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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
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26th June 2014

Dear Ms Marshall

Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with provisions in the Convention in connection with Greenpeace's application for judicial review of the NPS (Ref. ACCC/C/2012/77)

1. The United Kingdom ("UK") notes the Committee's draft findings forwarded by the secretariat on 26th May 2014. We also note the request for confirmation on whether the UK agrees with the Committee making recommendations in accordance with paragraph 36 (b) of the annex to decision I/7.

2. We are disappointed that the Committee has decided to make a finding of non-compliance. The UK has some concerns about the way in which the Committee has approached the complaint and have the following comments on the draft findings.

Committee's findings on the amendments to the Civil Procedure Rules

3. Paragraph 78 of the Committee's draft findings expresses its view on the amendments to the Civil Procedure Rules, introduced in England and Wales in April 2013, to make provision for judicial review in Aarhus Convention cases. The UK recalls the Chair's opening remarks at the meeting of 27th June 2013, where the Chair asked all parties to focus on the contents of the communication and not to introduce additional topics for discussion. The UK supports this approach to the work of the Committee, and had prepared for the meeting on that basis. The UK also fully supports the Committee's decision, expressed in paragraph 71 of the draft findings, not to look at issues relating to public participation on the basis that such allegations were not made in the communication.

4. In our oral submissions at the meeting, the UK also said there was no need for the Committee to consider the rule changes because the case pre-dated the new rules[1]. The communicant was not challenging the application of the new rules, and in the circumstances it would not have been proper for it to do so. It was the UK's understanding that the general rules, in particular those set out in the *Garner*[2] case, would form the basis of the Committee's assessment of whether costs were prohibitively expensive in breach of the Convention.

5. Whilst the UK provided the Committee with some information about the new rules in its response to follow up questions, it understood the purpose of this was to provide background information only. If the Committee was intending to make findings on the application of the new rules – which had come into force a little over two months prior to the meeting – we submit that the Committee should have invited discussion on this point at the meeting. We also draw attention to our letter of 28th March 2013 in which we highlighted the correspondence taking place with respect to decision IV/9i and requested clarification from the Committee on the specific issues that were to be addressed by progressing communication 77.

6. The Committee finds that, even with the new rules in place, this "would not in principle prevent a situation similar to the present one from arising"[3]. This is getting in to the realms of speculation and does not address the other points arising from the application of the new rules which may have mitigated the situation. We recall the guidance on the compliance mechanism and previous decisions in support of the view that it is open to the Committee to examine possible breaches of the Convention through considering a Party's legal system as a whole. The UK has been working with the Committee on the follow up to decision IV/9i, in particular the issues raised in the *Port of Tyne* communication (ACCC/C/2008/33). The UK submits that this would have been the proper forum to make any observations about the new rules, where any views can benefit from submissions made by the Party concerned and any interested party, and subjected to proper argument.

Exhaustion of domestic remedies

7. We are also concerned by the Committee's findings on the Communicant's failure to exhaust domestic remedies. The submissions made by the UK on this point had two bases: (a) that there was a question of admissibility for the Committee in deciding whether to hear the complaint owing to this failure; (b) whether those domestic remedies were properly open to the claimant and should have been pursued.[4] In its preliminary determination of admissibility of the communication, the Committee recalled the annex to decision I/7 on the pursuit by a communicant of domestic remedies. Although the Committee interprets these as not being strict criteria and considers that the Committee has discretion as to whether to hear a complaint, we are not of the view that this issue was considered by the Committee in making its findings. We would appreciate the Committee confirming its view on the application of the criteria concerning domestic remedies in the annex to decision I/7.

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[1] See paragraph 6 of the Note of Oral Presentation, James Maurici QC
[2] *R(Garner) v Elmbridge BC* [2010] EWCA Civ 1006
[3] Paragraph 78 of the draft findings of the Committee
[4] See paragraph 21 of the annex to decision I/7

8. At the Committee meeting, the UK submitted that municipal or domestic law should always be given the opportunity to remedy problems before an international body intervenes. This avoids "forum shopping" and preserves the position whereby an international tribunal is a 'court' of last resort rather than a 'court' of first instance, risking conflict with signatories to international instruments. It also ensures that the Committee is able to reach views based on a complete picture, rather than risk pre-judging the outcome of processes that may be capable of addressing the issues raised by a communicant. The UK invited the Committee to develop its principles on this question, which we have raised with the Committee in respect of a number of other communications and in more general discussions on the compliance mechanism. We would be grateful if the Committee could again reflect on this point.

9. Paragraph 75 of the Committee's draft findings addresses the point about the communicant's failure to apply for a PCO, and its general failure to exhaust domestic remedies before bringing its complaint. In making findings in this paragraph the Committee draws on the report by Mr Justice Sullivan (as he then was) *Ensuring Access to Justice in Environmental Judicial Review*[5] ("the Sullivan Report") where the costs of applying for a PCO are assessed to be in the region of £2,500-£8,000 plus VAT.

10. The UK respectfully draws the Committee's attention to the fact that the Sullivan Report examines the law and costs of obtaining a PCO before the *Garner* case, when courts applied the criteria in the earlier decision of *Corner House*[6]. Since the *Corner House* decision in 2005 and the Sullivan Report, the law on protective costs orders in environmental cases has developed significantly[7]. In particular, the *Garner* case provides established principles for when a PCO will be granted in environmental cases, reducing the costs and the uncertainty of making an application. The UK submits that the Committee has drawn erroneous conclusions from the Sullivan Report, absent argument from the parties on this point, and that its conclusions are based on out of date material.

11. The UK is concerned about the findings on the communicant's decision not to apply for a PCO because we do not know the reasons why the communicant chose this course of action. The communicant does not give any reasons for its decision in its written communication, and in its submissions at the meeting it referred only to the fact that applying for a PCO can lead to satellite litigation (where the decision to grant a PCO is litigated separately from the substantive claim), without expanding on this point.

12. There is no obligation on any claimant to protect its costs by applying for a PCO, and if a claimant is successful in its substantive claim, it benefits from this approach because it has not had to agree a cross cap, which has the effect of limiting the successful claimant's ability to recover costs from the losing defendant. Although at the time the communicant brought its case satellite litigation could be an issue, it was equally true that many PCOs were granted on the papers in a straightforward and low cost way.

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[5] May 2008, appendix 3 to the Sullivan Report

[6] *R(Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

[7] We refer to these developments at paragraph 35 of the UK's response to Communication 77 (31st May 2013)

13. Paragraph 75 goes on to make findings about the communicant's failure to exhaust domestic remedies, describing this approach as: "entirely understandable", on the basis that would have risked further costs exposure had it done so. The Committee's comments apply equally to the two questions of: (a) an appeal against the costs award; (b) failure to appeal the refusal of permission to apply for judicial review. When Mr Justice Ouseley made the original costs award of £11,813, he invited submissions from the parties on the amount of costs, consistent with the guidance in the relevant case law. This is a distinct and simple opportunity for the parties to seek to reduce their costs. The communicant did make submissions, and its costs were reduced to £8,000. The communicant could then either have appealed the costs award to the Court of Appeal within 14 days, if it had decided not to pursue the judicial review application any further, or could renew its application for permission for judicial review. The communicant took neither of those routes.

14. The discussion about whether the communicant would have been exposed to further costs was the subject of detailed submissions by both parties at the meeting. The UK submitted that, unless the renewal could be said to be an abuse of process, any further costs after the costs incurred in seeking permission on the papers, are exceptional. The factors a court will consider when deciding to award costs are questions about whether the renewal of the claim amounts to an abuse of process. *Mount Cook*[8] is the relevant case on this point, and the guidance it provides is summarised at paragraph 21 of the Committee's draft findings. The UK is not arguing that any of these criteria would have applied to a renewal of permission application by the communicant, and consequently does not understand the Committee's findings that the question of costs on taking such a step would have been uncertain or expensive. After hearing submissions from both parties on that point, the Committee has not made any findings on whether costs in practice would been prohibitively expensive, bearing in mind the clear tests that would have applied to the merits of the case from established case law.

Consideration of EU case law

15. The UK recalls that a significant part of the meeting was taken up with discussion of the recent ruling of the Court of Justice of the European Union ("CJEU") in the case of *Edwards*[9], and it set out the CJEU's findings in detail in its written response[10] to the communication. The case provided useful guidance to the UK and other Member States about the approach that should be taken by the courts as to whether costs in a case were prohibitively expensive, in particular whether those costs should be approached on a subjective or an objective basis. The communicant also made submissions on the *Edwards* case. The key paragraphs of *Edwards* provide:

> "40. [The] assessment [of the correct level of costs] cannot…be carried out solely on the basis of the financial situation of the person concerned but must

[8] At the meeting, the UK made submissions on the guidance given in *R(Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346.

[9] C-260/11, *Edwards v Environment Agency*, 11th April 2013.

[10] See in particular paragraphs 36 – 39 of the UK's response

> also be based on an objective analysis of the amount of the costs….Thus, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event to be objectively unreasonable…
>
> 42. The 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 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[11]".

16. Engagement with *Edwards* in the draft findings would have been particularly helpful where the CJEU considered the means of the party bringing the litigation (referred to above at paragraph 40 of its judgment). The UK submitted at the meeting that means are relevant in deciding whether to grant a PCO, and if so, at what level. Although the Committee refers to this broad question in paragraph 72 of its findings, where it finds that a costs assessment "should involve both objective and subjective elements," it is unclear how it has applied this to consideration of the costs awarded against the communicant. In referring to paragraph 72, we also take the opportunity to note the Committee's statement that "'fairness' in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant" and make the observation that fairness for all parties is of course a fundamental aspect of any judicial proceedings.

17. When paragraph 75 of the draft findings discusses the question of the amount of costs awarded, the Committee does not make findings on how costs should be assessed, nor does it apply any subjective criteria. It appears from the way in which costs are discussed that it has approached the question on a purely objective basis. The UK would be grateful for clarification as to how any subjective element of the costs award was considered by the Committee.

18. *Edwards* also provides guidance as to the criteria that should be applied by the court in deciding whether to grant a PCO. At paragraph 73 of its draft findings the Committee considers the context of the judicial review brought by the communicant but not the merits or complexity of the case itself. Following *Edwards*, our view is that the merits of the case are relevant. The fact that the court can make that assessment protects the taxpayer from frivolous and meritless challenges against public bodies, who have to meet the expense of defending these claims from public funds.

19. It is of course appreciated that the Committee is not bound by EU case law. However, it is submitted that making findings on the *Edwards* case would have provided valuable assistance to the parties on the current state of the law as it applies in the UK on PCOs.

UK position on the draft findings and recommendations

20. The UK invites the Committee to reconsider its draft findings and recommendations before adopting them. Given the concerns expressed in the preceding paragraphs,

the UK is unable to agree to these being made on the basis of the current draft and requests that paragraph 83 is amended accordingly.

Corrections

21. We have also noted a number of corrections to the text that need to be made and invite the Committee to reflect these in its findings. These are set out in the Annex.

Yours sincerely

Ahmed Azam
Aarhus Convention: United Kingdom National Focal Point

ANNEX – LIST OF CORRECTIONS

In paragraph 5, the reference to “31 July 2013” should be to “31 May 2013”.

In paragraph 17, it would be helpful to clarify that the Pre Action Protocol should normally be complied with, but is not a mandatory part of bringing a claim for judicial review. If a party does not follow the Pre Action Protocol it may be penalised in costs.

In paragraph 20, the opening sentence could be clarified to read: “With respect to costs in unsuccessful applications for permission to apply for judicial review” or similar.

In paragraph 26, it is Rule 45.41-45.44 that provides for costs protection in Aarhus Convention claims. Practice Direction 45 sets out the amounts of a cap. The final sentence should also clarify that these amended rules entered into effect on 1 April 2013 in England and Wales. Scotland and Northern Ireland have rules which came into effect separately.

In paragraph 29, the reference to the “Chief Inspector for Nuclear Installations” should be to the “Chief Nuclear Inspector”.

In paragraph 30, as currently worded the last sentence suggests that applications for judicial review are separate from correspondence received under the Pre Action Protocol, whereas in fact a Pre Action Protocol letter is the first step in an application for judicial review.

In paragraph 41, the reference to “Queens Counsel” should be to “Queen’s Counsel”.

In paragraph 58, the reference to “Environmental Agency” should be to “Environment Agency”.

In paragraph 75, the text refers to “the pre action protocol stage” but should refer to the permission stage.