

**Statement on UK compliance with Decision V/9n on behalf of the RSPB,
Friends of the Earth and ClientEarth**

We welcome the opportunity to provide the Sixth Session of the Meeting of the Parties to the Aarhus Convention with a Statement about the UK's compliance with Decision V/9n concerning the UK and prohibitive expense and to endorse the Compliance Committee's Report to the MoP in that regard.

England and Wales

Despite overwhelming public opposition to consultation proposals in 2015, the Civil Procedure (Amendment) Rules 2017¹ came into effect on 28th February 2017. The new Rules introduced damaging amendments to the costs regime for environmental cases including:

- Claimants seeking Aarhus costs protection must now disclose personal financial information in open court when making an application for JR or statutory reviews (including any actual or likely third party support) if they are to receive costs protection. There is no guarantee that a private individual's information will only be considered and discussed in a private hearing. We believe this will deter individuals from bringing legitimate claims and is unfair within the meaning of Article 9(4) of the Convention as implemented by the PPD².
- The Court may, of its own volition or at the request of the Defendant, vary either party's cost cap at any time during the proceedings. It is therefore not possible for Claimants to know with reasonable predictability what their costs protection will be in any claim, even right up to trial. They could well be exposed to much greater costs late on in proceedings, that if they had known at the outset, they would not have taken the case. This proposal was opposed by 98.2% of those responding to the public consultation. We believe its effect will be to deter many Claimants from embarking on litigation in the first place, because they simply cannot afford that risk.
- Other adverse changes include the introduction of separate costs caps for each claimant in proceedings with multiple claimants, the ordering of costs on a standard (rather than an indemnity basis) when Defendant's unsuccessfully challenge the status of an Aarhus Convention claim, and amendments to Practice Direction 25A regarding interim relief. Claimants seeking an interim injunction have no prior certainty as to whether a cross-undertaking in damages will be required and, if so, the level at which it will be set. Thus, there is a real possibility that the costs of obtaining injunctive relief (which the CJEU has confirmed form part of the costs in the case) will render the overall costs exposure prohibitively expensive for the claimant. Again, we believe that this risk and lack of certainty will deter claimants from obtaining injunctive relief and/or taking cases.

¹ http://www.legislation.gov.uk/uksi/2017/95/pdfs/uksi_20170095_en.pdf

² Amendments made by the EU Public Participation Directive (2003/35/EC) have now been incorporated into recast versions of the Industrial Emissions Directive (2010/75/EU) and the EIA Directive (2011/92/EU)

The first two of these changes are currently the subject of a Judicial Review (JR) brought by the RSPB, Friends of the Earth and ClientEarth on the basis that they are incompatible with EU law in the form of the PPD, rulings of the Court of Justice of the European Union in the *Commission v UK*³ and *Edwards*⁴ and Article 9(4) of the Aarhus Convention⁵. In April 2017, the Honourable Mr Justice Dove granted permission for both grounds of the JR to proceed and expedited the case in view of its strategic importance for other cases. The High Court heard the case on 19th July 2017 and judgment is awaited.

The new Costs Rules are already having a chilling effect on the ability of claimant's to pursue JR in England and Wales. The Liverpool Green Party (LGP) is an unincorporated association, which means it has no separate legal personality and can only bring a claim through an individual who acts on behalf of its members. It was advised that it had a strong claim for JR in relation to the grant of planning permission for a car-park in an Air Quality Management Area. When the LGP sent a letter in accordance with the JR Pre-Action Protocol outlining their grounds of claim, the Defendant failed to engage with the substance of those grounds but referred to the court's discretion to vary the limits on maximum costs liability for Aarhus Claims on the basis of financial information submitted. In light of this correspondence, LGP was unable to find an individual prepared to act as claimant.

There is also been considerable Parliamentary concern about the changes. In February 2017, the House of Lords Secondary Legislation Scrutiny Committee (which scrutinises new secondary legislation) drew the SI to the attention of both Houses, concluding: "*While asserting that the changes are to "discourage unmeritorious claims"... [and] the MOJ states that its policy objective is to introduce greater certainty into the regime, the strongly negative response to the consultation and the submission received indicate the reverse outcome, and that as a result of the increased uncertainty introduced by these changes, people with a genuine complaint will be discouraged from pursuing it in the courts...*"⁶. Lord Marks of Henley-on-Thames has also laid a "Motion of Regret" in the House of Lords reiterating concerns expressed by the SLSC to be debated in Parliament on 13th September⁷.

As complainants in the infraction proceedings leading to Case C-350 (*Commission v UK*), the RSPB and Friends of the Earth received a letter from the European Commission in March 2017. The letter confirms that the Commission will undertake a full assessment of the Amendment Rules, but highlights a number of concerns similar to those identified by the

³ Case C-530/11

⁴ *Edwards v Environment Agency* (Case C-260/11) and *R (Edwards) v Environment Agency* (No. 2) [2013] UKSC 78)

⁵ See ACCC Communications C23, C27 and C33

⁶ See <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldsecleg/114/11403.htm> 6

⁷ "*that this House regrets that the Civil Procedure (Amendment) Rules 2017 have been laid with insufficient regard to the overwhelmingly negative response to the proposed Rules during the consultation and to the lack of evidence that significant numbers of unmeritorious environmental claims are currently brought; that they may escalate claimants' legal costs and act against the intention of the Aarhus Convention that the cost of environmental litigation should not be prohibitive; and that they are likely to have the effect of deterring claimants from bringing meritorious environmental cases (SI 2017/95 (L. 1)). 25th Report from the Secondary Legislation Scrutiny Committee*". See <https://publications.parliament.uk/pa/ld201617/minutes/170314/ldordpap.pdf>

Aarhus Convention Compliance Committee at paragraphs 83 to 85 of its second progress review of the 24th February 2017.

The changes to the costs regime compound other changes to JR (some of which were introduced under the Criminal Justice and Courts Act 2015), including:

- Increased court fees – now approximately £1,000 simply to apply for JR in the High Court. Court applications during proceedings are £100s more;
- Reduced time-limits within which to take a case (challenges to decisions on planning matters must be brought within a demanding six weeks deadline). This creates significant practical barriers both in terms of preparing ones case and obtaining legal representation, but also for community groups and individuals to fundraise the necessary money to pay for the proceedings;
- The vague and unclear rule that a claim must be brought “promptly” within 3 months. This rule still applies to cases challenging national legal provisions and not EU law;
- Removing the right to an oral hearing in cases deemed “totally without merit”;
- The failure to extend costs protection for private environmental law claims (e.g. nuisance⁸);
- Further reductions in legal aid (NGOs do not qualify in any event); and
- Exposing JR interveners to potential costs orders.

In its Report to the sixth session of the MoP, the Compliance Committee concludes that a number of the 2017 amendments appear to have moved the UK further away from meeting the requirements of paragraphs 8 (a), (b) and (d) of Decision V/9n.

Northern Ireland

The Department of Justice in Northern Ireland consulted on similar proposals to the MoJ in 2015/2016⁹, provoking a modest but strong reaction¹⁰. The Department published its response in September 2016¹¹, acknowledging a “... *widespread opposition amongst respondents to the proposals made and a general consensus that they were a retrograde step in terms of the protection offered to environmental litigant*”. As a result, most of the damaging proposals, including the mandatory disclosure of financial details and the possibility for the respondents to apply for the caps to be varied, were withdrawn. The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017¹² provide for a maximum cap on adverse liability of £5,000 and provide for the cap to be reduced where necessary to ensure costs are not prohibitively expensive for the applicant.

⁸ See Communications C85 and C86

⁹ See <https://www.dojni.gov.uk/consultations/consultation-proposals-revise-costs-cappingscheme-certain-environmental-challenges>

¹⁰ NIEL’s response can be found here: <http://www.nienvironmentlink.org/cmsfiles/NIEL-response-DoJ-Costs-Protectionconsultation.pdf>

¹¹ See <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/costs-protection-inenvironment-cases-responses.pdf>

¹² See <http://www.legislation.gov.uk/nisr/2017/27/contents/made>

Other welcome measures that may improve access to environmental justice were proposed, including the fact that applicants can apply to the court for the respondent's cap of £35,000 to be increased if the default limits would make the proceedings prohibitively expensive, thus preventing cases from being "too expensive to win".

In its Report to the sixth session of the MoP, the Compliance Committee finds that the requirements of paragraphs 8 (a), (b) and (d) of Decision V/9n have been met in Northern Ireland, with the exception of cost protection for private law claims and providing sufficient clarity for applicants as regards cross-undertakings for injunctive relief.

Scotland

The Scottish Government remains non-compliant with the Aarhus Convention despite a number of proposed improvements to the Protective Expense Order (PEO) regime.

The PEO regime was extended in 2016 to cover cases falling under Articles 9(1) and 9(3) of the Convention and the categories of persons eligible for a PEO to include Members of the Public and Members of the Public Concerned. While it is too early to evaluate the impact of these changes, we hope that community groups will now routinely obtain costs protection.

The Scottish Civil Justice Council (SCJC) consulted this year on proposals to further amend the regime for the granting of PEOs¹³. While we agree that the definition of 'prohibitive expense' in the current rules¹⁴ implies a subjective test, and should be removed, we are concerned that the proposal to remove the definition entirely is not the correct approach. Given anecdotal evidence of lack of familiarity of members of the judiciary with the Aarhus Convention, and the clearly inconsistent approach of the courts in awarding PEOs¹⁵ some guidance should be retained to ensure applicants are treated fairly and equitably.

We welcome the proposal to simplify and accelerate the procedure for determining PEO applications and to cap liability for unsuccessful applicants. These changes should help to make the procedure more accessible to the public. However we note that the sum of £500 is arbitrary, and consider no liability for the other side's costs would be more appropriate, given that the overall cost of litigation remains prohibitively expensive. We also welcome the proposal to extend protection under a PEO awarded at first instance to the appeal stage where the appeal is filed by the respondent.¹⁶ However we note that if the applicant instigates

¹³ Consultation on Draft Court Rules in Relation to Protective Expenses Orders <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/consultation-on-draft-rules-for-protective-expenses-orders/consultation-document.pdf?sfvrsn=8>

¹⁴ at 58A.5 current Court Rules on Protective Expense Orders <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chapter58a-1.pdf?sfvrsn=8>

¹⁵ as demonstrated by the different approaches in *Gibson vs Scottish Ministers* and *John Muir Trust vs Scottish Ministers*

¹⁶ at 58.A.8 Draft Protective Expense Order Rules <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/consultation-on-draft-rules-for-protective-expenses-orders/annex-e---draft-protective-expenses-orders-rules.pdf?sfvrsn=2>

an appeal they will have to apply for a new PEO, thereby increasing uncertainty for litigants and risking mounting costs.

Furthermore, we are concerned about one aspect of the proposals that was not specifically consulted upon and has only subsequently become apparent. The present regime caps the applicant's liability in expenses to the respondent to the sum of £5,000¹⁷ and provides for that sum to be reduced - but not increased. As such, Petitioners benefitting from a PEO currently have absolute clarity and certainty as to the maximum extent of their financial liability in prescribed cases. The proposals consulted upon would give the Court the power to “vary either or both of the sums mentioned in paragraph (1)”. If this means the cap can be increased as well as decreased it is a significant departure from the current position which we fear will deter legitimate claims from proceedings.

In its Report to the sixth session of the MoP, the Compliance Committee welcomes the significant steps taken by Scotland in meeting the requirements of paragraphs 8 (a), (b) and (d) of Decision V/9n.¹⁸ However, we draw the attention of the Compliance Committee and the MoP to the fact that the SCJC proposals subsequently appear to include the possibility of increasing, as well as decreasing, the £5,000 cap on adverse liability for Petitioners.

Moreover, despite the above improvements, legal action remains, as a whole, prohibitively expensive for most individuals, communities and NGOs in Scotland. Barriers to legal aid mean that few awards are granted in environmental cases. Certain court fees have doubled in recent years - for example, hearing fees for the Court's time are now £500 per half an hour per party - and litigants own legal costs remain high in complex JR cases. It is apparent that the terms of PEOs have been set without an assessment of the overall costs of litigation to an applicant. Furthermore, PEOs do not cover proceedings in private law claims.

In March 2016, the Scottish Government invited views on developments in environmental justice in Scotland. A number of respondents submitted that the establishment of a specialist environmental court or tribunal should be considered to help improve access to justice, while the majority of responses are broadly critical of the limited approach taken to Aarhus matters in the paper¹⁹. The Government has yet to publish a formal response.

Time Limits

Following the judgment in *Uniplex*²⁰, the requirement to bring JRs “promptly” is no longer applied in cases raising points of EU law in England, Wales and Northern Ireland. However, and as mentioned above, all non-EU law environmental JRs are still subject to this vague requirement in England, Wales and NI. In Northern Ireland, the Civil and Family Justice Review Group has conducted a review of the procedures for the administration of civil and

¹⁷ See Chapter 58A.4(1)

¹⁸ Report of the Compliance Committee on Compliance by the UK with its obligations under the Convention with decision V/9 of the Meeting of the Parties, Advance Copy, 31 July 2017, para 69

¹⁹ See <https://consult.scotland.gov.uk/courts-judicial-appointments-policy-unit/environmentaljustice>

²⁰ Case C-406/08

family justice (including those for JR) and recommended that the “promptly” requirement be abolished in October 2016. It is expected to issue its final report soon.

We maintain that the 6 week timeframe for bringing JRs in planning cases in England and Wales is unduly demanding and unfair to Claimants for a number of practical reasons.

In the light of the above, the Compliance Committee finds that the UK has fulfilled the requirements of paragraphs 8 (c) and (d) with respect to time limits for JR in England and Wales and Scotland, but not in Northern Ireland. However, we draw the attention of the Compliance Committee and the MoP to the fact that in England & Wales non-EU environmental law JRs are still subject to the requirement of promptness. In our view this does not mean that the UK has fulfilled these requirements for Decision V/9n.

Conclusion

The Ministry of Justice in England and Wales has progressed damaging amendments to the costs regime for environmental cases, notwithstanding Decision V/9n concerning the UK's compliance with Articles 9(4) and (5) of the Convention on prohibitive expense and the conclusions of the Compliance Committees' second progress review. These proposals were made in the absence of evidential or policy justification and effected in the face of overwhelming public opposition. They are already having a chilling effect on the ability of claimants to bring JR.

The Compliance Committee's Report to the sixth session of the Meeting of the Parties on the implementation of Decision V/9n concludes that the UK has not yet met the requirements of paragraphs 8 (a), (b) and (d) of Decision V/9n and expressed concern at the overall slow progress in establishing a costs system which meets the necessary requirements in the intersessional period. With respect to time limits for JR, the Committee concludes that the UK has fulfilled the requirements of paragraphs 8 (c) and (d) of Decision V/9n in England and Wales and Scotland, but not in Northern Ireland and once again expresses concern at the lack of progress during the intersessional period. The Committee therefore recommends the MoP reaffirm Decision V/9n and requests the UK to, *inter alia*, urgently take the necessary legislative, regulatory, administrative and practical measures to ensure that costs in court procedures subject to Article 9 is fair, equitable and not prohibitively expensive.

We support the Compliance Committee's Report to the sixth session of the MoP and the conclusions and recommendations therein. However, in light of the slow progress made in respect of the UK as a whole, and the deterioration of the situation with respect to costs in England and Wales, we call upon the MoP to not only endorse the Committee's Report but to consider the possibility of endorsing new, constructive measures to bring the UK back into compliance with the Convention soonest, including a caution and/or an expert mission to advise on possible ways to implement the measures referred to in Decision V/9n.

Finally, we wish to emphasise that the outcome of the EU Referendum in June 2016 has created a climate of uncertainty around the future of the EU environmental law in the UK. There are also deep concerns about access to justice and the enforcement deficit arising from the loss of the Court of Justice of the European Union (CJEU) and the EU complaints



mechanism, thus reinforcing the importance of the role of the Aarhus Convention in providing civil society with robust and effective environmental rights.

3rd August 2017