

Aarhus Convention Secretariat
United Nations Economic Commission for Europe
Palais des Nations 8-14 avenue de la Paix
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By email only

Dear Sir/Madam

UK's compliance with decision VI/8k

I act for ClientEarth, one of the communicants of communication ACCC/C/2008/33. I also act for ClientEarth in its judicial review of the Secretary of State for Business, Energy and Industrial Strategy's (SSBEIS) decision to grant planning consent for a new 3.6GW gas plant at its Selby Power plant in North Yorkshire (*R (ClientEarth) v SSBEIS* [2020] EWHC 1303 (Admin)).

The judicial review was dismissed by the High Court on 22 May 2020 and is now subject to an appeal before the Court of Appeal.

The claim is an Aarhus Convention claim as defined by Civil Procedure Rule (CPR) 45.41 and therefore subject to a default cap of £10,000 for an organisation like ClientEarth and £35,000 for a public authority.

In its second progress review of the UK's compliance with implementation of decision VI/8k, the Committee considered the provisions in CPR 45.44(1), which provides that the court may vary the cost caps upwards or downwards.¹ At paragraph 48, the Committee expressed its concern that *"this provision may be used more often to increase, rather than decrease, the caps."* The Committee further considered *"that the uncertainty regarding the actual level of the cap that would apply in any particular case due to the possibility of variation may also be contrary to the requirement in article 3(1) of the Convention to establish a clear, transparent and consistent framework to implement the Convention's provisions."*

¹ Paragraphs 46-49



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ClientEarth

I write to inform the Committee of the costs capping orders made by the High Court and Court of Appeal in the judicial review and ClientEarth's experience when seeking an increase in the defendant's costs cap.

High Court

ClientEarth applied for a costs cap of £10,000 and for the defendant's costs cap to be increased to £55,000 under CPR 45.44 (2)(a) and (b), as without such variation its costs would be prohibitively expensive. The SSBEIS applied to increase ClientEarth's cost cap to £35,000 and opposed any increase in his own cap because the claimant had received an unexpected large donation in 2019, which the SSBEIS acknowledged was a '*windfall*', namely something that is unexpected, is not regular and not likely to be repeated. On this basis, the SSBEIS sought parity between the claimant and defendant.

Further, the SSBEIS argued that the Aarhus costs rules allow for (and require) regard to be had to a claimant's financial position when considering both the subjective and objective limbs of the test under CPR 45.44(3)(a) and (b). The SSBEIS therefore sought to argue that the claimant's financial resources after receipt of the windfall donation were relevant when considering the objective limb, which was clearly wrong.

On the 24th January 2020, the court granted ClientEarth permission to proceed on all grounds of its claim and set the costs cap at £25,000 for the claimant and £35,000 for the defendant. I attach a copy of the judge's order. ClientEarth did not feel able to appeal the costs order, as this required an application to the Court of Appeal, with the resulting increased uncertainty and costs at a time when ClientEarth's in-house lawyers were focused on preparing the substantive case, which had been allocated a three-day hearing. In practice therefore, we were unable to challenge the costs capping order.

Court of Appeal

ClientEarth filed an application to appeal the lower court's decision and has been granted permission to appeal on three of its grounds. Its costs cap for the appeal has been set at £10,000, although the SSBEIS sought an increase to £25,000 and ClientEarth's application to increase his cross-cap from £35,000 to £45,000 was refused. When making the costs capping order the Court of Appeal acknowledged that the claim is an Aarhus claim, which raises issues of public interest, but was not persuaded to increase the respondent's £35,000 cap.

ClientEarth hopes this information assists the Committee and is of value to the UK when it comes to collating and providing the data the Committee invited it to provide in its final progress report.²

² Paragraph 49 "*In this regard, the Committee invites the Party concerned in its final progress report to report on: (i) the proportion of Aarhus Convention claims in which an application to vary the cost cap is made, either up or down; (ii) the outcomes of each of those applications; (iii) the quantum of the varied costs cap; and (iv) for each case in which a variation was granted, the reasons given for doing so.*"

ClientEarth

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Gill Lobo', with a stylized flourish at the end.

Gillian Lobo

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