Ms Fiona Marshall
Environmental Affairs Officer and Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10
Switzerland

3 November 2021

Dear Ms Marshall,

Re: Decision VII/8S concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention

Firstly, we would like to extend our congratulations to the Secretariat for the smooth running of the hybrid Seventh Meeting of the Parties to the Convention and the progress made on the adoption of important Decisions last week. The RSPB and Friends of the Earth England, Wales and Northern Ireland were delighted to attend, albeit electronically, and we thank you for the opportunity to participate and make a Statement to MoP-7.

We write further to the adoption of the above Decision by MoP-7 and, specifically, the requests in that Decision that the UK (*inter alia*):

- Ensures that the allocation of costs in all court procedures subject to Article 9, including private nuisance claims, is fair and equitable and not prohibitively expensive; and

- Submits a plan of action, including a time schedule, to the Committee by 1 July 2022 regarding the implementation of the recommendations in paragraphs 2, 4, 6 and 8 of Decision VII/8S.

In that respect, we would like to formally submit the ELUK Statement to the Compliance Committee. The Access to Justice section of the Statement provides a summary of our ongoing concerns in England/Wales, Scotland and Northern Ireland. Secondly, we wish to bring the Committee's attention to two recent judgments of the Supreme Court and the High Court that have serious implications for the UK's ability to comply with Decision VII/8S.

CPRE Kent v Secretary of State for Communities and Local Government[1] [2]
CPRE Kent's Appeal to the Supreme Court arose out of an original decision by Lang J in the High Court when the judge refused their application for statutory review in a planning case. The judge made costs orders in favour of both respondents and the interested party. Following a request for a review of the decision on costs, the order was affirmed by a deputy High Court Judge in 2018. The Court of Appeal

1 *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36 (30 July 2021)
2 The judgment can also be found electronically here

granted permission to appeal. In a judgment dated 15 July 2019[3], the Court of Appeal dismissed the appeal. The leading judgment was given by Coulson LJ, who observed that the ordinary rule in relation to costs is that a claimant who issues and serves proceedings on other parties, and whose claim is struck out or refused at an early stage, will prima facie be liable for the other parties' reasonable and proportionate costs. He described the issue as whether different rules apply to claimants in judicial or statutory review cases (particularly planning cases), or whether they "are prima facie liable for the reasonable and proportionate costs of defendants and interested parties of preparing and filing an Acknowledgement of Service and summary grounds, if permission is then refused." The court's conclusion was that different rules do not apply and such claimants may be liable for more than one set of reasonable and proportionate costs. Permission to appeal against that order was granted later in 2018 and the Supreme Court was asked to consider two issues: (i) the extent to which a court can make adverse costs orders in favour of more than one defendant or interested party in a planning case where permission to apply for statutory (or judicial) review is refused; and (ii) the proper application of the Aarhus cap in a case which fails at the first hurdle (because permission is refused).

In the Supreme Court hearing, CPRE Kent relied heavily on *Bolton Metropolitan District Council and others v the Secretary of State for the Environment*[4], in which the (former) House of Lords held that where there is multiple representation, the leading party will not normally be required to pay more than one set of costs, unless the recovery of further costs is justified in the circumstances of the particular case. Other cases were cited in support, including the leading case of *Mount Cook*[5], which is generally interpreted to mean that a defendant is entitled to the costs of the Acknowledgment of Service but will not be awarded the costs of attending the hearing unless there are "exceptional circumstances".

On 15 July 2021, the Supreme Court dismissed the arguments submitted by CPRE Kent and upheld the decision of the Court of Appeal. The position regarding costs at the permission stage (which applies both to judicial review and statutory review cases) is now therefore:

- When permission to seek review is refused, a claimant may be liable to more than one defendant and/or interested party for their costs of preparing and filing their Acknowledgement of Service and summary grounds.

- It is not necessary for the additional defendant(s) and/or interested party to show 'exceptional' or 'special' circumstances in order, in principle, to recover those costs.

- However, to be recoverable, those costs must be reasonable and proportionate. So, for example, if there is an obvious lead defendant and the court was not assisted by the Acknowledgement of Service or summary grounds of an additional defendant(s) and/or interested party, then the costs of that additional defendant(s) and/or interested party may not be proportionate and so will not be recoverable. That is an assessment which is case-specific and not susceptible to more general rules.

***R (Bertoncini) v London Borough of Hammersmith and Fulham and Kendall Massey*[6]**

As the Committee will be aware, the Aarhus caps are intended to secure access to justice for environmental claimants. The rules have recently changed to allow defendants to vary or remove the

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3 [2019] EWCA Civ 1230; [2020] 1 WLR 352

4 *Bolton Metropolitan District Council and others v the Secretary of State for the Environment* [1995] 1 WLR 1176

5 *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346

6 *R (Bertoncini) v London Borough of Hammersmith and Fulham and Kendall Massey* CO/3213/2019 [2020] EWHC

costs cap if, given the financial circumstances of the claimant, that would not make the costs of the proceedings prohibitively expensive. There is currently no express provision concerning the ability of Interested parties to vary the default Aarhus caps in the Civil Procedure Rules.

In the case of *Bertoncini*, the defendant had argued that the cap (and hence the claimant's potential costs liability) should be increased from the default £5,000 to £10,000, whereas the Interested party argued that it should be increased to £20,000. On the papers, the judge refused permission to proceed and increased the cap to £20,000, ordering the claimant to pay costs totalling £14,991 (of which £10,000 were to be paid to the Interested party). The claimant renewed her permission application to an oral hearing. A point of jurisdiction arose, namely whether an Interested party has standing to apply for a variation to an Aarhus Convention costs cap.

In a judgment handed down in June 2020, the judge concluded that an interested party does have standing to apply for a variation. He maintained the cap at £20,000 and ordered the claimant to pay costs totalling £16,991 (of which £12,000 were to be paid to the interested party).

The implications of these judgments

In August 2021, the claimants in *Wild Justice v Secretary of State for the Environment, Food and Rural Affairs* (CO/2428/2021) were served with an estimate of costs of £23,925.00 by the interested parties[7] to provide an Acknowledgement of Service and Summary Grounds of Defence "per *CPRE Kent v Secretary of State for Communities and Local Government [2021] UKSC 36*".

Permission for the case was subsequently refused (see attached Order by the Hon Mr Justice Dove dated 6 October 2021). Dove J fixed the costs cap at £10,000, ordering the costs of preparing the Acknowledgement of Service be paid by the claimant to the defendant, summarily assessed in the sum of £8,900.00 and by the claimant to the interested party summarily assessed in the sum of £1,100.00.

The claimants are appealing the Order. However, the immediate effect of the Supreme Court judgment would appear to be two-fold. First, that interested parties now feel emboldened to submit excessive estimates of costs at an early stage in the proceedings. Second, that the court will, in such cases, now routinely order costs up to the full level of the default Aarhus caps of £5,000 and £10,000 at the permission stage (and that's assuming that the default costs caps are applied, rather than varied upwards). Up until this point, pre-permission costs for the defendant public body were typically in the order of £3,000 or below following *Mount Cook*. This position is exacerbated by the position following *Bertoncini*, in that Interested parties can now not only request their costs at the permission stage, they can also apply for the cap to be varied upwards to accommodate these excessive costs estimates.

The Aarhus caps are intended to limit the level of adverse costs exposure *throughout* the duration of a case to ensure the proceedings are not prohibitively expensive for the claimant. The possibility that sums well in excess of the default Aarhus cap can be ordered at an early stage will have a "chilling effect" on potential claimants and therefore further undermine the UK's ability to comply with Article 9(4) of the Convention.

We would be grateful if the Compliance Committee would take the implications of these judgment into account when considering the UK's compliance with Decision VII/8S and the phased action plan to be submitted by the UK by 1 July 2021. We believe the Civil Procedure Rules need to be amended to confirm that the default Aarhus caps of £5,000 and £10,000 can only be varied downwards where it can be shown that this is what is required to ensure the proceedings are not prohibitively expensive for the claimant, as is currently the position in Northern Ireland under The Costs Protection (Aarhus

[7] In this case, The British Association for Shooting and Conservation, The Moorland Association, The Countryside Alliance; and The National Gamekeepers' Organisation

Convention) (Amendment) Regulations (Northern Ireland) 2017. We also consider it inappropriate, and in conflict with the spirit of safeguarding against prohibitive expense for environmental claimants, that interested parties (which are typically commercial/private entities who are not acting in the public interest), should be able to apply to increase claimants' cost caps.

Please do not hesitate to contact us should you require any further information or clarification in relation to this matter.

Yours sincerely,

Carol Day (Consultant Solicitor) and Rosie Sutherland (Head of Legal), The RSPB.

Katie de Kauwe, Solicitor, Friends of the Earth England, Wales and Northern Ireland