



Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe Environment Division
Palais des Nations
CH-1211 Geneva 10
Switzerland
31st October 2018

Dear Ms Marshall,

Re: Decision VI/8k concerning compliance by the United Kingdom with its obligations under the Aarhus Convention

Thank you for the opportunity to provide the Compliance Committee with our comments on the UK's first progress report on decision VI/8k, and the implementation of decision VI/8k more generally.

To make it easier for the Committee to assimilate our comments, we have followed the same format as the UK Government.

4: Recommends the UK ensure its Civil Procedure Rules regarding costs are applied by its courts so as to ensure compliance with the Convention.

6: Recommends the UK review its system for allocating costs in private nuisance proceedings within the scope of article 9, paragraph 3, and undertake practical and legislative measures to overcome the problems identified in paragraphs 109 to 114 of the Committee's findings on communications ACCC/C/2013/85 and ACCC/C/2013/86 to ensure that such procedures, where there is no fully adequate alternative procedure, are not prohibitively expensive

England and Wales

The UK's first Progress Report summarises the changes implemented to the 2013 Environmental Costs Regime ("ECPR") by the Civil Procedure (Amendment) Rules (SI 2017/95)¹. The new regime came into effect on 28 February 2017, whereupon certain aspects of it were challenged by way of Judicial Review²

¹ The Statutory Instrument amended Section VII of Part 45 of the Civil Procedure Rules (CPR), related parts of the CPR and associated Practice Directions

² *The Royal Society for the Protection of Birds Friends of the Earth Ltd & ClientEarth v Secretary of State for Justice the Lord Chancellor* [2017] EWHC 2309 (Admin)

(JR). We recognise that the judgments of the Court of Justice of the European Union (CJEU) give national courts the power, in principle, to vary the claimant's costs cap and we therefore chose, in the context of the JR, not to challenge that principle. We do, however, remain concerned (as we expand later) that the removal of certainty with regard to adverse costs exposure has a chilling effect on some potential litigants. Essentially, our JR argued that:

- The Rules failed to provide claimants with early certainty, ideally prior to the issue of proceedings, as to their likely costs exposure because the Amendment Rules allow for the default cap to be varied at any point in the proceedings; and
- Claimants will be deterred from bringing claims if there is a risk that their personal financial information, or that of the individual funders, will be discussed in open court.

In addition, we sought a declaration that in assessing what is prohibitively expensive for the claimant, the court may take into account their own legal costs. We are therefore disappointed to note that the UK Report mischaracterises the judgment of the High Court handed down on 15th September 2017. In fact, the Hon. Mr Justice Dove held that:

- The rules varying the default costs caps are consistent with EU law, but only when considered in the context of the surrounding rules and practice. During the hearing, the Government had conceded that Defendants must make an application for a variation to the Claimant's costs cap at the earliest opportunity (i.e. when they file an Acknowledgment of Service) and that later applications may only be considered if the Claimant has lied or misled the court over his finances or their means have substantially changed. As long as the Amendment Rules operate in this way in practice they do not offend against EU law and the requirements of early certainty and reasonable predictability³; and
- The possibility that a claimant's financial affairs will be discussed in public could deter meritorious claims. The Rules should therefore be amended to ensure that hearings are held in private in the first instance. The judge also considered it helpful to define the nature and content of the financial information a Claimant must file with the court.

We are also disappointed that the necessary change to the Practice Direction concerning private hearings has yet to be implemented. The UK maintains this is because the Civil Procedure Rule Committee was in the process of undertaking a comprehensive open justice review, including examination of the provisions in the Civil Procedure Rules governing when hearings must be held in private. The Government published a consultation on 12 July 2018 on changes to Part 39 of the Civil Procedure Rules: 'Miscellaneous provisions relating to hearings'⁴. Our response to that Consultation dated 22nd August 2018 (attached) pointed out that any failure to hold the hearing in private is likely to be unlawful in light of the judgment in our JR and that CPR 39.2 (and the Practice Direction accompanying CPR 39) must be amended to require the court to hold the first hearing in private.

Whilst acknowledging that arrangements have been put in place to ensure that any hearing of an application for variation of costs cap will be heard in private pending the outcome of the open justice review⁵, we are concerned to note the UK's ongoing failure to remedy the unlawfulness confirmed by a judgment of the High Court. This puts it in danger of breaching the requirements under Article 3(1) of the Convention, for not having clear, consistent and transparent legal frameworks and other measures to ensure compliance.

³ As the Secretary of State only conceded this as the lawful position during the hearing, the judge awarded the Claimants their full costs in the proceedings (subject to the cap of £35,000) on the basis that the position was clarified by the case

⁴ See [here](#)

⁵ See [here](#)

In the course of his judgment, the Hon. Mr Justice Dove also identified a number of clarifications that could helpfully be made to the CPR, which have – as noted by the UK Report – subsequently been implemented by way of the Civil Procedure (Amendment) Rules 2018 (No.239/L.3) SI⁶ (which came into force on 6 April 2018). These include clarification that: (i) in relation to any financial support provided by third parties, it is only the aggregate amount that must be provided, rather than a breakdown of individuals’ donations; (ii) the court may vary a costs cap only on an application made by the claimant or the defendant; and (iii) an application to vary the costs cap must be made at the outset – either in the claim form (if made by a claimant) or in the acknowledgment of service (if made by a defendant) – and must be determined by the court at the earliest opportunity; and that an application may only be made at a later stage in the process if there has been a significant change in circumstances. We are also disappointed to note that the UK’s Report fails to explain that these clarifications would not have been secured but for our JR and the submissions we made.

The UK Report concludes that following the most recent changes in April 2018, the policy position is settled for the time being and that it will formally review the ECPR when it has sufficient data to do so (anticipated to be April 2020) and will publish its findings at that point.

The effectiveness of the ECPR

As the new costs regime has only been operational for a few months, it would be premature for us to comment definitively on its effectiveness. However, we can make some preliminary observations based on our experience since April 2018.

Before doing so, it should be noted that the UK position would appear to be an express decision not to address the remaining recommendations made in Decision VI/8K (and, prior to that, Decision V/9n). We invite the Committee to comment on the UK’s continuing failure to comply with these Decisions.

Firstly, we should say that the ECPR continues to play a crucial role in enabling many claims to get off the ground. No case exemplifies this better than Judicial Reviews brought in respect of the Airports National Policy Statement (which sets out the Government’s support for a new runway at Heathrow airport and expansion in the South East) currently before the High Court. Cases were brought by:

- A group of local authorities (including Hillingdon, Wandsworth, Richmond, Hammersmith & Fulham, and the Royal Borough of Windsor & Maidenhead) together with the Mayor of London and Greenpeace. The grounds of this challenge concern *“air quality, inadequate environmental assessment, climate change, surface access, breach of the habitats directive and a flawed consultation process”*;
- Rival expansion firm, Heathrow Hub;
- Friends of the Earth, which is arguing that the NPS amounts to a breach of the UK’s climate change policy, as well as its sustainable development duties and includes a failure to comply with the Strategic Environmental Assessment (SEA) regime;
- Climate change campaigning charity (Plan B), which is arguing that the proposal breaches legal obligations in the Planning Act to alleviate the impact of climate change and a failure to give consideration to the Government’s obligations under the Paris Agreement on Climate Change; and
- Two individuals.

⁶ See [here](#)

All of the claimants except the Local Planning Authorities have been granted Aarhus costs protection⁷ limiting their adverse costs liability to £5,000 (the individuals) and £10,000 (the organisations). The High Court refused permission for one of the cases brought by an individual on the papers. Following a hearing on 4th October 2018, the judge ordered a “rolled-up hearing” (thus dealing with permission to proceed and full trial at a later date) in respect of the other five cases. At that hearing, the Secretary of State for Transport (as defendant) served the court with a pre-permission Statement of Costs for the legal team of six barristers and 3 solicitors of **£619,382.80**.

Although the eventual costs liability (which, on this basis, will likely extend to millions of pounds) will be split between five claimants, it is inconceivable that anyone (other than the most exceptional claimant) would be able to contemplate legal action in the absence of Aarhus costs protection. The financial risk could potentially ruin them. We also note that litigation involving expenditure of this scale is a formidable challenge for the LPAs, which have collectively brought their challenge on environmental and health grounds in the public interest and will (subject to any prior agreement with the Government on costs) be liable for one fifth of the total costs bill if unsuccessful.

In addition to this exceptional case, the Aarhus costs regime allows numerous claimants to bring cases to court that would otherwise not have been pursued. However, costs often remain prohibitive for some claimants and other limitations of the scheme can prevent important and arguable cases from proceeding. We have identified the following deficiencies in the current costs regime:

- **Practical operation of the Rules** – despite the observations of the judge in *RSPB, Friends of the Earth Ltd & ClientEarth v Secretary of State for Justice the Lord Chancellor*, the CPR is not, in practice, operating as envisaged. The Government would appear to be testing the boundaries of these rules, which can mean that the Claimant’s position is not clear early on. For example, Friends of the Earth is currently challenging the Secretary of State for Housing, Communities and Local Government’s decision to adopt a revised National Planning Policy Framework (NPPF) for England in the absence of a Strategic Environmental Assessment and, as a consequence, a failure to consult the public on the assessment. This clearly engages Articles 6 and 7 of the Convention as well as EU Directive 2001/42/EC on SEA.

In this case, the Defendant took the approach of “reserving its position” as to the Aarhus costs cap when acknowledging service, rather than making an application to vary when doing so or confirming the default costs caps. The court then decided not to make an order as to the costs cap when deciding that the case should go to a “rolled up” hearing (which would deal with permission and full trial at the same time at a much later date in December 2018), that is, even though the required financial information had already been provided by the Claimant when issuing the claim and so was entitled to default caps. We suspect this could be in response to the Defendant saying it was reserving its position.

The matter remains open and Friends of the Earth await a court order dealing with the costs issue. However, it has meant increased uncertainty, as well as increased costs and resources to deal with what may now become satellite litigation on the level of costs cap to be applied. The potential for cap variation to lead to costly and time-consuming satellite litigation was one of the points we

⁷ The Civil Procedure Rules 45.41(2)(a) and (b) now provide that the costs limits will only apply in claims brought by “members of the public”, as that term is defined in the Aarhus Convention. It is thought that this change was designed to reverse the decision in *R (HS2 Action Alliance) v Secretary of State for Transport* [2015] EWCA Civ 203, in which the Court of Appeal held that a local authority claimant was entitled to rely on the costs limits laid down by the previous rules. The Compliance Committee has since held that a public authority cannot constitute a “member of the public” for the purposes of the Convention, and accordingly public authority claimants no longer benefit from the costs limits under the new CPR provisions – see [here](#)

made to the MoJ when responding to the public consultation on the proposals to move away from fixed caps.

This case illustrates that Claimants are not – in practice – in a clear and reasonably predictable situation when it comes to financial risk in environmental cases, and the government is testing how the courts will deal with the matter in applying the rules. This includes pursuing areas of ambiguity in an apparent attempt to increase pressure on and risk for claimants.

- **Scope of the ECPR** - the UK Report acknowledges that the Government decided not to extend the scope of the ECPR to cover reviews under statute which engage Article 9(3) of the Convention or more widely, including private nuisance cases or to other types of cases which could be brought against private individuals or public bodies, but based on private law remedies (e.g. the many types of claims under tort law). The Government explains that the 2017 changes were intended to address compliance with UK and EU law (including Case C-530/11, *Commission v UK*) and that it is currently considering other issues covered by the Decision further (but does not intend to act anytime soon to bring itself into compliance) and is engaging with key stakeholders to consider options. We are aware of statutory reviews in which the claimants have been advised that they have reasonable prospects of success but that Aarhus costs protection would be unavailable;
- **Definition of a member of the public** – problems persist with regard to Unincorporated Associations (UA) and resident’s groups, which have no formal legal personality and require an individual to bring the case on their behalf. The CPR is not designed for such cases as it is the individual’s financial resources that are examined with regard to the level of the cap as opposed to those of the organisation. In practice, clients are advised to provide a schedule of financial information for both the individual and the UA, which incurs unnecessary duplication.
- **Schedule of financial resources** - we are also aware of cases in which defendants have challenged the amount of information provided by the claimant. In *the RSPB, Friends of the Earth Ltd & ClientEarth v Secretary of State for Justice the Lord Chancellor*, Mr Justice Dove referred to an earlier concession made by the Ministry of Justice (letter dated 6th July 2017) that the schedule of the claimant’s financial resources should be provided in the form specified in CPR 46 PD 10.1 (see below)⁸. The CPR confirms that the information to be provided to the court comprises a summary of the applicant’s significant assets, liabilities, income and expenditure. However, in some cases defendants are pressing claimants to provide more information, beyond that required under the CPR, which can be intrusive and intimidating:

“46PD.10

10.1 Unless the court directs otherwise, a summary of an applicant’s financial resources under rule 46.17(1)(b)(ii) must provide details of—

(a) the applicant’s significant assets, liabilities, income and expenditure; and

(b) in relation to any financial support which any person has provided or is likely to provide to the applicant, the aggregate amount—

(i) which has been provided; and

(ii) which is likely to be provided.”

⁸ See paragraph 55 of the judgment

- **Varying the default caps** - the Government also points out that the 2017 amendments gave the courts the power to vary the level of the costs cap from their default levels of £5,000 for an individual or £10,000 for a group or organisation, downwards or upwards, in the light of the schedule of means provided by the claimant. This principle applies similarly to defendants, for whom the default cap is set at £35,000. We are aware of one case in which the defendant agreed to a pre-permission reduction in the default cap of £5,000 to £2,000. However, the reciprocal cap was also reduced from £35,000 to £14,000, which means that the claimant’s legal team will be unable to recover their full costs if they are successful.
- **Reciprocal caps** – there is almost always an asymmetric relationship between the parties involved in Aarhus cases. Often these cases have poorly-resourced individuals, community groups or NGOs litigating against public bodies or well-funded private entities. Reciprocal cost caps only serve to exemplify these inequalities. The Heathrow cases referred to above are examples of cases in which such inequalities exist – and are again manifest if the claimants are successful. If they win, the costs recoverable from the Secretary of State will be capped at £35,000 *in total* despite the fact that their lawyers (five different legal teams as the separate claims have been joined) will no doubt incur far higher expenditure. Most of them will have some sort of agreement with their lawyers enabling them to ‘top-up’ the reciprocal cap with any further sums raised towards the case to help to cover their full costs, but this will not be guaranteed and may amount to very little, or nothing given (as in Heathrow) there are many cases competing for public funds. In any event, it is wrong in principle for claimants to be forced to rely on the goodwill of the public to enable them to properly fund legal action. There is the real problem in cases such as this of the case being ‘too expensive to win’ due to the lack of recovery, and prohibitive in that way.

Reciprocal caps (or cross caps) have no legal basis in the Aarhus Convention. In Communication C33, the UK argued that: *“it is important to recognize that the provision of a fair and just system of law involves treating all parties to litigation fairly. The resources applied by public authorities in defending judicial review proceedings stem ultimately from the taxpayer, and it is therefore proper that the cost implications for both parties in an individual case should be taken into account”*⁹. This reasoning then flowed through into the 2013 Environmental Costs Protection Regime, which introduced the concept of the reciprocal cap. However, this type of argument downplays or hides the fact that the “taxpayer” (i.e. the nation state) has very substantial sums of money available to it, and via the public authority in question, has taken a decision that is of dubious legality with significant environmental consequences, to which an individual claimant – often in the public interest too – has taken a claim to address, in response.

One answer to this issue where there is a clear balance “public interests” on both sides is for the costs in environmental matters to be fully publically funded, in appropriate circumstances (e.g. where permission has been granted and the case is reasonably arguable). This would enable claims at proportionate cost to come forward and sums be recovered accordingly.

The Compliance Committee takes a ‘holistic’ approach to the issue of costs in relation to Article 9(4) of the Convention¹⁰. This includes a consideration of all of the costs in the proceedings, including the applicant’s own costs. The consideration of the effects of reciprocal cost caps is therefore critical in relation to the issue of prohibitive expense. The Committee previously recognised the limiting effect of reciprocal cost caps:

⁹ See Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, para 40, available [here](#)

¹⁰ *Ibid*, paragraph 128

“132. The Committee also notes the limiting effect of reciprocal cost caps which, as noted in Corner House, in practice entail that “when their lawyers are not willing to act pro bono” successful claimants are entitled to recover only solicitor’s fees and fees for one junior counsel “that are no more than modest”¹¹. 103 The Committee in this respect finds that it is essential that, where costs are concerned, the equality of arms between parties to a case should be secured, entailing that claimants should in practice not have to rely on pro bono or junior legal counsel.”

Moreover, the Committee has also already clarified that in the context of Article 9(4) of the Convention, “fairness” refers to what is fair for the claimant, not the defendant public body¹².

The reasoning behind cross-caps is fundamentally flawed. They have no basis in the Convention, increase the inequality in arms between parties which are often unmatched from the outset (to the detriment of claimants and petitioners) and are set at an entirely arbitrary level. We recommend that reciprocal cross-caps are removed from the ECP Regimes of the UK (or, at the very least, successful claimants – as well as defendants – should be able to apply to the court to have the reciprocal cap raised when they have been successful and their reasonable costs exceed £35,000).

- **Appeals** - whilst it is constructive to have the appeal court directed to consider the need for a protective costs cap in Aarhus cases (CPR 52.19A¹³), we urge the Committee to note that it is by no means certain that a claimant will receive another cap, or (if so) what level it will be set at. This creates significant uncertainty and pressure for the claimant at an intense and time-pressured period when seeking an appeal. In addition, the requirement to provide a schedule of financial resources again, and without the additional guidance and clarity of the rules at first instance, re-creates further practical barriers. For example, there is no requirement to only provide the aggregated amount received from third-parties, and there could be a requirement for more intrusive disclosure.
- **The need to act “Promptly”** - it is erroneous to think that this onerous and vague requirement for claimants when starting a case is no longer a problem. It still applies in domestic UK law environmental cases, for example, a JR based on the Climate Change Act 2008. As the UK leaves the EU, there is scope for this problem to grow in application, as more and more environmental cases will become based on solely UK law. As such, the *Uniplex* case will provide no answer.

¹¹ *R (Corner House Research) v. Secretary of State for Trade and Industry* [2005] 1 WLR 2600, para. 76 (ii) and (iii).

¹² See Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, para 135, available [here](#)

¹³ CPR 52.19A Orders to limit the recoverable costs of an appeal – appeals in Aarhus Convention claims:
(1) In this rule, “Aarhus Convention claim” and “prohibitively expensive” have the same meanings as in Section VII of Part 45, and “claimant” means a claimant to whom rules 45.43 to 45.45 apply.
(2) In an appeal against a decision made in an Aarhus Convention claim to which rules 45.43 to 45.45 apply, the court must—
(a) consider whether the costs of the proceedings will be prohibitively expensive for a party who was a claimant; and
(b) if they will be, make an order limiting the recoverable costs to the extent necessary to prevent this.
(3) When the court considers the financial resources of a party for the purposes of this rule, it must have regard to any financial support which any person has provided or is likely to provide to that party.

Northern Ireland

The UK Report summarises changes to the 2013 Environmental Costs Protection Regime in Northern Ireland¹⁴ as a result of the passage of the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017¹⁵ (which came into force on 14 February 2017).

These changes included a number of helpful modifications to the regime. For example, the Regulations clarify the definition of a “member of the public” and now provide that the maximum amount of costs that can be recovered from an unsuccessful applicant (capped at £5,000 (for an individual) and £10,000 (in other cases)) is capable of being lowered where necessary to avoid prohibitive expense to the applicant. Similarly, successful applicants can apply to have the current reciprocal cap of £35,000 increased where necessary to avoid prohibitive expense.

The amended regulations also allow for a separate cap to appeals in Aarhus Convention cases (set at the same level as the first instances case). However, the court has the same flexibility to vary the caps on appeal in order to avoid prohibitive expense.

Moreover, as noted in the UK Report, the Department of Justice in Northern Ireland decided, in our view correctly, against proceeding with a number of proposals consulted upon in 2016 regarding multiple applicants, the disclosure of applicant finances, third party support and costs in unsuccessful status (unsuccessful challenges to the status of Aarhus cases in Northern Ireland, therefore, continue to be ordered on the indemnity basis).

The amending regulations do not require an applicant to disclose their means or require the court to have regard to third party support or change to the costs position in cases involving multiple applicants or respondents. Additionally, the Northern Ireland Regulations already extend costs protection to applicants in statutory reviews as well as judicial reviews to the High Court of decisions within the scope of the Convention.

Finally, the Report notes that Regulations made in January 2017 exempted the fees applicable to JRs (and statutory reviews) within the scope of the Aarhus Convention from a phased increase to most civil court fees in Northern Ireland from 1 April 2017. Also welcome, has been an amendment to the time limits for bringing judicial reviews to a fixed period of 3 months from the date of the relevant decision.

We applaud the DoJNI for giving proper consideration to the views of those responding to the consultation on proposed changes to the costs regime for environmental cases. The vast majority of those responding opposed the unhelpful changes outlined above and the DoJNI clearly gave that body of opinion appropriate weight.

The same objection to cross capping, in principle, set out in the England and Wales section above also applies to Northern Ireland. Additionally, it has yet to be seen how the power of the Court to increase/decrease limits to avoid cases being prohibitively expensive works in practice. This is of concern in challenges to major decisions (e.g. major infrastructure proposals) where it is simply impossible to provide adequate legal support within the reciprocal cap of £35,000. In one such case the decision was taken not to seek such an uplift to the £35k reciprocal cap because the contention likely to be involved was not manageable, itself in terms of cost and given the chilling effect of an examination of the means of the applicants, likely to be involved.

It remains the case that these Regulations do not apply to actions to uphold common law rights in the environmental field, such as nuisance.

It is also worth reiterating other points made in our submission of 23 January 2015:

¹⁴ Introduced under the Costs Protection (Aarhus Convention) (Northern Ireland) Regulations 2013

¹⁵ See [here](#)

The Cost Protection Regulations only address part of the affordability problem. They do not address the difficulty an applicant may have in being able to afford their own legal costs in the event that they lose the case. Given the expense involved in High Court challenges these in themselves are a significant obstacle to access to environmental justice. There is no sign of any public policy initiatives being taken to address this, such as:

- (1) Amending the Legal Aid rules which currently deny assistance where a number of members of the public have a similar interest in objecting to or challenging a policy, project or development with the result that financial assistance from public funds is rarely available to fund environmental legal challenges even where the applicant would otherwise qualify for such assistance;
- (2) Examining the application of the costs indemnity rule in environmental cases. This prevents those acting for successful applicants recovering a fair commercial level of costs from the respondent in successful cases where they have agreed a concessionary level of costs with their clients. Contingency and 'no win no fee' arrangement are unlawful in Northern Ireland;
- (3) Removing certain cases from the jurisdiction of the High Court to less expensive fora. A large number of environmental law issues in this jurisdiction arise in relation to planning decisions. At present objectors, unlike developers, have no right of appeal to the Planning Appeals Commission, which is a specialist forum dealing with such matters. It is also, in general, a less expensive forum than the High Court.

The marked rise in environmental legal challenges being brought by personal litigants in Northern Ireland is likely to be explained by the failure to address this aspect of affordability.

Scotland

The UK Report refers to the establishment of a working group to consider the practical operation of the rules on Protective Expenses Orders (PEOs) and a Scottish Civil Justice Council (SCJC) public consultation on the draft rules around the granting of PEOs.

Scottish Environment Link (of which RSPB Scotland and Friends of the Earth Scotland are members) responded to this consultation in 2017 (attached). SEL recognised that many of the proposals in the consultation paper would move Scotland closer towards compliance with the Aarhus Convention, noting the stark differences between the SCJC's consultation and the regressive nature of similar consultations in relation to the Aarhus costs regime in England and Wales.

However, SEL also had a number of general concerns and specific comments about the consultation. Firstly, and as a general point, it pointed out that environmental litigation in Scotland is very expensive (expenses often run into six figures). Expenses follow success and very few PEOs have been granted under the statutory regime, which was created in 2014 and extended in 2016¹⁶.

Furthermore, there are a number of structural problems with the PEO system that limit Scotland's ability to meet its obligations under the Aarhus Convention. Firstly, obtaining a PEO requires an application and hearing, which is costly to prepare for and contest - and any appeals require a repeat PEO application because they only cover first instance proceedings. Most critically, however, PEOs are designed to reduce the uncertainty of open-ended costs liability to the other side by capping costs liability in the event that the litigation is unsuccessful - they offer no assistance to a litigant for their own legal expenses in the event that his/her case is unsuccessful.

¹⁶ See the Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 (SSI 2013/81), as amended by Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015 (SSI 2015/408)

In terms of specific concerns, SEL noted the following:

- **Prohibitive Expense** – while the current definition of ‘prohibitively expensive’ fails to reflect the judgment of the CJEU in *Edwards*¹⁷ (because it focuses on the resources of the particular applicant), SEL has concerns about the proposal to remove the definition entirely. Anecdotal evidence suggests that members of the judiciary dealing with PEO applications are often unfamiliar with the Aarhus Convention and the definition of ‘prohibitively expensive’. SEL’s preferred approach is to adopt a similar approach to the Department of Justice in Northern Ireland¹⁸.
- **PEO procedure** - SEL supports proposals to move Scotland towards a simplified, written PEO application procedure. PEO applications require considerable preparation and are often orally contested – making proceedings considerably more expensive (anecdotal evidence suggests that the current process of applying for PEOs can cost c£20,000). This is an unacceptable level of costs exposure, which strikes at the heart of the rationale for PEOs. SEL supports the following approach, which is recommended by the Faculty of Advocates: (i) the introduction of a formalised application process, a practice note and clear guidance on the application process; (ii) a short oral hearing (if necessary) to determine any unaddressed issues; (iii) a designated judge to determine PEO applications; and (iv) mandatory publication of all decisions on PEO applications.
- **PEO application fee** – SEL supports the principle of capping a PEO applicant’s potential liability to the other side during applications as it will make the system more accessible for the public. However, it expressed two concerns. Firstly, that it was unclear how the valuation of the proposed £500 cap was arrived at. Secondly, it is doubtful that a potential liability of £500 will either have a significant deterrent or disciplinary effect on applicants (if that is the intention) or that it will provide any significant recovery of expenses for those opposing a PEO application. SEL therefore recommends the cap be removed – and that a PEO applicant should not be liable for their opponents’ costs where a PEO application is unsuccessful. Secondly, SEL pointed out that the provision “except on cause shown” creates a low threshold which may encourage objections by a PEO applicant’s opponents to the proposed £500 cap. If this were the case in practice, PEO applicants would remain exposed to significant liability for their opponents’ costs at the PEO application stage - and it is unlikely that the draft rule would have its intended effect on reducing the prohibitively expensive nature of the PEO application process. SEL recommended that this wording be removed from draft rules.
- **Appeals** – SEL welcomes the general direction of change allowing for PEO awards to ‘carry-over’ during appeals (i.e. the petitioner retains a PEO for the appeal in the Inner House), where the respondent appeals. However, SEL pointed out that the additional expenses implications of the appeal must be fully considered and integrated into any carry-overs – the costs of each party will obviously increase as an appeal progresses and is heard. SEL also disagrees with the proposal that the limits on the parties’ liability in expenses set by the original PEO should not have continuing effect for the purposes of the appeal where it is the applicant which appeals; and that the original applicant will have to apply for a further PEO in such circumstances. Requiring another PEO application at this stage would require further expense by the applicant, at a time when the applicant has already expended significant resources in the original PEO application and proceedings in the Outer House – and such a requirement will increase the likelihood of proceedings being ‘prohibitively expensive’ for the applicant.

¹⁷ *R (on the application of Edwards and another (Appellant)) v Environment Agency and others (Respondents) (No 2)* [2013] UKSC 78, para 23

¹⁸ The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017

SEL recommends that a provision be added to automatically double cross-caps on appeal – to reflect the increase in the petitioner’s costs on appeal, and to allow petitioners to better recover their costs in the event that their case is successful. In particular, SEL does not support any simultaneous automatic doubling of the cap which governs the petitioner’s liability (currently set at a default level of £5,000). This cap is set at the outset at the level which the petitioner can afford without proceedings being prohibitively expensive for them, and this is unlikely to change as the case progresses. Instead, SEL recommends that a party with a PEO which has carried-over on appeal be given the opportunity to apply to the court ‘on cause shown’ for their cross cap to be increased, to allow for any increase in relative outlays necessary for the appeal and to ensure that equality of arms is maintained during the appeal. Finally, it is recommended that PEO awards should carry over to proceedings in the Inner House as standard, regardless of whether the petitioner or respondent is appealing the original decision.

SEL had several general comments on the proposals:

- The draft Rules should be amended to ensure that PEO applicants can respond to any submissions raised by a party opposing their PEO application;
- The current Aarhus costs regime currently caps the applicant’s liability in expenses to the respondent to the sum of £5,000 (and makes provision for that sum to be reduced on cause shown by the applicant). The draft Rules make a significant change to this position by allowing a court to increase a PEO applicants’ liability above the levels of the default caps ‘on cause shown’ - i.e. it would allow for a court to raise an applicant’s adverse liability exposure above £5,000. This proposal was not specifically highlighted in the consultation document to allow proper public consideration of the impacts of such a significant change, and for the views of the public to be canvassed on such a move. We fear that this change will deter legitimate claims from proceeding because it will introduce considerable uncertainty in respect of cost protection. SEL recommended the retention of the current position;
- SEL is unclear why the terms on which a PEO applicant is represented (e.g. requiring applicants to disclose that their lawyers are acting on a *pro bono* basis) is relevant to the PEO application process. Environmental lawyers should not be expected to work for free in cases of important public interest. A rule favouring *pro bono* representation would likely be harmful to the (already limited) economic viability of the few environmental legal specialists working in the interest of those unable to afford litigation. Potential litigants may also struggle to find an adequately qualified lawyer who will represent them *pro bono*. SEL recommended the removal of this provision in the draft Rules;
- When assessing what level of costs would be prohibitively expensive for an applicant, the court relies upon an estimate of expenses. If the expenses increase above this estimate during litigation, this changes the prohibitively expensive calculation. SEL recommended that provision is made in the rules for expenses estimates given by the respondent (and any interested parties) during the PEO application process to be binding, and act as a cap on their ability to recover expenses;
- SEL also recommended that the imposition of automatic default caps should be replaced by with a system of qualified one way costs shifting, which – as noted by the Jackson Review – have the effect of putting parties who are in an asymmetric relationship (such as the parties in almost all Aarhus-type litigation) onto a more equal footing, ensuring that litigants are not denied access to justice because of the prospect of incurring liability for costs beyond their means¹⁹. It is worth noting that

¹⁹

Rupert Jackson, ‘Review of Civil Litigation Costs: Final Report’ (2009), paragraph 89

qualified one way cost shifting has been introduced this year in personal injury cases explicitly to address such imbalance and subsequent chilling effect in such cases;²⁰

- SEL also pointed out that Aarhus litigants should not face liability for three sets of expenses (their own, the respondent's and interested parties') in the event that their case is unsuccessful, recommending that provision is made in the rules that PEO applicants face no liability for the expenses of any interested parties which intervene;
- SEL noted that the scope of consultation should be extended to cover all claims falling within the ambit of the Aarhus Convention including Sheriff Court actions, nuisance claims or any type of private law claim. The Compliance Committee has previously highlighted the lack of costs protection in relation to private law claims as a feature of the UK Scottish system which is non-compliant with the Aarhus Convention²¹ (this has been partially addressed with the introduction of QOCS in personal injury cases, as noted above);
- SEL recommended that PEO applicants should be exempted from paying court fees, which have more than doubled in recent years following the Scottish Government's policy of full cost recovery. As such, court fees can run into 5 figures in complex cases; and
- As in England and Wales, the Rules should be amended to ensure the confidentiality of all financial information provided by PEO applicants.

The UK Report notes that the SCJC has carefully considered the responses and that revised rules for PEO applications will be brought forward shortly. We hope that the new rules address the above concerns highlighted above by SEL.

We also note that the Scottish Government is considering environmental governance in the context of the UK's forthcoming exit from the European Union and that a consultation on this is expected later this year. In this context SEL is urging the Scottish Government to enshrine EU environmental principles in legislation and establish both an environmental watchdog to replace the role of the Commission and a specialist environmental court or tribunal to help make up for the loss of oversight of the CJEU.

Recommendations included in paragraph 8(c) of the decision

Northern Ireland

The UK Reports that the Rules of the Court of Judicature (Northern Ireland) (Amendment) 2017 amended the Rules of the Court of Judicature (Northern Ireland) 1980 (S.R. 1980 No. 346) from January 2018 to remove the requirement of promptitude from the time limit for making an application for leave to apply for judicial review so that the time limit is three months from the date grounds for the application first arose. As noted above, we welcome this development.

Conclusion

We welcome the introduction of the Environmental Costs Protection Regimes of the UK in 2013 - they are undoubtedly enabling numerous claimants to bring cases to court that would otherwise not have been pursued. However, costs are still prohibitive for some claimants and other limitations of the schemes can prevent important and arguable cases from proceeding.

²⁰ Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 – see: <http://www.legislation.gov.uk/asp/2018/10/contents/enacted>

²¹ See Communication ACCC/C/2012/68 and Aarhus Convention Compliance Committee, 'Second progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention' (2017), paragraphs 102 and 106.

In England and Wales, these concerns include (but are not limited to) the scope of the ECPR, the nature and extent of financial information to be provided by claimants when applying for JR, the confusion surrounding costs protection, appeals and the need to act “promptly” and the effect of reciprocal caps. We are also concerned about the Government’s ongoing failure to implement changes to the CPR to ensure that any hearing of an application for variation of costs cap will be heard in private.

We welcome helpful changes to the ECPR in Northern Ireland, but note persistent problems (as above) in relation to reciprocal caps, the exclusion of private law cases and prohibitively expensive own costs.

In Scotland, we await the outcome of a Scottish Civil Justice Council (SCJC) public consultation on the draft rules around the granting of PEOs. We note that costs are routinely high and that very few PEOs have been granted. We hope that the revised regime will address the problems identified in this submission, including (but again not limited to) the fact that PEOs only cover first instance proceedings, that the PEO application procedure can, in itself, be prohibitively expensive and confusion around appeals. We were also particularly disappointed that the consultation failed to clarify that the draft Rules would introduce a significant change by allowing a court to increase a PEO applicants’ liability above the levels of the default caps ‘on cause shown’ - i.e. it would allow for a court to raise an applicant’s adverse liability exposure above £5,000.

To conclude, we believe that while progress has been made in some jurisdictions of the UK, significant problems persist, particularly in relation to own costs and reciprocal caps. We are also disheartened to note that the Ministry of Justice in England and Wales has pursued amendments that undermine the effectiveness of the ECPR at a time when we would hope to see progress towards compliance with the Convention. These amendments have been promulgated in the absence of evidence that environmental claims cause delay or hinder economic development in any way.

Please do not hesitate to contact us should you require any further information or clarification on any of the points made in this submission.

Yours sincerely,

Carol Day and Rosie Sutherland (RSPB), Michelle Hill (RSPB Northern Ireland) and Lloyd Austin (RSPB Scotland)

Will Rundle and Katie de Kauwe, Friends of the Earth England, Wales and Northern Ireland

Mary Church, Friends of the Earth Scotland

Gillian Lobo, ClientEarth

Roger Watts, Solicitor and Partner, C & J Black Solicitors, 13 Linenhall Street, Belfast, BT2 8AA

Copied to Ms Nikita Bhangu, United Kingdom National Focal Point to the UNECE Aarhus Convention - Nikita.Bhangu@defra.gsi.gov.uk