ClientEarth

01 August 2022

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Aarhus Convention Secretariat
United Nations Economic Commission for Europe
Palais des Nations
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By email: Aarhus.compliance@un.org

Dear Aarhus Convention Secretariat

Re: UK plan of action submitted pursuant to Paragraph 9(a) of Decision VII/8s of the Meeting of the Parties to the Convention (the "Decision")

1. ClientEarth submits this letter as the communicant of communication ACCC/C/2008/33 (dated 2 December 2008) and as an interested party in the Decision.

2. The timeline relating to the Decision can be summarised as follows:

    a. **18 – 20 October 2021**. The Decision is adopted by the Meeting of the Parties at its seventh session;

    b. **14 December 2021**. The Compliance Committee holds an open session, during its seventy-third meeting, in order to provide guidance to the Parties on the required content and format of their respective plans of action;

    c. **7 February 2022**. The Compliance Committee, taking into account comments and questions raised at the seventy-third meeting, sends to the UK (and other Parties subject to a decision) an information note on what is required from the plan of action, alongside a sample template for such a document;

    d. **1 July 2022**. Pursuant to paragraph 9(a) the Decision, the UK submits to the Compliance Committee a plan of action, ostensibly setting out how it intends to implement the recommendations in paragraphs 2, 4, 6 and 8 of the Decision.

3. The Decision included a number of determinations regarding the compliance of England and Wales ("**E&W**")[1] with their obligations under the Aarhus Convention, based on the findings in the Compliance Committee's report on compliance, submitted in October 2021 to the seventh session. In particular, the Compliance Committee found (*inter alia*) that:

    a. Type and eligibility of claims covered – E&W are not in compliance because some environmental claims (including private law claims such as private nuisance) are not covered by the Environmental Costs Protection Regime ("**ECPR**");

[1] The Decision includes determinations regarding the compliance of the various administrations within the UK, but for present purposes this letter addresses only those that deal with England and Wales.

b. Variation of costs caps – there is a concerning lack of examples in which the default costs caps have been varied downwards. The levels of the default costs caps of £5,000 (individuals) and £10,000 (other) can only be compliant if variation downwards is not only theoretically possible but can be predictably relied upon in practice;

c. Schedule of claimant's financial resources and hearings on applications to vary costs caps – there is a risk potential claimants will be dissuaded from bringing a judicial review because their financial circumstances will be provided to the defendant and may be discussed in open court;

d. Costs for procedures with multiple claimants – There is no basis for the rule requiring separate costs caps for each claimant (particularly where claimants make the same legal arguments on the same factual basis) and it is not undesirable for claimants to be able to share the costs burden for challenges within scope of the Convention;

e. Costs relating to the determination of an Aarhus claim – it is unfair that claimants do not recover their full costs in the case of an unsuccessful challenge. Prior to February 2017, defendants who unsuccessfully challenged that a claim was an Aarhus claim were required to pay 'indemnity costs' to claimants regarding that challenge. Since February 2017, defendants are required to pay the claimants' costs regarding the challenge on the 'standard' basis, which is lower;

f. Costs protection on appeal – the lack of any cost caps in CPR 52.19A fails to ensure sufficient clarity or costs protection for claimants in appeals regarding Aarhus claims;

g. Cross-undertakings in damages - the 2017 CPR amendments do not provide clarity to applicants seeking interim injunctions as to: (a) whether a cross-undertaking will be required, and (b) if a cross-undertaking is required, what the level will be, which fails to meet the requirement in Article 3(1) of the Convention for a clear, transparent and consistent framework to implement the provisions of the Convention.

4. ClientEarth wishes to bring the following shortcomings of the plan of action to the attention of the Secretariat:

a. In Section A it is stated that "[w]*here possible we have engaged with stakeholders*". ClientEarth was not consulted by either the Department for Environment, Food & Rural Affairs ("**Defra**") or the Ministry of Justice ("**MoJ**") and, as far as this organisation is aware, no other NGO was consulted in relation to the plan of action as far as it concerned E&W (we refer you to the letter, dated 28 July 2022, from RSPB, Friends of the Earth, Friends of the Earth Scotland and ERCS for further detail on this point);

b. In Section B it is stated, in relation to the measures that will be needed to implement the recommendations included in the Decision, only that "[t]*he UK Government will consider whether it is appropriate to amend the Environmental Cost Protection Regime (ECPR) in the Civil Procedure Rules (CPR) or make other*

changes following the conclusion of the Call for Evidence". This does not constitute any proper form of commitment to measures necessary to combat the prohibitive cost and time of judicial review, which have been determined to put E&W in breach of commitments under the Convention;

c. Related to the above point, the 'substance' of the plan addressing paragraphs 2 (a), (b) and (d), 6(a), (b) and (d) and 8 of the Decision, set out in Section C, does little more than state that:

"*The UK Government is committed to reviewing the Environmental Costs Protection Regime (ECPR). It proposes to do this through a Call for Evidence in the coming months*" and

"*The UK Government will respond to this Call for Evidence in due course*."

The plan of action does not provide any detail on proposed measures (or associated timeframes) to bring E&W into compliance with their obligations under the Convention;

d. Paragraph 2(a) of the Decision requires the UK to implement measures to, "[e]*nsure 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*". To be clear, therefore, the Decision makes determinations in relation to both private and public cases. In response, the plan of action states:

"*The UK Government is committed to reviewing the Environmental Costs Protection Regime (ECPR). It proposes to do this through a Call for Evidence in the coming months. This will consider and seek views from stakeholders on how to best address outstanding Aarhus Convention compliance issues relating to the ECPR and other outstanding compliance issues.* ***The costs protection regime in Northern Ireland does not cover private law claims****. There are no current plans to do so, but it will be kept under review*" (emphasis added).

In fact, the ECPR does not cover private law claims in any jurisdiction in the UK, yet the plan of action makes no commitment to extending costs protection to such claims other than to state that the issue will be "*kept under review*". This is particularly disappointing given the continued non-compliance by E&W with Article 9(3) of the Convention.[2]

5. Overall, it is deeply disappointing that the plan of action fails to provide any concrete detail on how the UK Government intends to address the issue of the prohibitive cost and time of court proceedings in E&W. The Government's suggestion that it merely 'intends' to publish a call for evidence in 'the coming months' is particularly unsatisfactory given:

a. The long history of non-compliance by the UK Government with respect to the position in E&W (the Compliance Committee made findings in 2010 to the effect set out above);

[2] See the Committee's Findings in ACCC/C/2013/85 and ACCC/C/2013/86.

ClientEarth

b. The fact that the UK Government (in the form of the MoJ) has been promising since October 2018 to review the ECPR;[3] and

c. In contrast to the intransigence highlighted above, the determination of the Government to make changes to the judicial review regime to make it more difficult to bring successful environmental claims. For example, in November 2021 the UK Government published its Judicial Review and Courts bill. Under the bill, a strong presumption would be created in favour of judges having to grant new remedies[4] in most cases – remedies that could result in environmental harms going unremedied (i.e. leaving the claimant without proper redress). In the end, the presumption was voted down by the House of Lords (after strong advocacy by NGOs, including ClientEarth and Wildlife and Countryside Link) and then dropped by the Government from the final bill, which became an Act.[5] Notwithstanding the fact that the presumption was removed, the new forms of quashing order codified by the Judicial Review and Courts Act 2022 remain available to the court, to apply at its discretion, which has introduced greater uncertainty and risk for claimants, even when they are successful.

6. Notwithstanding the criticisms of the plan of action set out above, we will continue to contribute constructively to the implementation of the recommendations in the Decision, in particular by contributing to any forthcoming review of the ECPR.

Yours sincerely,

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[3] See paragraph 13 of the UK's 1st Progress Report on Decision VI/8k concerning compliance by the UK with its obligations under the Aarhus Convention, dated 1 October 2018 (accessible here).
[4] Prospective only and suspended quashing orders.
[5] Judicial Review Bill: Compromise on controversial clause - Public Law Project.