ClientEarth

July 2021

VI/8k: Draft report of the Compliance Committee – ClientEarth comments

Introduction

1. As one of the communicants of communication ACCC/C/2008/33, we are very grateful for the opportunity to comment on the Compliance Committee's draft report on the Party's compliance with its obligations under the Aarhus Convention pursuant to Decision VI/8k.

2. We welcome the findings of the draft report and the Compliance Committee's continued efforts on these issues. In particular, we welcome the Committee's recommendation to the seventh Meeting of the Parties that it request the Party to submit a plan of action, including a time schedule, to the Committee by 1 July 2022 regarding the implementation of the Committee's other recommendations. As we noted in our comments on the Party's final progress report, we very much support the requirement for a strategy and reporting on delivery of that strategy.[1] We hope that this will encourage the Party to meaningfully engage with the steps it must take to achieve compliance.

3. Having said this, we are of course very disappointed with the Party's continuing non-compliance with decision VI/8k and various aspects of the Convention. We submitted our communication in December 2008 – over twelve years ago – and, still, the Party has not remedied the key complaint of prohibitive expense for claimants identified by the Compliance Committee.

4. Moreover, it is deeply frustrating that the Party has failed to use the time – amounting almost to 5 years – since the sixth Meeting of the Parties to make improvements in order to reach full compliance.

5. We enclose with our comments a chronology which details the history of the Party's continuing non-compliance with Article 9(4) of the Convention, since communication ACCC/C/2008/33 was submitted. This chronology (which we also enclosed in our comments on the Party's final progress report) serves as an important and stark reminder of the long-standing nature of the Party's non-compliance.

[1] ClientEarth, VI/8k: UK's final progress report – ClientEarth's response, paragraph 24.

6. In this submission, we will build on comments we made at the open session on the draft report, hosted by the Compliance Committee on 9 July 2021. There are two issues we will address:

   I. Lack of data on variation of costs caps; and

   II. Cross caps.

I. Lack of data on variation of costs caps

7. The Committee has provisionally found that the Party has not demonstrated that the rules and practice relating to variation of costs caps provide a clear and consistent framework that costs will be fair, equitable and not prohibitively expensive. As such, it has not met the requirements of paragraph 2(a), (b) and (d) of decision VI/8k with regards to the variation of costs caps in England and Wales.

8. As part of its discussion on this issue, the Committee notes its regret that the Party has provided only limited data in respect of variation of costs caps: "*the Party has only provided data for the period March 2017 – May 2019 and [the Committee] thus has no information before it regarding the number of variations applied for or granted in the past two years*."[2]

9. As we noted in our comments on the Party's final progress report, it is very disappointing that the Party has failed to comply fully with the Committee's earlier request for data.[3] In its second progress review, the Committee invited the Party to, in its final progress report, 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.[4]

10. However, the Party failed to provide this information. In its final progress report, the Party provides data on the number of applications to vary but does not detail the outcome of "each of" those applications; nor the quantum of any varied costs cap; nor the rationale for the variation. Instead the data provided only indicates the number of cases in which the court ordered an increase of the costs cap.

11. In addition, and as noted above, the data provided is for a very limited period and, it should be noted, is limited to the claimant's cap.

12. The Party recognises that the data relied upon is data sought by and provided to the Observers RSPB and Friends of the Earth in October and December 2019.[5] The Party acknowledges that "*this is a relatively small sample of data and it is difficult to draw definitive conclusions*".[6] As the Party notes, "*[t]he observers' requests for data did not include the number of applications in which claimants sought to vary the default cost cap downwards, and what the outcomes were*."[7] The Party appears to state this as an explanation for why the data it is providing to the Compliance Committee

[2] Compliance Committee, Draft report on decision VI/8k, paragraph 66.
[3] ClientEarth, VI/8k: UK's final progress report – ClientEarth's response, paragraphs 14-16.
[4] Compliance Committee, Second progress review, paragraph 49.
[5] UK, Third Progress Report, paragraph 10.
[6] UK, Third Progress Report, paragraph 14.
[7] UK, Third Progress Report, paragraph 15.

is not more extensive. This approach is disappointing and frustrating. Rather than relying on data sought by the RSPB and Friends of the Earth, we suggest that the Party should now be asked to collate more extensive and more recent data in order to more effectively assess how the variation rules are working.

13. It may well be helpful for the Committee's recommendations to reflect the need for the Party to provide up to date data, collected for this important purpose, in its 2023 and 2024 progress reports.

II. Cross caps

14. We invite the Compliance Committee to consider the issue of cross caps in more detail in the report. The draft report acknowledges that CPR 45.43 provides for a cross cap on an unsuccessful defendant's liability to pay the claimant's costs up to £35,000[8] but the focus of the discussion is on the more specific issues around variation of the claimant's caps.

15. We raise a more general concern about a cross capping regime where the costs cap is set at just £35,000 in circumstances when a public authority's decision has been found to be unlawful.

16. It is not clear why, under the auspices of rules introduced in order to comply with the Aarhus Convention, an unsuccessful public authority should have the protection of such a low cross cap. Article 9 of the Convention is all about ensuring that people – claimants – have access to justice through the review mechanisms and procedures required. The intention is not to afford favourable financial protection to *any* party to environmental litigation at the expense of the claimant.

17. In our experience the cross-capping regime risks undermining the position of claimants. Litigation can often cost more than £35,000 – particularly in complicated matters (which environmental cases often are). The practical effect of the Party's approach to cross caps means that potential claimants might be deterred from pursuing challenges because of the risk that the Aarhus costs rules will prevent them from being able to recoup all of their expenditure.

18. Of course, there is in theory scope for variation of the cross cap. However, in our experience, this is very difficult to achieve and we know of no cases in which this has happened. We have applied for the cross cap to be raised twice in recent years and, in both cases, our application was rejected, even when our costs cap was increased by £10,000. Claimants and/or their lawyers are often required to subsidise what would be a public authority's legal costs of defending an unlawful decision if usual costs rules applied or a realistic, higher, default cross cap was set. This is because of the expense and uncertainty of the variation process. In practice claimants are deterred from making such an application.

19. We invite the Committee to consider this particular topic in its report. One recommendation that could be made would be for the Party to collate data on cross caps, including applications to vary them in order to get a sense of how frequently claimants who are confident enough to make their claim still feel potentially exposed by the £35,000 cross cap. In addition, we would like the Party to consider carrying out a comprehensive survey of claimants and their lawyers in order to inform their action plan.

[8] Compliance Committee, Draft report on decision VI/8k, paragraph 51.

Conclusion

20. It is with deep frustration and concern that we acknowledge the Party's continued failure to comply with the requirements of decision VI/8k and, by extension, the provisions of the Aarhus Convention. It has now been eleven years since the Committee found non-compliance in response to communication ACCC/C/2008/33 and yet claimants still face prohibitive expense and constraining uncertainty when considering bringing environmental cases in the public interest.

21. We welcome the Committee's draft report and support, in particular, the recommendations for constructive measures such as a requirement for the Party to produce a strategy with time schedule for compliance. We sincerely hope that the Party will now take seriously its obligations under the Aarhus Convention and that the significant moment of reflection and engagement that the seventh Meeting of the Parties engenders results in swift action to ensure compliance.

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Annex

DATE	EVENT
2 December 2008	ClientEarth communication ACCC/C/2008/33 submitted to the Committee.
24 September 2010	Report of 29th meeting of the Committee on communication ACCC/C/2008/33 makes a finding that the UK is not compliant with articles 3(1) and 9(4) of the Aarhus Convention.[9]
1 July 2011	Decision IV/9i adopted by the 4th Meeting of the Parties to the Aarhus Convention, endorsing the findings of the Committee at paragraph 3 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 this 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 requires a Party to the Convention to consider...;* c) *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 article 3, paragraph 1 of the Convention".*
1 July 2014	Decision V/9n adopted by the 5th Meeting of the Parties to the Aarhus Convention, endorsing the findings of the Committee at paragraph 2 that the Party concerned has not yet fully addressed the points of non-compliance identified in paragraph 3 (a)-(d) of that decision, and in particular 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 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 are not prohibitively expensive, the Party concerned has failed to sufficiently consider the establishment of appropriate*

[9] The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998.

	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"*
15 September 2017	Decision VI/8k adopted by the 6th Meeting of the Parties to the Aarhus Convention, endorsing the findings of the Committee that: **Paragraph 2 :** *Reaffirms its decision V/9n and requests the Party concerned to, as a matter of urgency, take the necessary legislative, regulatory, administrative and practical measures to:* *(a) Ensure that the allocation of costs in all court procedures subject to article 9 is fair and equitable and not prohibitively expensive;* *(b) Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;* *(d) Establish a clear, transparent and consistent framework to implement article 9, paragraph 4, of the Convention;* **Paragraph 4:** *Recommends that the Party concerned ensure that its Civil Procedure Rules regarding costs are applied by its courts so as to ensure compliance with the Convention;* **Paragraph 5:** *Endorses the finding of the Committee with regard to communications ACCC/C/2013/85 and ACCC/C/2013/86 that, by failing to ensure that private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention, and for which there is no fully adequate alternative procedure, are not prohibitively expensive, the Party concerned fails to comply with article 9, paragraph 4, of the Convention;* ***Paragraph 6**: Recommends that the Party concerned review its system for allocating costs in private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention*

26 February 2019	Committee's first progress review of the implementation of Decision VI/8k on compliance by the United Kingdom. The Committee expressed its disappointment concerning the marked shortcomings in the UK's first progress report, which failed to meet the requirements of a detailed progress report on the measures taken and the results achieved by the UK in the implementation of its recommendations under Decision VI/8k. The Committee found that the United Kingdom had not yet met the requirements of paragraphs 2(a)-(e), 4, 6 and 8(a) and (b) of Decision VI/8k.
6 March 2020	Committee's second progress review of the implementation of Decision VI/8k on compliance by the United Kingdom. The Committee welcomed the second progress report of the Party concerned, which was submitted on time and was detailed, well structured, and accompanied by relevant supporting documentation. Nevertheless the Committee considered that the UK had not yet met the requirements of paragraphs 2(a), (b) and (d), 4, 6 and 8(a) and (b) of Decision VI/8k.

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