COALITION FOR ACCESS TO JUSTICE FOR THE ENVIRONMENT

Ms Aphrodite Smagadi,
Secretary to the Aarhus Convention Compliance Committee,
United Nations Economic Commission for Europe,
Environment and Human Settlement Division,
Room 332, Palais de Nations,
CH-1211 Geneva 10,
Switzerland

19th September 2012

Dear Ms Smagadi,

Re: Decision IV/9i on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Aarhus Convention, as adopted by the Meeting of the Parties to the Aarhus Convention at its Fourth Session

We are grateful to the Compliance Committee for inviting CAJE to participate in the teleconference on 28th September to discuss the UK's recent proposals regarding the above. We are pleased to confirm that Gita Parihar of Friends of the Earth will provide an oral update on behalf of CAJE.

We thought it might be useful to also provide the Compliance Committee with a written note of our concerns – and to update the Committee on parallel proceedings on 'prohibitive expensive' in the Court of Justice of the European Union (CJEU).

The broad thrust of the UK's proposals, as set out on 28th August, is as follows:

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 at all. It will not be dependent on permission having been granted.

The recoverable costs will be fixed as follows: the liability of the claimant to pay costs of the defendant will be capped at £5,000 if the claimant is an individual and at £10,000 where the claimant is an organisation; and the liability of the defendant to pay the costs of the claimant will be capped at £35,000.

The fixed recoverable costs for both the claimant and defendant cannot be challenged, but the fixed costs regime will not apply if the claim is not within the scope of the Convention.

The rule proposed by Lord Justice Jackson for appeals for cases that have been heard under a fixed costs regime will also apply for appeals in cases brought under the Aarhus costs regime (essentially, the Court of Appeal has the discretion to review the cap/cross-cap on appeal).

CAJE acknowledges two improvements on the proposals set out in the Ministry of Justice consultation paper of 19th October 2011. Firstly, it is proposed that costs protection would apply from the time the claim is issued as opposed to the grant of permission. Secondly, there would be no ability to challenge the figures on the basis of information in the public domain - thus ensuring certainty as to costs liability up until the end of the first instance proceedings. These are welcome improvements.

However, we still have a number of significant concerns, which are set out below:

(i) The cap is still too high - both in relation to individuals (5k) and groups (10k). The vast majority of individuals would find 5k prohibitively expensive (especially in Scotland and Northern Ireland). We assume 'groups' includes commercial entities, community groups and NGOs. While 10k may be suitable for commercial organisations, most community groups would find 10k 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 10k, including specialist NGOs with limited staff and budgets. We are concerned to note that this proposal was not referred to in the consultation document of October 2011[1] and therefore CAJE did not make representations on it. If it had been, we would undoubtedly have opposed it, as would others;

(ii) The effect of the proposed cross-cap (even increased to 35k) is still problematic. Claimant lawyers will be deterred from taking cases because the 35k 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 35-40k is clearly prohibitively expensive. 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. We believe a fairer and more practical solution would be for successful claimant lawyers to recover their fees at ordinary commercial rates on assessment;

(iii) 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 Supreme Court. CAJE maintains the level of the cap should not be increased if there is one (or even two) appeal(s);

(iv) There are questions around the scope of cases falling within the proposals, which may prolong the likelihood of satellite litigation. We are confused as to why other environmental s.288 (and other statutory

[1] See https://consult.justice.gov.uk/digital-communications/cost_protection_litigants

challenges - many of which concern matters falling squarely within the remit of the Convention) are excluded from the proposals. Furthermore, the proposals are still silent on private law environmental cases;

(v) The proposals are also silent as to the costs of any interested third party. Any PCO should include a provision to the effect that there will be no order for costs in favour of an interested party; and

(vi) There are still no proposals in relation to injunctive relief. The ‘chilling effect’ of the requirement to provide a cross-undertaking in damages in order to obtain interim relief is linked to the question of prohibitive expense. The two must be viewed together when considering compliance with the Aarhus Convention.

In light of the above, CAJE remains of the view that the simplest and clearest way to comply with the requirements of Article 9(4) of the Aarhus Convention would be to introduce a system of Qualified One-Way Costs Shifting (QuOCS) as advocated by Lord Justice Jackson in his civil litigation review.

We respectfully ask the Committee to take these observations into consideration when considering the extent to which the most recent proposals will bring the UK into compliance with the Convention.

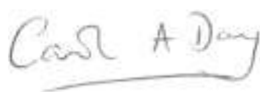
Edwards and UK Infringement Proceedings

As highlighted previously, the CJEU is also considering a number of questions around ‘prohibitive expense’ (in the context of Article 9(4) of the Convention and the EC Public Participation Directive) as a result of a UK Supreme Court reference in the case of *Edwards*. At the conclusion of the hearing on 13th September, we were informed that Advocate General Kokott will deliver her Opinion on 11th October. Judgment is likely to follow a couple of months later.

Meanwhile, the European Commission’s infringement proceedings against the UK (as a result of the complaint lodged by CAJE in 2005) are running in parallel. This case also concerns the issue of prohibitive expense but also includes injunctive relief. A hearing in this case is expected towards the end of 2012/beginning 2013. The Committee may wish to note that Denmark, Ireland and Greece have intervened in both proceedings.

With best wishes.

Yours sincerely,



Carol Day
Solicitor
WWF-UK (on behalf of CAJE)