**COALITION FOR ACCESS TO JUSTICE FOR THE**

**ENVIRONMENT**

Ms Aphrodite Smagadi,

Secretary to the Aarhus Convention Compliance Committee,

United Nations Economic Commission for Europe,

Palais de Nations, Room 348,

CH-1211 Geneva 10

Switzerland.

28th February 2013

Dear Ms Smagadi,

**Re: Decision IV/9i of the Meeting of the Parties to the Aarhus Convention**

Thank you for your letter dated 22nd January 2013 inviting the UK Government to update the Compliance Committee on its progress in implementing the above Decision.

CAJE would be grateful if the Committee would take the following information into account when considering the UK’s compliance at its fortieth meeting on 25-28 March 2013. We refer to the questions set out in your letter to Defra dated 8th October 2012.

**Protective Costs Orders**

**Will the new rules on PCOs apply to all Aarhus related cases, not just those regarding public participation?**

As the Committee is aware, the Ministry of Justice announced proposals in relation to Protective Costs Orders (PCOs) for “environmental cases” in England and Wales in August 2012 - shortly before the hearing of the Court of Justice of the European Union (CJEU) in Case C-260/11 (*The Queen, on the application of David Edwards and Another v Environment Agency and Others*.

CAJE was keen to clarify the scope of the proposals and duly contacted the Ministry of Justice. In September 2012, the MoJ confirmed that the proposals will apply to “*all environmental judicial reviews*” (email dated 11th September 2012). However, we would be grateful for the Government’s formal confirmation that the proposals will apply to all such cases and not be limited to cases falling within the scope of the EC Public Participation Directive.

In this regard, the Committee will wish to note that proposals in relation to Protective Expenses Orders (PEOs) in Scotland will be limited to cases falling within the scope of the PPD (see later).

Furthermore, there is a separate consultation on PCO proposals for Northern Ireland organised by the Department of Justice there – for further detail, see below.

Earlier this month, we were notified that the Civil Procedure Rules Committee had passed amendments to the Civil Procedure Rules in respect of costs in cases covered by the Aarhus Convention in England and Wales. The relevant Statutory Instrument (SI 262) and Practice Direction 45 are attached to this letter - alternatively the SI can be accessed electronically here: <http://www.legislation.gov.uk/uksi/2013/262/contents/made>

We refer the Compliance Committee to pages 11 and 41-42 of SI 262 and pages 3-4, 9 and 40-41 of Practice Direction 45. However, to summarise, the effect of the amendments are as follows:

* The letter of claim should clearly state that the claim is an Aarhus claim and give reasons. If the defendant does not accept this, the reply should state this clearly and explain the reasons.
* Where the court holds that the claim is an Aarhus claim, it will normally order the defendant to pay the claimant’s costs of those proceedings on the indemnity basis, and that order may be enforced notwithstanding that this would increase the costs payable by the defendant beyond the amounts prescribed in Practice Direction 45 (see below);
* Where a claimant is ordered to pay costs in an Aarhus claim, adverse costs are capped at: (a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person; (b) in all other cases, £10,000;
* Where a defendant is ordered to pay costs, they will be capped at £35,000;
* If in an Aarhus Convention claim the court is satisfied that an injunction is

necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court will, in considering whether to require an undertaking by the applicant to pay any damages which the respondent or any other person may sustain as a result and the terms of any such undertaking: (a) have particular regard to the need for the terms of the order overall not to be such as would make continuing with the claim prohibitively expensive for the applicant; and (b) make such directions as are necessary to ensure that the case is heard promptly.

While CAJE welcomes the UK’s attempts to address the shortcomings identified by the Compliance Committee in Communication C33, these amendments do not satisfactorily address the UK’s compliance with Article 9(4) of the Aarhus Convention and furthermore would apply only to England & Wales and not to the other jurisdictions in the UK. We amplify our reasoning below.

However, before turning to the specific amendments made, we wish to inform the Committee that on 13th December 2012, the Ministry of Justice sought views on a package of measures “*to stem the growth in applications for judicial reviews*”. The consultation paper can be found here: <https://consult.justice.gov.uk/digital-communications/judicial-review-reform>

To summarise, views were sought on the following proposals:

* To reduce the deadline for applying for Judicial Review in relation to planning cases to 6 weeks, in line with the limit pertaining to appeals lodged under s.288 of the Town and Country Planning Acts 1990;
* To remove the opportunity for an oral renewal of permission where: (i) there has been a prior judicial process involving a hearing considering the same issues as raised in the JR; and (ii) where the judge has deemed the case to be "totally without merit"; and
* To increase the fees for JR to eventually reflect the costs of the hearing. As an interim measure, there will be an additional fee of £235 relating to an application for oral renewal but eventually fees will probably increase to reflect the full costs of an oral hearing (£475).

It is unclear how these proposals relate to the recent amendments to the Civil Procedure Rules. When we raised this issue with the MoJ, we were informed that the “*MoJ will take into consideration the UK’s obligations under the Aarhus Convention*” (email dated 17th December 2012). However, the December Consultation paper makes no reference to the UK’s obligations under the Aarhus Convention - or to recent amendments in relation to environmental cases. Moreover, some of the proposals specifically target planning cases (a proportion of which are likely to be Aarhus cases) and will further undermine the UK’s ability to fulfil the requirements of the Convention.

We attach a copy of CAJE’s response to this consultation paper for the Committee’s information. However, for ease of reference we summarise our main concerns below:

* **Absence of evidence and data misconceptions** - the proposals appear to have been formulated in the absence of any factual evidence or statistical foundation. For example, the consultation paper makes the wholly unsubstantiated assertion that JR can have the effect of “*stifling innovation and frustrating much needed reforms, including those aimed at stimulating growth and promoting economic recovery*.” However, the consultation paper contains no data on planning or environmental cases – or indeed any data to support the assertion that there is a relationship between JR and economic growth.

The consultation paper also refers to the “*significant growth in the use of Judicial Review to challenge the decisions of public authorities*”. However, this is almost wholly due to an increase in the number of challenges made in immigration and asylum matters. The consultation paper fails to confirm that the proportion of applications for ‘other matters’ remains unchanged from 2010 and has, in fact, remained unchanged since 2005. Furthermore, according to the Ministry of Justice’s own statistics the number of substantive JR hearings is steadily decreasing. In 2010 the number of hearings decreased by 6% on 2009 and in 2011 the number decreased by 14% on 2010. CAJE is troubled that the consultation paper seriously misrepresents the situation with regard to ‘other matters’, including environmental claims.

* **Reducing the time limit for lodging Judicial Reviews in relation to planning cases** - CAJE does not support the proposal to shorten the time limit for lodging an application for JR in planning cases to bring them into line with the time limits for statutory appeal (6 weeks). In our view, this proposal would seriously undermine the UK’s ability to secure compliance with Article 9(4) of the Convention in that it would be impossible to construct a case which may involve quite complex legal arguments in that timeframe. In our view, the optimal position would be to amend the time limits relating to *both* statutory appeals and Judicial Review to three months – thus ensuring legal certainty and sufficient time for appellants and claimants to properly prepare their cases.
* **Removal of the oral hearing when permission is refused on the papers in certain circumstances** - CAJE does not support the proposal that where an application for permission to bring Judicial Review has been assessed as totally without merit there should be no right to request an oral renewal. The consultation paper acknowledges that of the 2,000 renewed applications made in 2011, 300 (some 15%) were granted following an oral renewal, thus confirming the importance of the oral hearing as an established common-law right and a fundamental safeguard to ensure that arguable cases proceed.

Secondly, in our experience, even cases deemed “wholly without merit” can ultimately be successful. In *R (on the application of Friends of the Earth Ltd) v Secretary of State for Energy and Climate Change* it is clear that if oral renewal had not been available, the judicial review of an unlawful government decision would have run aground, causing enormous and irreparable harm to the UK's solar industry. The JR challenge, which was originally refused permission on the papers, was granted permission with expedition at oral renewal and subsequently succeeded in both the High Court and Court of Appeal, with the Government being refused permission to appeal to the Supreme Court.

* **Increasing fees for Judicial Review** - CAJE is particularly concerned to note the government is considering the scope for adjusting fees further over time so that they reflect “*the full costs of providing the service*”. While it is unclear what these costs may entail, increasing the fees for JR at a time when the UK has been found in non-compliance with Article 9(4) of the Aarhus Convention and is being infracted by the EU in respect of ‘prohibitive expense’ is clearly obstructive.

**Do the more limited PCOs only apply to Judicial Review cases or also to statutory review cases, such as those involving challenges to planning decisions?**

We would be grateful for the UK’s clarification on this matter. We are unclear as to why challenges brought under s.288 of the Town and Country Planning Acts 1990 (and other statutory challenges - many of which concern matters falling squarely within the remit of the Convention) were excluded from the August 2012 proposals. We also note the proposals are silent on private law environmental cases.

**Do the more limited PCOs apply to each stage of the proceedings, i.e. does a judge in first, second and third instance re-determine whether the limits are to apply anew and at the levels of GBP 5,000, 10,000 and 35,000 at each level or will a different manner of granting PCOs be applicable for appeals, and if so what system?**

It would appear that certainty as to costs protection only applies up until the conclusion of the first instance proceedings - there is no certainty as to costs in the Court of Appeal and the Supreme Court.

CAJE maintains that the level of the cap should not be increased if there is one (or even two) appeal(s). A claimant may be able to proceed at first instance if adverse costs liability is capped, however, it is unlikely the claimant would be able to find that same sum again (and again) should it be necessary to appeal a decision to a higher court. Moreover, the fact that a higher court may impose a much higher cap will undoubtedly have a ‘chilling’ effect on the claimant’s ability to proceed.

**Will a judge have discretion in granting the PCOs and, if so, what conditions will frame that discretion? Or does an Aarhus-related case automatically engage the proposed PCOs? If any conditions apply, is the fact that an individual or an NGO is acting in the public interest among the relevant conditions?**

It would appear that a fixed recoverable costs regime will apply in all cases where the claimant states in the claim form that the case is an Aarhus case and the reasons why this is so, subject only to the court determining that the case is in fact not an Aarhus case. Subject to the claim being confirmed as an Aarhus claim, the fixed recoverable costs for both the claimant and defendant cannot be challenged and it will not be dependent on permission having been granted.

CAJE welcomes rule 45.44, which states that “*if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant to pay the claimant’s costs of those proceedings on the indemnity basis, and that order may be enforced notwithstanding that this would increase the costs payable by the defendant beyond the amount prescribed in Practice Direction 45*.” We would, however, press for the removal of the word “normally” in order to ensure that claimants are not deterred from bringing environmental cases on the basis that the nature of the claim may be challenged and they may have to bear the financial brunt of defending their claim.

**How were the figures GBP 5,000, 10,000 and 35,000 determined? In other words why does the party concerned find that if these figures meet the conditions of Article 9, paragraph 4, of the Convention? Who are to be considered as ‘groups’ under the proposed PCO rules?**

There would appear to be no explicit rationale for the £5,000 cap relating to individuals. It would appear to have been set “*taking account of the levels which are currently being used by the courts as well as the importance of setting a level which could not be further reduced*”. The figure for the cross-cap appears to have been taken from the Court of Appeal case of *Garner* (in which a cross-cap of £30,000 was imposed) with an uplift of £5,000 to allow for VAT ((MoJ Consultation Paper, 19th October 2011, paragraphs 34-35 and 36 respectively – available at: <https://consult.justice.gov.uk/digital-communications/cost_protection_litigants>).

CAJE believes that the £5,000 cap for individuals is too high. It is certainly inconsistent with the objective approach proposed in ‘Sullivan I’ and ‘Sullivan II’ of focusing on the ‘ordinary person’ (i.e. just above legal aid means eligibility).

In order to determine what an appropriate figure might be (and as a guide to what the ‘ordinary person’ might be expected to pay), CAJE highlighted that the maximum monthly contribution an individual in receipt of legal aid would be expected to pay is £147.35. Working on the basis that an environmental JR should take no more than 12 months to conclude (and hopefully less), the maximum overall contribution an individual benefitting from legal aid would be expected to make to the case would be **£1,768.20** (£147.35 x 12).

If the objective of a PCO is to ensure that access to justice is not prohibitively expensive for any member of society, it is logical for the claimant’s liability to be set at a figure just above the maximum exposure under the public funding regime. Thus, we would argue that a more reasonable figure for the claimant’s liability would be £2,000-3,000. Given an objective approach to the limit, that should then be the generally applicable level. While it may appear a modest sum, the difference between £2,000 and £5,000 is considerable and would continue to have a significant chilling effect on most individuals.

Finally, CAJE is concerned about the requirement that in order to benefit from a PCO limiting adverse costs liability to £5,000 a claimant must be claiming “*only as an individual and not as, or on behalf of, a business or other legal person*”. Does this mean, for example, that a resident complaining of a nearby development proposal has to say that they are not concerned about other people at all? As currently framed, an individual claiming to represent the public interest would be liable to adverse costs of £10,000. Where does this leave the recognition that every person has the rights of access to justice as set out in Article 1 of the Convention? The UK proposals appear to encourage something akin to a ‘selfish public interest claim’.

**Groups**

CAJE has two major concerns about the amendments to the CPR concerning groups.

Firstly, there is significant ambiguity as to what is meant by groups. Does it, for example, encompass commercial entities, community groups and NGOs? While £10,000 may be suitable for commercial organisations, most community groups would find that figure prohibitive. In financial terms, there is little difference between one person bringing a case in their own right or acting in a group with a few others - indeed the proposals might prevent community groups from trying to bring litigation at all. Many NGOs would also not be able to afford to raise £10,000, including specialist NGOs with limited staff and budgets.

Secondly, we are also concerned to note that a separate figure for groups (which includes environmental NGOs) was not referred to in the consultation document of October 2011 and therefore CAJE did not make representations on it. If it had been, we would undoubtedly have opposed it, as would others.

**Scotland**

In light of the EU’s infraction proceedings, the Scottish Government has proposed specific Rules of the Court of Session for granting Protective Expenses Orders (PEOs) to ensure compliance with the requirements of the PPD. The proposals have been presented to the Court of Session Rules Council (which has responsibility for drafting rules of court) and are detailed in the Scottish Government's response to the consultation findings (see: <http://www.scotland.gov.uk/Publications/2012/10/6740/2>)

To summarise, the proposals are as follows:

* In the interests of certainty and flexibility, the limit on liability for expenses if a petitioner or pursuer loses is presumptively fixed at £5,000 - capable of being lowered - but not raised - on cause shown. This will therefore set a certainty about the maximum potential liability on costs a pursuer or petitioner may be liable on an award of a protective expenses order;
* The presumptive £5,000 limit is only available for individuals and NGOs promoting environmental protection: other organisations will be required to apply for a protective costs order at common law. Similarly, public bodies will require to apply for a cross-cap at common law in such cases;
* The Government is keen to ensure that there is some protection afforded to the public purse and an incentive to keep costs down. A cross-cap at £30,000 is retained, but subject to the ability of petitioners, on cause shown, to raise the limit;
* The ability to challenge limits will only apply, in the case of the £5,000 cap, where an application is made by the petitioner or pursuer to lower the cap, and, in the case of the cross-cap, to raise the £30,000 limit. The challenge can only be based on information either publicly available or disclosed to the court;
* The Rules will only apply to cases covered by the PPD;
* There will be provision in the rules regarding appeals. However, as there will be different costs considerations on appeal to those at first instance, the Government considers it should be for the judge to set out the appropriate costs limit(s), having regard to the costs decisions in the lower court;
* The court will have discretion to decline to make a PEO if it considers that the application or appeal is without merit and has no reasonable prospect of success. To make this practicable, the PEO must be applied for at the beginning of the relevant proceedings;
* There are no proposals in relation to cross-undertakings in damages with regard to interim relief.

While the current proposals are an improvement on those outlined in the earlier consultation paper[[1]](#footnote-1) (which simply replicated the Ministry of Justice’s proposals for rules of court in England and Wales, with no regard for the differences in cost regimes between jurisdictions, such as availability of legal aid) we still have a number of concerns about them. Some of our concerns may be clarified during the process of transposing proposals into rules by the Rules Council, although there will be no opportunity to influence the rules at that point, as we have been advised that the Council has decided not to consult on the draft rules.

In a Scottish context, based on the experience of the Environmental Law Centre Scotland, the sum of £5,000 would be difficult, if not impossible, for many community groups to find - let alone individuals. We are concerned with the presumption that litigants are either able to fund their own solicitors or that solicitors and counsel are prepared to work on a speculative, or no-win no-fee, basis. This presumption does not apply in Scotland. There are relatively few judicial review cases and generally a poor success rate for Petitioners. Very few solicitors work in the field and speculative or no-win no-fee cases will only operate in a market where there are a high turn over of cases, with the opportunity for the solicitors & advocates (barristers) to have sufficient ‘wins’ to cancel out the lost cases. In other words, even if the cap of £5,000 were appropriate for England & Wales (and we consider it is not) it is most definitely not appropriate in Scotland.

Evidence suggests that deprived communities bear the brunt of poor environmental decision making, with people living in deprived areas in Scotland suffering disproportionately from industrial pollution, poor water and air quality. Such a limit would disproportionately impact on these communities. Should an individual or community lose the case they would additionally be liable for their own sides’ legal fees, which could amount to tens of thousands of pounds (under this regime, the Government considers these costs to be at least £30,000 in addition to the PEO).

The level of the PEO cannot be viewed in isolation in relation to the question of what is ‘prohibitively expensive’. The proposed limit is particularly unfair considering that legal aid is effectively denied to those seeking to pursue public interest environmental cases, and given the Government’s proposals do nothing to tackle difficulties in obtaining legal aid for environmental cases, arising from Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002. This has a particularly adverse effect in environmental cases (further discussed below).

While we object to the level of the £5,000 cap, and the principle of an automatic cross cap, we note that petitioners will be able to apply to lower the £5,000 cap and increase the cross cap. We assume the requirement for certainty as to potential adverse liability (as required by Case C-427/07 *Commission v Ireland*) can be assured in this situation as petitioners have certainty as to their **maximum** adverse costs liability. However, while the proposals do not enable the respondents to challenge the level of either cap, nor do they expressly forbid it. Therefore, it is not clear whether respondents would be permitted to challenge a petitioner’s application to alter the level of either cap. This possibility clearly detracts from the ability of the system to provide the certainty required by EU law.

Furthermore, while it is encouraging that respondents are not able to require petitioners to disclose their means, it is not clear from the proposals whether the Court is able to require such disclosure, and whether it has any discretion in granting a PEO based on a petitioners means.

The proposals allow for PEOs to be awarded in appeals, but the cost limits are left to judicial discretion, taking into account decisions on costs in the lower court. There are relatively low numbers of environmental cases, and the tendency has been for such cases to be appealed. This might be because cases raised so far tend to raise important points of principle for third parties (such as availability of remedies and the standing requirements to bring cases) not yet fully litigated in Scotland. Cases might also tend to be appealed due to the absence of any degree of specialism within the judiciary for dealing with environmental cases, or because they are challenges to the largest/most controversial developments in Scotland. We anticipate that cases raised in the immediate future are likely to continue the trend of being appealed. We also think it likely that if the public authority or developer is successful at first instance, they are likely to appeal. Therefore we are concerned with the way in which the proposals for PEOs deal with appeals.

**Legal Aid in Scotland**

The Legal Aid system in Scotland has granted very few awards of legal aid for environmental cases and effectively prohibits aid for public interest cases, which most Aarhus challenges are. When deciding whether to grant legal aid, under Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002[[2]](#footnote-2), the Scottish Legal Aid Board (SLAB) looks at whether ‘other persons’ might have a joint interest with the applicant. If this is found to be the case SLAB must not grant legal aid if it would be reasonable for those other persons to help fund the case. Further, the test states that the applicant must be ‘seriously prejudiced in his or her own right’ without legal aid, in order to qualify[[3]](#footnote-3).

These criteria strongly imply that a private interest is not only necessary to qualify for legal aid, but that a wider public interest will effectively disqualify the applicant. This has a particularly adverse effect in relation to Aarhus cases; environmental issues by their very nature tend to affect a large number of people. In fact, it would appear impossible to obtain legal aid on an environmental matter that was purely a public interest issue. Moreover, in contrast to the situation in England and Wales where the system allows for joint funding of a case, community groups cannot apply for legal aid in Scotland.

In correspondence with the Scottish Parliament’s Public Petitions Committee (regarding FoES petition on Aarhus compliance), SLAB indicated that in a three-year period (2008-2011) only two environmental cases where Regulation 15 was considered had been granted legal aid[[4]](#footnote-4). In the same period, three cases had been refused Legal Aid citing Regulation 15, and all were environmental cases. Correspondence with SLAB in April 2012 confirmed that two of the three cases refused were later granted on appeal, and by that point a further award of Legal Aid had been granted in a case where Regulation 15 was relevant, amounting to a total of 5 cases granted over a 4 year period. We consider that it is likely most, if not all, of these cases had a strong private interest. We understand that only one of these grants was in a public interest matter, and legal aid was granted only when the case was on appeal. At the appeal stage, SLAB somewhat arbitrarily decided that Regulation 15 did not apply to the appeal proceedings. It is not clear on what basis this decision was made, but it may be incorrectly cited as an example of legal aid being available for public interest cases.

A recent Freedom of Information request confirmed that in the last 5 years the Scottish Government has not had any discussions with the Scottish Legal Aid Board on the impact of Regulation 15 in environmental cases. We consider that removal of Regulation 15 is essential for Aarhus – and Public Participation Directive – compliance.

**Court Fees in Scotland**

The Scottish Government is in the process of implementing a policy of full cost recovery in court fees. Fee proposals for the Court of Session will have a serious impact on parties seeking access to justice under the Aarhus Convention, because the complexity of environmental cases and a lack of specialization in the judiciary means environmental judicial reviews tend to require lengthy hearings, and fees include an hourly rate for time in court.

Fees for the Court of Session are already very expensive – prohibitively so for the ordinary person – particularly in relation to the time spent in court in judicial review cases. For example in *McGinty* the Outer House hearing took 18 hours, which we estimate would incur costs of approximately £1,620 for the hearing alone; in Walton hearings in the Outer House lasted for 22 hours, and in the Inner House for 18 hours amounting in our estimate to £5,580. Under the new regime, McGinty’s costs for time spent in court alone would double to £3,240 in 2014; and Walton’s more than double to £12,060.

Because of the restrictions on legal aid in environmental cases, it follows that such cases are highly unlikely to secure an exemption from court fees on the basis of legal aid[[5]](#footnote-5).

**Northern Ireland**

In December 2011, the Department of Justice issued a consultation paper on “Cost Protection for Litigants in Environmental Judicial Review Applications”. The Department seems to contemplate provisions whereby:

* The applicant’s liability for the respondent public body’s costs would be limited to £5,000 (in cases where the court has ordered the applicant to pay the public body’s costs); and
* The public body’s liability for the applicant’s costs would be limited to £30,000 (in cases where the Court ordered the public body to pay the applicant’s costs).

We understand that the Department intends to issue its decision on this in March of this year.

Of course, in any case in Northern Ireland the applicant (save in cases where legal aid is available) would still have to make provision to pay his or her own legal costs in cases where the court did not order the public body to pay such costs. Furthermore, even in cases where the applicant has the benefit of an order for costs against the public body, it is unlikely that the costs awarded will cover the total of costs incurred by the applicant.

Northern Ireland is a separate jurisdiction within the UK and so has its own rules and procedures for judicial review, although these are broadly similar to the judicial review rules and procedures in England & Wales. However, note that the Civil Procedure Rules, mentioned above, do not apply in Northern Ireland.

**Given that the recovery of success fees has been prohibited by the 2012 Legal Aid, Sentencing and Punishment of Offenders Act, might it be that this prohibition takes away from public interest litigants what might be achieved through the proposed limitation of PCOs (resulting in a neutral position or limited positive effect, when it comes to the reducing of the costs of engaging in judicial review proceedings)?**

The effect of the cross-cap (even increased to £35,000) is still problematic. Claimant lawyers will be deterred from taking cases because the £35,000 cap will prevent them from fully recovering their costs in successful, but complex, cases. As such, they will be unable to operate on a Conditional Fee Agreement (CFA or “no win no fee” basis). They will therefore be forced to charge on the usual basis, which means that claimants will have to pay their own legal costs, plus the cap, if they lose. A total liability of £35,000-40,000 is clearly prohibitively expensive. CAJE believes a fairer and more practical solution would be for successful claimant lawyers to recover their fees at ordinary commercial rates on assessment.

Our view remains that there is no basis in the Convention for the imposition of a cross-cap – the question of prohibitive expense applies to the *claimant* not the defendant. Environmental cases often raise complex issues of public interest. They concern the lawfulness of decisions made by public bodies and can only proceed if permission is granted (i.e. it has been shown that there is a good, arguable case). The Aarhus Convention serves to ensure that individuals and civil society groups are able to exercise those rights, often in the interests of the public at large, and that the procedures for doing so are fair, equitable, timely and not prohibitively expensive. The Convention says nothing about the issue of fairness to the defendant or the burden on the public purse. In any event, the number and proportion of environmental cases taken on an annual basis in the UK is very small.

**Cross-undertakings in damages in case of injunctive relief – will these remain in place?**

Practice Direction 45 contains an amendment to Practice Direction 25A concerning Interim Injunctions (see below):

*“8) In Practice Direction 25A—*

*(a) in paragraph 5.1(1), at the beginning insert “subject to paragraph 5.1B,”;*

*(b) in paragraph 5.1A, at the beginning insert “Subject to paragraph 5.1B,”; and*

*(c) after paragraph 5.1A insert paragraph 5.1B as follows—*

*“5.1B (1) If in an Aarhus Convention claim the court is satisfied that an injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court will, in considering whether to require an undertaking by the applicant to pay any damages which the respondent or any other person may sustain as a result and the terms of any such undertaking—*

*(a) have particular regard to the need for the terms of the order overall not to be such as would make continuing with the claim prohibitively expensive for the applicant; and*

*(b) make such directions as are necessary to ensure that the case is heard promptly.*

*(2) “Aarhus Convention claim” has the same meaning as in rule 45.41(2).”*

While we welcome the Government’s attempts to address this issue, we fear this formulation is likely to be problematic in practice. There will inevitably be questions around what constitutes “significant environmental damage” (and, indeed, this issue may be at the heart of a case in which the need for an EIA is in question). The court will suddenly be required to be the primary arbiter as to whether environmental harm is likely to result – a role it is presently ill-equipped to satisfy. The wording also fails to reflect a precautionary approach.

We are also concerned that the retention of judicial discretion as to whether an undertaking is required does not satisfy the requisite need for certainty with regard to “prohibitive expense” as laid down by the CJEU in *Commission v Ireland*[[6]](#footnote-6). We fear that claimants will still be deterred from making an application to the court for injunctive relief.

**Private law claims – What plans does the Party concerned have for the reduction of costs in case of private environmental nuisance claims?**

**Time limits – The Party concerned in case of time limits seems to continue to rely on judicial discretion when it comes to time limits. It is not clear to the Committee how the Party is going to ensure that the rules on time limits set a clear starting point for when the time limits stats to run; and how it is going to set a clear time limit for bringing a case against a contested decision. Could you please clarify?**

As far as we are aware, the UK Government has made no proposals in relation to private law claims.

The only proposals in relation to time limits appear to be those concerning planning cases in England and Wales (i.e. to formally reduce the time limits for lodging a JR in relation to planning cases to six weeks), as outlined in the consultation paper dated 13th December 2012. We set out our concerns about these proposals above.

Finally, we are also not aware of any action on the UK’s part with regard to the Committee’s findings on substantive legality in judicial review proceedings (paragraphs 123-127 of the findings). Moreover, the Committee will wish to note the very recent judgment of the Court of Appeal in the case of *Evans* (22nd February 2013), in which the Government and the Court of Appeal held that proportionality is not relevant in this type of case. For a fuller discussion of the case, please see a separate submission prepared by two members of CAJE (WWF and ELF) dated 28th February 2013. CAJE therefore welcomes the Committee’s commitment to pursue this matter in correspondence with the UK and look forward to the UK’s response.

Please do not hesitate to contact CAJE if you require any further information about the points made in this response.

Yours sincerely,



Carol Day

Solicitor

WWF-UK (on behalf of CAJE)

1. Legal Challenges to Decisions Under the Public Participation Directive 2003/35/EC, paragraph 36, http://www.scotland.gov.uk/Publications/2012/01/09123750/0 [↑](#footnote-ref-1)
2. <http://www.legislation.gov.uk/ssi/2002/494/regulation/15/made> [↑](#footnote-ref-2)
3. For a more detailed dissection see Frances McCartney, 'Public interest and legal aid' Scots Law Times, Issue 32: 15-10-2010 [↑](#footnote-ref-3)
4. <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/40063.aspx> [↑](#footnote-ref-4)
5. The granting of a legal aid certificate (together with some other exemptions in terms of receipt of certain benefits) give an exemption from the payment of a court fee [↑](#footnote-ref-5)
6. Case C-427/07 [↑](#footnote-ref-6)