Communication to the Aarhus Compliance Committee concerning compliance by the United Kingdom with provisions of the Convention in connection with the planning of the Crossrail project (ACCC/C/2012/77) The thirty seventh meeting of the Aarhus Compliance Committee in Geneva

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NOTE OF THE ORAL PRESENTATION
by James Maurici to the Committee on
27 June 2013 on behalf of
THE GOVERNMENT OF THE UNITED KINGDOM

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Introduction

1. This communication concerns costs awarded against the Communicant following the rejection of its application for permission to apply for judicial review of the Secretary of State for Energy and Climate Change's decision to designate the National Policy Statement of nuclear power generation under the Planning Act 2008. It alleges that the £8000 costs ultimately awarded against it are "prohibitively expensive". The Communicant invites the Committee to recommend that a costs award of £1500 should replace that already issued.

2. The UK refers the Committee to DEFRA's letter of 31 May 2013 which sets out in more detail its case in response.

3. The purpose of these submissions is to highlight the key points.

(i) Some preliminary matters

4. First, it is important to have regard not just to Article 9(4) itself but also Article 3(8) which provides in terms that the Convention "*shall not affect the powers of national courts to award reasonable costs in judicial proceedings*". Thus while the costs awarded against a party must be reasonable and not be prohibitively expensive there is no prohibition on awarding costs against a losing party. This is, of course, a practice common in many legal systems. Advocate-General Kokott in Case C-427/07 ***Commission v Ireland*** [2009] E.C.R. I-6277 confirmed that Article 3(8) means that there is no ban on costs being awarded against losing parties (see paragraph 94 of her opinion). And this is accepted by the Communicant whose complaint is not that costs were awarded against it, but only as to the level of those costs. Moreover, previous decisions of this Committee have accepted that *in principle* the award of costs against a losing party is Convention compliant.

5. Second, what is *"prohibitively expensive"* will depend on all the circumstances of the case. Thus in ACCC/C/2008/23 this Committee held that the award of £5,130 plus interest against two individual communicants following an interim dispute about an injunction was not prohibitively expensive. It is contended that the following are relevant to considering whether costs are prohibitively expensive: (i) the merits of the claim which

has failed; (ii) the way the claim has been conducted by the losing party; and (iii) the means of the losing party. These matters are all considered further below.

6. Third, as a matter of fact this case pre-dates the new rules introduced by the Government in response to the Port of Tyne Communication findings (ACCC/C/2008/33) see the letter dated 28 February 2013 from Defra. Those rules came into force in April 2013. Accordingly, for the purposes of ruling on this Communication there is no need for the Committee to consider these rule changes.

(ii) The merits of the application for judicial review, resulting in the award of costs

7. The UK would make the following points:

8. First, the merits of a claim are relevant when considering whether costs are prohibitively expensive under the Convention. The Court of Justice of the European Union recently so held in Case C260/11 ***Edwards***: see para. 42.

9. Second, the order for costs the subject of this Communication was contingent on the refusal of permission to apply for judicial review. The threshold for the grant of permission is a very low one: it is mere arguability. Permission is a filter stage aimed at weeding out speculative and hopeless claims. The Communicant failed to persuade a High Court Judge that its claim was even arguable. The Communicant had a right to renew its application for permission to an oral hearing, and with domestic law providing that any further award of costs against it for so doing would only exceptionally be made. That is to say it could have challenged the refusal of permission to bring its claim with relatively little, if any, risk of a further adverse costs order against it. The fact that the Communicant chose not to renew its application for permission, on which the award of costs now complained of was contingent, suggests that it lacked any faith in its own grounds of challenge.

10. Third, the Communicant seeks to suggest that the claim raised issues of the highest public concern. It is agreed that the Nuclear NPS, the designation of which was challenged by the Communicant, is of strategic importance. But that cannot be used to suggest that the failed challenge was itself in the public interest. As Advocate-General Kokott remarked

in ***Edwards*** in the context of Article 9(4) of the Convention "*[a] clearly hopeless action is not in the interest of the public, even if it has an interest in the subject-matter of the action in principle*". As explained in Defra's 31 May 2013 letter there is (rightly) no complaint made before this Committee that the NPS was adopted in breach of Article 7 of the Convention. There was very extensive public engagement and consultation prior to designation. That much at least can be taken as a matter now agreed between the parties.

(iii) <u>The characterisation of the claim</u>

11. The conduct of a litigant whose claim fails must be relevant in assessing whether a costs award made against it is reasonable and not prohibitively expensive. In this regard the UK makes the following points:

12. <u>First</u>, whilst judicial review is brought on a point of law, this was an unusually complex case, as evidenced by the fact that, although the Communicant was only applying for permission, its own grounds of claim were 37 pages long, and it submitted a bundle of 67 documents numbering 1,611 pages. These documents go into considerable detail about the Fukushima incident, and all had to be considered by the Secretary of State's legal representatives. The underlying matters raised were of technical and scientific complexity. In this, the UK draws support from the costs order made by Mr Justice Ouseley in this case who held that: "*the statutory role of the different bodies involved was complex, and the arguability of the allegations that material considerations had been ignored and that the consultation was flawed could not be resolved devoid of factual analysis. The costs measured against ordinary claims are obviously high, but not obviously so when measured against this claim.*"

13. <u>Second</u>, the claim itself was densely, at times confusingly drafted, and required considerable work by its advocates to clarify the grounds of challenge. It had to carry this work out under time pressure and on an issue of strategic importance to the UK's energy policy. The bulk of the costs incurred were barristers' fees. Whilst this is a significant investment, it was entirely correct for efforts to be focused on eliminating the challenge at the first stage: the grounds of defence were proportionate to the complexity of the claim. While the costs seem high – given the nature of the claim – they were justified.

14. Third, the Communicant cites the case of ***R(Ewing) v Office of the Deputy Prime Minister*** as evidence that the costs at the permission stage needs to be proportionate. That is agreed. However, the ***Ewing*** case is not helpful for the Communicant's argument, as it recognises that "*the considerations which may apply in responding to the application for permission will vary enormously from case to case.*" There is no absolute or inflexible rule to be applied in determining what is "reasonable" and "proportionate" in terms of the costs incurred. The Judge in awarding the costs he did considered these matters.

(iv) The approach to the assessment of costs in this case

15. The Committee will need to engage with the issue of whether the Judge in making the order he did approached the matter correctly. It is submitted he did. He gave detailed and careful reasons for his decision. The Committee is referred to those reasons and asked to consider them carefully. There are a number of further points:

16. First, the Communicant could have applied for an interim protective costs order, seeking to limits its exposure to costs even at the permission stage. This is not at all uncommon. The Communicant did not so apply.

17. Second, the Court of Justice of the European Union has (see again ***Edwards***) given useful guidance on matters relevant to assessing whether costs are prohibitively expensive. Thus "*...[t]he court may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure and the potentially frivolous nature of the claim at its various stages.*" Here as already stated the merits of this case were weak and it is submitted there was no strong public interest in pursuing this claim. These were all matters the Judge had regard to in making the decision he did on costs.

18. Third, the Court of Justice also held that although a claimant's own financial means cannot be the sole consideration is deciding what is prohibitively expensive, they are a relevant factor. In this case, the Communicant's income for the year 2010 was £8,931,000. It is submitted that this approach supports the view that £8,000 is reasonable in this case.

19. Fourth, the Committee needs to consider the consequences if it determined that a public authority such as the Department of Energy and Climate Change cannot recover its reasonable costs in defending wholly unmeritorious claims such as the one brought by the Communicant. And remembering that it did not through the Judge's order recover all the costs it incurred in any event. In ***R (Davey) v Aylesbury Vale District Council*** [2008] 1 W.L.R. 878 the Court of Appeal said "[*t]he basic rule ... that costs follow the event in public law cases, as in others*" exists "*because, where an unsuccessful claim is brought against a public body, it imposes costs on that body which have to be met out of money diverted from the funds available to fulfil its primary public functions*". In the light of the current fiscal crisis the Department of Energy & Climate Change (the defendant in the judicial review brought by the Communicant) has like other public authorities had its budget cut significantly. If it cannot recover its reasonable costs from the Communicant in this and other similar cases then the monies it spent defending those proceedings are diverted from its principal function, namely works to make sure the UK has secure, clean, affordable energy supplies and promote international action to mitigate climate change. As a result real environmental harm might occur in circumstances which could have been avoided had the Department's resources not been diverted in litigating failed challenges against its decisions.

(v) Non-exhaustion of domestic remedies

20. The UK makes reference to paragraph 21 of Decision I/7. The Communicant objects to the level of costs awarded against it when it was refused permission to apply for judicial review. If it was dissatisfied with this there were two remedies open to it domestically. First, to appeal to the Court of Appeal against the costs award. Second, the refusal of permission on which the costs award was contingent could have been renewed to an oral hearing to a High Court Judge, and was thereafter subject to further appeals to the Court of Appeal. Moreover, as explained in the DEFRA letter of 31 May at para. 21 an oral renewal of a permission application only exceptionally risks the award of any further costs against the applicant. All of this is clearly relevant, not least because in part the Communicant's case alleges that the Judge in making the costs order he did misapplied the relevant domestic law costs principles as set out in cases like ***Ewing*** (see further para. 34 of DEFRA's 31 May 2013 letter).

21. It has not been suggested, nor could it credibly be, that these unused domestic remedies would, to use the language in Decision I/7, be "unreasonably prolonged" nor that they "obviously [do] not provide an effective and sufficient means of redress". The proper course would have been for the Communicant to pursue these remedies.

22. The exhaustion of domestic remedies principle referred to in paragraph 21 of Decision I/7 is a recognised rule of customary international law.

Conclusion

23. For all these reasons it is contended that the Committee should reject the allegations made of breach of the Convention.

24. In any event the remedy sought by the Communicant, that the Committee recommends a costs award of £1,500, places the Committee in an invidious position. As the Committee is aware, it is not an appropriate use of the compliance mechanism to recommend awards of costs to national courts. Following the Communicant's wishes risks bringing the Committee into conflict with national legal systems. Article 15 of the Convention provides that the Committee is established on a "*non-confrontational, non-judicial and consultative basis*" to in order to advise; it ought not to be asked to suggest costs awards.

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