ClientEarth

13 November 2023

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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: First progress report, submitted 13 October 2023, on the 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 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 ECPR;

    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;

[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.

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 its 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.

3. 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. **13 – 16 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 (the "**Plan of Action**"), ostensibly setting out how it intends to implement the recommendations in paragraphs 2, 4, 6 and 8 of the Decision;

e. **1 August 2022**. ClientEarth provides comments on the Plan of Action, in response to the Compliance Committee's invitation of 4 July 2022;

f. **14 October 2022**. ClientEarth sends a letter to the Compliance Committee (alongside the RSPB, Friends of the Earth, Friends of the Earth Scotland and Environmental Rights Centre for Scotland): (i) requesting that the Committee discuss the Plan of Action at its 77th meeting in December 2022; and (ii) reiterating the lack of engagement with stakeholders in relation to the Plan of Action and the paucity of its substantive content;

g. **3 December 2022**. The Compliance Committee writes to the UK's focal point for the Aarhus Convention making clear that the Plan of Action is "*only partially appropriate*" and requesting that the UK attend the 77th meeting in December 2022 to discuss it;

h. **9 December 2022**. The Compliance Committee provides a summary of its concerns with the Plan of Action, ahead of the 77th meeting. The summary makes the following main criticisms:

i. The Plan of Action proposes to publish a Call for Evidence on its environmental costs protection regime ("**ECPR**") "*in the coming months*", with no precise date given. The Compliance Committee had already (at paragraph 7 of its report to MOP7 on decision VI/8k (part I)) expressed its disappointment that the ECPR review, which was supposed to have taken place in April 2020, had been delayed;

ii. The Plan of Action does not refer at all to the list of issues that the Committee (at paragraphs 6 and 81 of its report to MOP7 on decision VI/8k (part I)), had identified as needing to be addressed in England, Wales and Scotland. In order to fulfil paragraph 2(a) and (b) of the Decision in England, Wales and Scotland, the UK should ensure that any proposed revisions to the ECPR of those jurisdictions address each of the issues listed by the Committee in its report to MOP7 on decision VI/8k;

iii. Regarding paragraphs 4(a) and (b) of the Decision, the Plan of Action does not provide a firm timeline to commence even the proposed initial analysis of the implications of the Compliance Committee's findings or possible options to address them. Moreover, the Compliance Committee expresses concern at the United Kingdom's statement with regard to paragraph 4 (a) of decision VII/8s that "*if appropriate, the United Kingdom will come forward with measures to address the issue, in light of the obligations under the Aarhus Convention*";

iv. Concerning paragraph 6 (a)-(d) of the Decision, with respect to England and Wales, the Compliance Committee notes that, while the Plan of Action again refers to its plans to publish a Call for Evidence on reviewing the ECPR in the coming months, it does not indicate whether the Call for Evidence will actually consult upon the matters addressed by the recommendations in paragraph 6(a) or (b).

i. **16 December 2022**. Open session of the Compliance Committee's 77th meeting. The Compliance Committee criticised the Plan of Action, making the following comments (in summary): the Plan of Action lacked the required granular detail to act, as intended, as a planning tool for bringing the UK into compliance by 1 October 2024; the Compliance Committee was expecting a set of tools to work towards compliance, rather than a general Call for Evidence; the Plan of Action was general and random and needs to be rectified as the 1 October 2024 deadline is not far away;

j. **13 October 2023**. The UK submits its first progress report on the Plan of Action (the "**First Progress Report**") to the Compliance Committee.

4. ClientEarth does not here repeat its observations on the deficiencies of the Plan of Action, which are set out in the letter of 1 August 2022 to the Secretariat.

5. ClientEarth wishes to bring the following problems with the First Progress Report to the attention of the Secretariat, to the extent that they relate to the jurisdiction of England and Wales ("**E&W**"):

    a. As an overall comment, the First Progress Report indicates that no progress has been made with respect to the recommendations and requirements in the Decision. This is deeply concerning and puts in doubt the ability of the UK to come into compliance with the Aarhus Convention by the deadline, set in the Decision, of 1 October 2024;

    b. Environmental Cost Protection – This section does no more than set out the basis for the existing ECPR and state that "[t]*he government will raise the issues raised in the committee's recommendations in the forthcoming Call for Evidence on the operation of the Environmental Costs Protection Regime (ECPR) to seek views on the way forward"*. This outcome is entirely unsatisfactory:

        i. The UK government has a long history of non-compliance with respect to the position in E&W and has (in the form of the Ministry of Justice) been promising since October 2018 to review the ECPR;[2]

        ii. In contrast to the intransigence highlighted above, the UK government has sought, in recent years, to make changes to the judicial review regime that would make it more difficult to bring successful environmental claims. A key example of this trend is the Judicial Review and Courts Act 2022, which came into effect on 28 April 2022. Under that Act, the courts have the power to grant new remedies[3] – remedies that limit the scope and effect of quashing orders and may result in environmental harms going unremedied and claimants without proper redress. The draft Bill included a clause that would have required the court to apply these new remedies in almost all cases, but it was voted down by the House of Lords (after strong NGO advocacy) and dropped the government from the final Bill;

        iii. There is a risk that the Call for Evidence will be used as an opportunity to contest or undermine the conclusion of the Compliance Committee that reform is needed. We hope that this is not the case and the Call for Evidence instead invites views on clear, precise and time bound proposals for bringing the UK into compliance with the Aarhus Convention;

        iv. ClientEarth is concerned that no date or (even) rough timeframe has been provided for the Call for Evidence. Given the limited time remaining to comply with the terms of the Decision, it would have been beneficial to know a precise timeframe for the Call for Evidence and for any decisions or changes arising out of it.

[2] 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).
[3] Prospective only and suspended quashing orders. Section 1(1) of the Act specifies that a quashing order may now include provision "*for the quashing not to take effect until a date specified in the order*" (i.e., suspended) or "*removing or limiting any retrospective effect of the quashing*" (prospective only).

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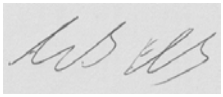
6. Overall, the First Progress Report reveals that the UK government has made zero progress towards meeting the requirements of the Decision and is rapidly running out of time to do so, with no clear pathway towards achievement being set out. ClientEarth is deeply concerned by this state of affairs. Notwithstanding this, 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 faithfully



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