to the Aarhus Convention,<sup>15</sup> neither they nor the provisions applicable in England and Wales or Scotland apply to private law claims. The Committee points out that this summary amounts to statements of fact and in no way prejudices the forthcoming consideration by the Committee of communications ACCC/C/2013/85 and ACCC/C/2013/86.

44. Bearing in mind that the requirement in article 9, paragraph 4, for procedures to be not prohibitively expensive applies to all procedures within the scope of paragraphs 1, 2 and 3 of that article, the Committee finds that the Party concerned has taken insufficient measures to fully meet the requirements of article 9, paragraph 4, in this regard.

*Costs incurred pre-permission or in satellite proceedings at first instance*

45. The Committee welcomes the confirmation by the Party concerned during its statement at the forty-first meeting that the costs caps will apply to all costs incurred up until the end of the first instance, including any costs incurred prior to the grant of permission in judicial review cases or in satellite proceedings at the first instance. The Committee notes that this clarification is lacking in the rules themselves, and invites the Party concerned to provide clear direction either in the rules or in accompanying guidance that the costs caps indeed include any costs incurred pre-permission or in satellite proceedings at the first instance.

*Costs relating to determination of claim being an Aarhus claim*

46. The Committee welcomes the inclusion in the civil procedure rules for England and Wales<sup>16</sup> and Northern Ireland<sup>17</sup> of provisions on the allocation of costs should the defendant

<sup>10</sup> See <http://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/court-of-session-rules>.

<sup>11</sup> CPR (England and Wales), rule 45.41.

<sup>12</sup> Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.

<sup>13</sup> Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control.

<sup>14</sup> Court of Session Rules, rule 58A.1, para. 1.

<sup>15</sup> The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, sect. 2, para. 1.

<sup>16</sup> CPR (England and Wales), rule 45.44, para. 3 (a) and (b).

challenge a claimant's assertion that the claim is an Aarhus claim. Both sets of rules provide that if the court holds that the claim is not an Aarhus Convention claim, it will normally make no order for costs in relation to those proceedings and, conversely, if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant to pay the claimant's costs of those proceedings on the indemnity basis. In contrast, the Scottish civil procedure rules do not mention how the costs of a challenge that a claim qualifies for costs protection should be determined. To assist with certainty, the Committee invites the Party concerned to consider introducing a provision clarifying the costs apportionment for such challenges into the Scottish rules also.

#### *Level of cost caps*

47. While the new rules are a positive step forward, the Committee is not convinced that the sum of £5,000 for individuals and £10,000 for organizations will not be prohibitively expensive for many individuals and organizations. In this regard, the Committee notes that the cap on what the applicant must pay if its claim is ultimately unsuccessful at first instance does not operate on its own — the unsuccessful applicant will also have to meet its own costs, estimated by the Ministry of Justice to be in the region of £30,000 for an average application for judicial review. This means a total costs liability in the region of £35,000 in an average case, and in a complex case, the applicant's own costs may make the total even higher. The Committee agrees with the reasoning in the so-called Sullivan I report: "Overall, we consider that the costs, whether actual or risked, would be 'prohibitively expensive' if they would reasonably prevent an 'ordinary' member of the public who would not be entitled to legal aid from embarking on the challenge falling within the terms of Aarhus, including obtaining any appropriate interim relief."<sup>18</sup> The Committee is concerned that, despite the efforts of the Party concerned, the current figures remain prohibitively expensive sums for the majority of the public and many environmental NGOs. It thus welcomes the information from the Party concerned that it intends to review on a regular basis the impact and application of these changes, including the level at which the caps have been set and whether, in the light of experience, any other changes to the procedure for such cases should be made.<sup>19</sup> The Committee looks forward to being informed of the outcomes of these regular reviews.

#### *Reliance on legal aid to prevent the cost caps being prohibitively expensive*

48. In its progress report of 28 February 2013, the Party concerned stated that "in the case of an individual whose financial means might dissuade them from bringing proceedings because of the possibility of having to pay costs of up to the £5,000 limit, it is likely that they would be entitled to legal aid (subject to the usual means and merits tests)" (para. 8 (vi)). Noting the observer's submissions on this point, the Committee considers that it is problematic to rely on legal aid in this way. The short time frames for bringing judicial review may mean that by the time a claimant has had its legal aid application approved it may be too late to bring a claim. Moreover, the financial thresholds to qualify for legal aid are very low, which means that most members of the public will earn too much to qualify. The Committee understands that legal aid can be difficult to obtain in public interest cases and may not be available for all types of environmental claims (e.g., negligence claims are

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<sup>17</sup> The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, sect. 4, para. 3.

<sup>18</sup> *Ensuring access to environmental justice in England and Wales: Report of the Working Group on Access to Environmental Justice* (chaired by L. J. Sullivan) (London, May 2008), Executive Summary, para. 5. Available from [http://www.wwf.org.uk/filelibrary/pdf/justice\\_report\\_08.pdf](http://www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf).

<sup>19</sup> Letter from the Party concerned of 17 September 2012.

excluded).<sup>20</sup> In the light of the above, the Committee finds the availability of legal aid for some applicants does not preclude the fact that the cost caps of £5,000 and £10,000 may be prohibitively expensive for many other applicants who would not qualify for such aid.

*How the cost caps will apply in practice*

49. The Committee finds there is a lack of clear guidance as to how the costs caps will be applied in practice, especially in England and Wales. In particular, it notes that the following is not made clear in the new provisions:

(a) If there are multiple individual applicants, whether the cap of £5,000 will be shared amongst them or if each applicant may be liable for costs up to this sum. With respect to England and Wales, the Committee notes that in the *Garner* case the court imposed an overall PCO of £5,000 to be shared between three applicants.<sup>21</sup> However, it is not clear to the Committee whether the *Garner* case stands as a precedent that the overall PCO should be £5,000 irrespective of the number of applicants, or as precedent that the Court has discretion to decide whether the PCO should be imposed per applicant or overall. The Party concerned, in its comments of 24 March 2014 on the draft of this report, is of the view “that on the ordinary meaning of the text of the rules, the claimant’s cap applies per claimant”. Moreover, if “they form a group, for the group to represent them, the ‘non-individual’ cap’ would apply. ... If, however, they have separate interests and may argue differently and accordingly cause separate costs to the defendant, it would be appropriate for them to bear liability for the defendants costs to the level of the cap” for each individual;

(b) Similarly there is no guidance as to whether for multiple NGO applicants (or other legal persons) the cost cap of £10,000 (England and Wales and Northern Ireland) will be imposed as a total overall cost cap, irrespective of the number of applicants, or whether it will be at the discretion of the court to decide. The Party concerned, in its comments on the draft of this report, informed the Committee that, *mutatis mutandis*, the same situation would be applicable to NGOs as to individuals;

(c) There is no clear guidance as to what the cost cap will be, and how it will be apportioned, if the applicants include both individuals and NGOs;

(d) There is no guidance as to what happens if one of applicant fails to pay his or her share of the PCO. Will the other applicants be liable for that applicant’s share?

The Committee considers that directions clarifying the above points should be inserted either in the rules or in accompanying guidance.

*Cross-caps*

50. The Scottish rules provide that the cap on the costs that the successful applicant may recover from the respondent may be increased on cause shown by the applicant. The rules for England and Wales and Northern Ireland do not provide the possibility for such an increase. From the information before it, the Committee understands that the figure of £30,000 is the estimated cost to bring an application for judicial review in an “average case”, though the costs for more complex cases may be higher. It notes that that the Aarhus Convention looks at prohibitive expense and financial barriers to access to justice for the applicant, not the defendant. If there is to be a cross-cap, to ensure that it will not act as a

<sup>20</sup> See <https://www.gov.uk/check-legal-aid> and [http://www.adviceguide.org.uk/england/law\\_e/law\\_legal\\_system\\_e/law\\_taking\\_legal\\_action\\_e/help\\_with\\_legal\\_costs\\_legal\\_aid.htm](http://www.adviceguide.org.uk/england/law_e/law_legal_system_e/law_taking_legal_action_e/help_with_legal_costs_legal_aid.htm).

<sup>21</sup> *R. (Garner) v. Elmbridge Borough Council*, para. 58.

barrier to access to justice in more complex cases, the Committee recommends that the Party concerned consider following the Scottish approach in the rules applicable to England and Wales and Northern Ireland also so that applicants may apply to have the cross-cap raised in more complex cases.

*Recoverability of costs of third parties*

51. The Committee welcomes the information provided by the Party concerned in its comments on the draft of the present report that, for England and Wales, the cap prescribed by Practice Direction 45 (rule 45.43), is a cap on the total costs liability of the claimant, including any costs of third parties, and that a similar situation applies in Scotland (rule 58A.1, para. 3) and in Northern Ireland.

*Costs for appeals*

52. The Committee reiterates that decision IV/9i requires the Party concerned to ensure that the costs for all court procedures subject to article 9 are not prohibitively expensive. This includes the costs for court procedures at all stages, whether at the first instance or on appeal. The Committee notes that the three jurisdictions of the Party concerned take rather different approaches to the costs of proceedings beyond the first instance. Scotland's Court of Session Rules provides that an application for a protective expenses order may be made at any stage of an appeal proceeding, whether or not an application for such an order was made, or an order granted, at the first instance.<sup>22</sup> The rules provide no further guidance, and the Committee interprets this to mean that the provisions on protective expenses orders set out in chapter 58A will apply afresh on appeal, though it would be helpful if the rules would be clear on this point. The Costs Regulations (Northern Ireland) provides that upon an appeal of a decision in an Aarhus Convention case, the court may make an order that the recoverable costs of the appeal will be limited to the extent which the court specifies having regard to (a) the means of both parties; (b) all the circumstances of the case; and (c) the need to facilitate access to justice.<sup>23</sup> The Committee expresses concern that this provides no guidance whatsoever as to the potential level of the cost cap(s). The CPR (England and Wales) rules are expressed in very similar terms,<sup>24</sup> save for the following additional clause: "If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order".<sup>25</sup> The Committee finds this clause of particular concern. If the case raises an important issue of principle or practice, it seems all the more important to facilitate access to justice regarding such an issue, not to hamper it. Moreover, substantial sums may often be at issue in the environmental context, in particular with respect to large development projects, and it would be problematic if this clause were to operate against cost caps for the party seeking to protect the environment in such cases.

53. In the light of its various concerns outlined above, the Committee expresses its appreciation for the serious efforts made by the Party concerned to address decision IV/9i in the context of PCOs. Nevertheless, the Committee finds that further work remains to be done in order to meet the requirements of article 9, paragraph 4, to ensure that all procedures subject to article 9 are not prohibitively expensive, and with regard to article 3, paragraph 1, to provide a clear, transparent and consistent framework to implement the Convention.

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<sup>22</sup> Chapter 58A.3, para. 3.

<sup>23</sup> Regulation 3, para. 7.

<sup>24</sup> Rule 52.9A, paras. 1 and 2.

<sup>25</sup> Rule 52.9, para. 3.



## 2. Cross-undertaking for damages

54. In England and Wales, new Practice Direction 25A 5.1B, paragraph 1, provides:

If in an Aarhus Convention claim the court is satisfied that an injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court will, in considering whether to require an undertaking by the applicant to pay any damages which the respondent or any other person may sustain as a result and the terms of any such undertaking (a) have particular regard to the need for the terms of the order overall not to be such as would make continuing with the claim prohibitively expensive for the applicant; and (b) make such directions as are necessary to ensure that the case is heard promptly.

The Northern Ireland provision is expressed in very similar terms.<sup>26</sup> The Committee welcomes the efforts taken by the Party concerned to implement paragraph 133 of the Committee's findings on ACCC/C/2008/33. It also welcomes the new rule that the court will "make such directions as are necessary to ensure that the case is heard promptly". The Committee, however, regrets that, though the new provisions are a positive step, they are not sufficient to fully meet the requirement in article 3, paragraph 1, for a clear, transparent and consistent framework to implement the Convention. The provisions' reliance on judicial discretion does not provide certainty as to whether (a) the applicant will be required to give a cross-undertaking or not; (b) if a cross-undertaking is required, what the level of the undertaking will be; and (c) how the court should determine what would be "prohibitively expensive for the applicant". These uncertainties may mean that applicants wishing to seek interim relief may be dissuaded from doing so because of the risk that they may be required to give cross-undertakings for damages, and thus face prohibitive expense. While recognizing it is ultimately for the Party concerned to decide how to implement this provision in its national law, the Committee notes that the simplest way to ensure compliance may be to provide that, when interim relief is sought in an Aarhus claim, no cross-undertaking will be required. Then the sole question for the judge is whether the injunctive relief sought is itself appropriate.

55. With respect to Scotland, the Committee has not been informed of any measures that the Party concerned has taken to ensure that applicants do not face prohibitive expense when seeking interim interdicts in court procedures subject to article 9 due to the possibility that a caution (similar to a cross-undertaking in damages) may be issued in this jurisdiction. At its forty-fourth meeting, the Party concerned informed the Committee that, while cautions are rarely issued in Scotland, this is something that "should be monitored to ensure that any change in practice remains consistent with the obligations of the Aarhus Convention". In order to ensure a clear, transparent and consistent framework to implement the Convention as required by article 3, paragraph 1, the Committee encourages the Party concerned to address this point in the Court of Session Rules or accompanying guidance.

56. In summary, the Committee welcomes the serious and constructive efforts made by the Party concerned to address the Committee's finding, endorsed through paragraph 3 (a) of decision IV/9i, that, by failing to ensure that the costs for all court procedures subject to article 9 were not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect, the Party concerned failed to comply with article 9, paragraph 4, of the Convention. However, as set out in the considerations above, the Committee is not convinced that the measures taken by the Party concerned in their current form sufficiently meet the requirement of the Convention to ensure that all court procedures subject to article 9 are not prohibitively

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<sup>26</sup> See Regulation 5.

expensive. Moreover, a number of aspects of the measures taken lack the necessary clarity to provide a clear, transparent and consistent framework to implement the Convention as required by article 3, paragraph 1.

## **B. System as a whole sufficient to remove or reduce financial barriers to access to justice**

57. In the light of the Committee's above finding that the Party concerned has failed to take sufficient measures to ensure that the costs for all court procedures subject to article 9 in England and Wales, Scotland and Northern Ireland were not prohibitively expensive, the Committee finds that the Party concerned has failed to sufficiently consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice, as required by article 9, paragraph 5.

58. The Committee in this respect, however, welcomes the intention of the Party concerned "to review the system in place for allocating costs in court procedures in light of" relevant rulings of CJEU and its Supreme Court, as was communicated to the Committee in the Party's comments on the draft of the present report.

## **C. Time limits for seeking judicial review**

59. In its findings on communication ACCC/C/2008/33 endorsed by the MOP through paragraph 3 (c) of decision IV/9i the Committee found that, by not ensuring clear time limits in England and Wales for the filing of an application for judicial review, and by not ensuring a clear date from when the time limit started to run, the Party concerned failed to comply with the requirement in article 9, paragraph 4, of the Convention for procedures subject to article 9 to be fair and equitable. It recommended that the Party concerned review its rules regarding the time frame for the bringing of applications for judicial review to ensure that the legislative measures involved were fair and equitable and amounted to a clear and transparent framework. Those recommendations were welcomed by the MOP through paragraph 4 of decision IV/9i and agreed by the Party concerned.

### **Clear time limits for the filing of an application for judicial review**

60. In England and Wales, the procedural rules regarding timing in case of judicial review are set out in CPR rule 54.<sup>27</sup> Rule 54.5, paragraph 1, states that an application for judicial review must be filed: "(a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose". According to case law considered by the Committee when making its findings on ACCC/C/2008/33, an application for judicial review filed under rule 54.5 could be refused even if filed within three months if the Court determined that in view of all the circumstances it was not made "promptly".<sup>28</sup>

61. In its statement to the forty-first meeting, the Party concerned informed the Committee that following the CJEU decision in the *Uniplex* case, the requirement that the application be made "promptly" was no longer applied in cases where a remedy for breach of an obligation or right under EU law was sought, including in many Aarhus cases.

62. The Committee welcomes this development as moving in the right direction; however, it regrets that it is not sufficient to meet the requirement in article 9, paragraph 4, that all procedures subject to article 9 be fair and equitable, nor the requirement in article 3,

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<sup>27</sup> See <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54#54.5>.

<sup>28</sup> See *Andrew Finn-Kelcey v. Milton Keynes Borough Council* [2008] EWCA Civ 1067.

paragraph 1, for a clear, transparent and consistent framework to implement the Convention. As conceded by the Party concerned, the change in jurisprudence resulting from the CJEU decision in *Uniplex* relates only to cases concerning the assertion of rights under EU law. The *Uniplex* decision thus does not ensure that the requirement that the application be made “promptly” is no longer applied in cases where the provision of national law allegedly contravened is not derived from EU law.

63. By letter of 19 September 2012, the Party concerned informed the Committee that it was considering whether there was a need to amend the civil procedure rules governing time limits in judicial review applications so as to reflect recent court practice in England and Wales, and also Northern Ireland, following the CJEU decision in *Uniplex*. On the basis of the information submitted by the Party concerned in its comments on the draft of the present report, the Committee understands that (a) the “promptly” requirement no longer applies in relation to judicial reviews relating to planning legislation in England and Wales (rule 54.5 in force July 2013) and that the time limit for seeking judicial review of a decision made under planning legislation is now six weeks; (b) in Scotland the Courts Reform Bill is currently before Parliament and proposes a time limit of three months to apply for supervisory jurisdiction unless a shorter period has been enacted; and (c) in Northern Ireland the timing of judicial reviews is still being considered. The Committee welcomes the removal of the “promptly” requirement with respect to planning decisions in England and Wales and the proposed removal in Scotland of the “promptly” requirement in applications for judicial review generally. It encourages the Party to ensure that the necessary changes are introduced in all its jurisdictions and for all applications for judicial review/supervisory jurisdiction within the scope of article 9 of the Convention, not just planning decisions.

#### **Clear date from when the time limit started to run**

64. In its report of 28 February 2013, the Party concerned stated that the overall time limit for judicial review is three months from when “the cause of action arose”. However, it has not put before the Committee any legislative or judicial directions that make clear at which point in a judicial review claim the cause of action will be said to have arisen. Moreover, in an April 2013 paper prepared for a consultation process on reform of judicial review more generally, the Party said: “We have decided not to seek to clarify when the time limit starts to run in Judicial Review cases where the grounds giving rise to the claim are the result of an ongoing breach, relate to a delay in making a decision or taking action, or relate to a case where there have been multiple points at which decisions have been made.”<sup>29</sup> The Committee finds that by not taking measures to ensure a clear date from when the time limit started to run, e.g., the date on which a claimant knew, or ought to have known of the act or omission at stake, the Party concerned remains in non-compliance with the requirement in article 9, paragraph 4, that procedures subject to article 9 be fair and equitable. Moreover, it remains in non-compliance with the requirement in article 3, paragraph 1, to provide a clear, transparent and consistent framework to implement the Convention.

<sup>29</sup> United Kingdom, Ministry of Justice, *Reform of Judicial Review: the Government Response* (London, The Stationery Office, April 2013), p. 6, para. 15. Available from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228535/8611.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228535/8611.pdf).

## **IV. Conclusions and recommendations**

### **A. Main findings**

65. The Committee welcomes the constructive ongoing engagement of the Party concerned throughout the intersessional period with respect to the follow-up on decision IV/9i. Having considered the information available to it, however, the Committee concludes that, despite the Party's serious and active efforts to implement the recommendations made by the Committee to the Party with its agreement and welcomed by the MOP through paragraph 4 of decision IV/9i, the Party concerned has not yet fully addressed the points of non-compliance identified in paragraph 3 (a)-(d) of decision IV/9i. The Committee thus finds that:

(a) By not taking sufficient measures to ensure that the costs for all court procedures subject to article 9 in England and Wales, Scotland and Northern Ireland are not prohibitively expensive, and in particular, by not providing clear legally binding directions from the legislature or the judiciary to this effect, the Party concerned continues to fail to comply with article 9, paragraph 4, of the Convention;

(b) In the light of the above finding, the Party concerned has failed to sufficiently consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice, as required by article 9, paragraph 5;

(c) By still not ensuring clear time limits for the filing of all applications for judicial review within the scope of article 9 of the Convention in England and Wales, Scotland and Northern Ireland, nor a clear date from when the time limit started to run, the Party concerned continues to fail to comply with article 9, paragraph 4 of the Convention;

(d) By not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4, the Party concerned continues to fail to comply with article 3, paragraph 1 of the Convention.

### **B. Recommendations**

66. The Committee recommends that the MOP reaffirm its decision IV/9i and requests the Party concerned to take urgent action to:

(a) Further review its system for allocating costs in all court procedures subject to article 9, and undertake practical and legislative measures to ensure that the allocation of costs in all such cases 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 to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework;

(d) Put in place the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4, of the Convention.

67. The Committee recommends to the MOP that it request the Party concerned to provide detailed progress reports to the Committee by 31 December 2014, 31 October 2015

and 31 October 2016 on the measures taken and the results achieved in implementation of the above recommendations.

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