

Mr. Kieran Fitzpatrick
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Ireland

3 April 2023

To: Ms Fiona Marshall,
Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Palais des Nations, 1211 Geneva 10,
Switzerland

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Ireland in connection with the cost of access to justice (ACCC/C/2014/113)

Dear Ms Marshall,

Further to your letter of 20 March 2023, and the request therein, I confirm that I see no reason for the Compliance Committee to not resume its deliberations on its draft findings in regard to my Communication.

If the Committee is minded to take into account the judgment on 10 November 2022 by the Supreme Court of Ireland in *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IESC 43, then, if I may, I would like to comment on this case.

I would briefly make the point that, while the decision reverses the *McCallig* case approach of “costs-splitting”, it does not mitigate the risks of the catch-22 problem, which I had outlined in my original communication. Environmental litigants still face the unpredictable risk, of being hit with prohibitive adverse costs, if at least one of their claims (or a stand-alone single claim) fails to fall within the limited and difficult to define costs-protection-rules, or if an applicant is deemed to not have standing to proceed, as in *Callaghan* (2018)¹, as provided in my 22 December 2020 response to the Committee.

It should also be observed that the second applicant to the case could not afford to take the risk of participating in the appeal hearings, thus evidencing the ongoing deterrence of the costs system.²

The Party Concerned, via the legislature, and via the courts (at a binding precedent level), has not addressed the “catch 22” problem effectively. For example, the Supreme Court failed to overcome the problem in *Coffey v EPA* (2013)³. The government, even in proposed Aarhus-costs legislation, fails to address the “catch-22” problem appropriately; litigants thus remain in financial jeopardy.

Yours sincerely,

Kieran Fitzpatrick

¹ *North Meath Wind Farm Ltd and Element Power Ireland Ltd v An Bord Pleanála and North Meath Wind Information Group and John Callaghan* [2018] IECA 49, 23 February 2018.

² See para 13 of judgement - *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43.

³ *Stella Coffey v Environmental Protection Agency and Teagasc* [2013] IESC 31, 25 June 2014.