

Fifth session of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)

Written Submission on behalf of Friends of the Earth, the Royal Society for the Protection of Birds (RSPB) and WWF-UK

We request the opportunity to make a brief intervention at the Fifth Meeting of the Parties to the Aarhus Convention under Agenda Item 5(a) - Procedures and mechanisms facilitating the implementation of the Convention (Reports on the status of implementation of the Convention) on Monday 30th June 2014 (3.30-4.30pm). The statement will comprise a summary of the following two pages.

- **UK National Implementation Report (NIR)¹** – CAJE is concerned that the UK NIR does not accurately reflect the situation in the UK with regards to the implementation of the Convention. In particular, it fails to identify a substantial number of actual and proposed legislative and policy changes implemented in the UK since the MoP-4, which actively undermine compliance with the second and third pillars of the Convention in respect of public participation and access to justice. The scale and pace of legislative and policy change in the UK has been quite unprecedented. Individuals and organisations are struggling to keep abreast of the proposed changes or to submit properly considered responses to consultation exercises. These concerns have been made public through widespread unease about legal aid reform, representations to civil servants about consultation timeframes and in detailed responses to the UK draft NIR. It is therefore regrettable that the final NIR wholly fails to reflect these concerns. The MOP may wish to be aware that as part of an EU-wide NGO exercise in National Reporting, a representative of CAJE has prepared a UK "Shadow NIR"² detailing these, and other, concerns.
- **Decision IV/9i and Costs** - CAJE welcomes the UK's efforts to address the findings of the Compliance Committee in Decision IV/9i³ concerning "prohibitive expense", including the introduction of new costs regimes for environmental (Aarhus) cases. However, these measures do not go far enough. Accordingly, CAJE supports *draft Decision V/9o concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention*⁴ and the Report by the Compliance Committee⁵ on *Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention*, which conclude that further action is necessary to bring the UK into compliance with Article 9(4) of the Convention. CAJE also notes significant differences between the regimes for costs protection implemented in England and Wales, Scotland and Northern

¹ Available at: http://www.unece.org/env/pp/reports_trcImplementation_2014.html

² This document will be available on the UNECE website (MoP agenda) as a Category III document in due course: http://www.unece.org/env/pp/aarhus/mop5_docs.html

³ Communication C33 available here: <http://www.unece.org/env/pp/compliance/ComplianceCommittee/33TableUK.html>

⁴ Dated 12th May 2014 and available at: http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Category_I_documents/ECE_MP_P_P_2014_L.24_ENG.pdf

⁵ Dated 22nd May 2014 and available at: http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Category_II_documents/ece_mp_p_2014.23_aec.pdf

Ireland respectively and would highlight that considerable confusion remains as to the extent of costs protection and the position with regard to appeals and injunctive relief.

CAJE is also disappointed to find that the Ministry of Justice in England and Wales is not monitoring the effect of the new costs regime in terms of the number and/or success rate of environmental cases. Recent changes to the process of JR (see below) appear to have been implemented in the absence of any form of evidential base and the failure to collect data about environmental claims lodged after 1st April 2013 will render it impossible for the UK to conclude whether it has addressed the findings of the Compliance Committee and the CJEU with regard to Article 9(4) of the Convention.

- **Further reforms to Judicial Review** – the Government in England and Wales has made numerous reforms to the process of JR designed to “*tackle the burden that the growth in unmeritorious judicial reviews has placed on stretched public services*”. These reforms include: (i) doubling the court fees for JR; (ii) the introduction of a new fee of £215 for oral renewal (where permission has already been refused by a judge on the papers but the claimant asks for the decision to be reconsidered at a hearing); (iii) reducing the time limit for challenging decisions on planning matters from three months to six weeks; (iv) further restrictions in public funding; and (v) the removal of the right to an oral renewal hearing in cases assessed by a judge to be “totally without merit”.

Future proposals include the introduction of a presumption that interveners in JR will bear their own costs and any costs arising to the parties from their intervention; (ii) giving the judiciary the discretion to make orders for costs against individuals and organisations that are funding for litigation but are not party to it; and (iii) the abolition of the existing “Mount Cook” principles (whereby a claimant’s liability is generally limited to the defendant’s costs of preparing the Acknowledgement of Service). Thus, while the Government states that it will “*continue to look for ways to improve access to justice and to provide fair and simple means of resolving disputes*” in reality the UK is going in the opposite direction of travel.

- **Article 9(2) and the scope of review** - Article 9(2) of the Convention requires contracting Parties to provide review procedures to challenge the substantive and procedural legality of decisions, acts or omissions subject to the provisions of Article 6. In Communication C33, the Compliance Committee concluded that the UK allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to Articles 9(2) and (3). However, the Compliance Committee was not convinced that the UK, despite these exceptions, meets the standards for review required by the Convention as regards substantive legality. While it did not find the UK in non-compliance with Article 9(2) or (3), it suggested that the application of the ‘proportionality principle’ by the courts in England and Wales could provide a more appropriate standard of review in cases within the scope of the Convention. Shortly afterwards, the Court of Appeal categorically confirmed that *Wednesbury* unreasonableness is the correct standard of review to apply in cases concerning Environmental Impact Assessment (EIA) screening decisions. While concerns about the scope of JR were raised by both CAJE and Link in responses to the draft NIR, concerns were not reflected in the NIR.

Annex I – Background information

1. UK National Implementation Report (NIR)

The UK report was prepared by the Department for Environment, Food and Rural Affairs (Defra) in conjunction with other government departments and the Devolved Administrations in Scotland, Wales and Northern Ireland.

Detailed responses were submitted by CAJE and Wildlife and Countryside Link (the latter supported by 14 NGOs). Both groupings were concerned that the draft NIR failed to refer to changes to law and practice (both actual and proposed) that undermine the UK's ability to comply with provisions of the Convention. However, these concerns were, with one or two exceptions, not reflected in the final NIR. Particular concerns were highlighted in relation to:

- **Article 3, paragraph 2** – the Cabinet Office introduced new Consultation Principles in July 2012. The Principles were intended to represent a move towards a “*more proportionate and targeted approach*” and a clear mandate to move away from a 12 week norm for consultation. In 2012, CAJE expressed concern about the potential effects of the new Principles in restricting the ability of civil society to participate in policy-making. In responding to the draft NIR, both CAJE and an umbrella body for 44 environmental organisations (Wildlife & Countryside Link) pointed out that these concerns have proven to be the case in practice. However, these concerns were not reflected in the final UK NIR;
- **Article 6** – Changes to the planning regime introduced by the Planning Act 2008, the Localism Act 2011 and the Growth and Infrastructure Act 2013 restrict the public’s ability to participate in decisions on plan-making and the determination of planning applications. CAJE highlighted concerns about changes to the planning regime and compliance with the Aarhus Convention in responding to the draft NIR. None of these concerns were reflected in the final report.
- **Article 9(4)** – the UK has taken positive steps to address non-compliance with Article 9(4) of the Convention with regard to “prohibitive expense” following the findings of the Compliance Committee in Decision IV/9i and the judgments of the CJEU in *Edwards* and *Commission v UK*. However, these measures remain inadequate to address the problem of prohibitive expense for both individuals and groups – and subsequent amendments regarding JR procedures have undermined progress made in this area. These concerns were raised in responding to the draft NIR (and are detailed below) but were not reflected in the final Report.

As part of an EU-wide NGO exercise on National Implementation Reports, a representative of CAJE has prepared a UK “Shadow NIR”, which may be available in due course on the UNECE website.

2. Decision IV/9i (Communication ACCC/C/2008/33)

Decision IV/9i on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention was adopted at the Fourth Meeting of the Parties to the Aarhus Convention in Moldova in 2010.

The devolved administrations of the UK subsequently implemented new costs regimes to address the finding that the UK was in non-compliance with Article 9(4) of the Convention and the requirement for legal review procedures to be “*not prohibitively expensive*”.

On 1st April 2013, the Ministry of Justice (MoJ) for England and Wales implemented new costs rules for environmental (Aarhus) cases. Practice Direction 45 to the Civil Procedure Rules⁶ (England and Wales) provides for a cap on adverse liability of £5,000 for individuals and £10,000 for all other claims. The liability of the defendant for a successful claimant's costs is capped at £35,000. These figures for the caps were taken from developed court jurisprudence (notably *Garner v Elmbridge Borough Council*⁷), while the £35,000 cross cap was assumed by the Government to be a reasonable limit on the amount of costs that may be recovered by a successful claimant of an Aarhus claim. Similar (but not identical) costs regimes were introduced in Northern Ireland on 15 April 2013 and Scotland on 25 March 2013.

While these amendments represent a significant improvement, they do not bring the UK into compliance with Article 9(4) of the Convention. Firstly, the judgments of the CJEU in *Edwards*⁸ and *Commission v UK*⁹ confirm that the determination of what is "prohibitively expensive" for claimants requires the application of both an objective and subjective test. The figures of £5,000 and £10,000 remain patently beyond the means of most individuals and many groups (particularly small specialist environmental charities). Moreover, it must be recalled that the cap on what the applicant must pay if its claim is ultimately unsuccessful at first instance does not operate on its own – the unsuccessful applicant will also have to meet its own costs, estimated by the MoJ to be in the region of £30,000 for an average application for JR. This means a total costs liability in the region of £35,000 in an average case, and in a complex case, the applicant's own costs may make the total even higher.

In Scotland, it is possible for the petitioner to apply to the court for the cap of £5,000 to be reduced (and for the cross-cap to be increased) on "cause shown". This is, in our view, a slightly better way for the system to operate as a cap of £5,000 provides certainty as to the maximum adverse liability the petitioner may face with the possibility of reducing the figure, thus also satisfying the subjective limb of the "prohibitively expensive" test.

CAJE is also concerned that there are significant differences within the UK as to the type of claims benefiting from the new Aarhus rules. In England and Wales, the rules cover Judicial Reviews but not statutory reviews¹⁰. The Scottish provisions cover JR and appeals under statute, but only regarding decisions, acts or omissions which are subject to the EU Directives 85/33/EEC and 2008/1/EC (i.e. procedures in respect of EIA and IPPC). In Northern Ireland, the provisions apply to JRs and statutory reviews of a decision, act or omission subject to the Aarhus Convention. In no jurisdiction do the provisions apply to private law claims, even though the UK Court of Appeal has noted that the provisions of the Convention are capable of applying to private law claims¹¹ (note also that this matter is currently the subject of two Communications before the Compliance Committee¹²).

In particular, CAJE notes concerns in relation to the following matters:

- **Appeals** – Decision IV/9i requires the UK to ensure that the costs for *all* court procedures subject to Article 9 are not prohibitively expensive. This includes the costs for court procedures at all stages, whether first instance or on appeal. It is particularly unhelpful that the three jurisdictions of the UK take different approaches to the costs of proceedings beyond first instance;

⁶ See <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs/practice-direction-45-fixed-costs#5.1>

⁷ [2011] EWHC 86 (Admin)

⁸ Case C-260/11 - *R oao David Edwards, Lilian Pallikaropoulos v (i) Environment Agency, (ii) First Secretary of State, (iii) Secretary of State for Environment, Food and Rural Affairs*

⁹ Case C530/11

¹⁰ Civil Procedure Rules (England and Wales), s 45.41, section: VII Costs Limits in Aarhus Convention Claim

¹¹ *Morgan v Baker*

¹² See Communications ACCC/C/2013/85 and ACCC/C/2013/86

- **Lack of clarity as regards liability** – it is unclear, for example, whether the £5,000 and £10,000 caps will be imposed as a total overall cost-cap (irrespective of the number of applicants). It is also unclear whether how the cost-cap will be apportioned if the applicants include both individuals and NGOs. Finally, there is no guidance as to what happens if one of applicant fails to pay his or her share of the total.
- **Cross-undertaking in damages** - new rules and Practice Directions concerning cross undertakings in damages and interim relief in environmental JR claims came into effect on 1st April 2013¹³. While the new regime is a positive step, it is insufficient to meet the requirement in Article 3(1) of the Convention for a clear, transparent and consistent framework to implement the Convention. The reliance on judicial discretion does not provide certainty as to whether the applicant will be required to give a cross-undertaking or not (and if so, what the level it would be) and how the court should determine what would be “prohibitively expensive for the applicant”. These uncertainties may mean that applicants wishing to seek interim relief may be dissuaded from doing so, because of the risk that they may be required to give cross-undertakings for damages, and thus face prohibitive expense.

CAJE also notes the draft findings of the Compliance Committee in Communication ACCC/C/2012/77¹⁴, in which the Committee has reached a preliminary conclusion that a costs award against Greenpeace in the order of £8,000 for responding to an Acknowledgement of Service renders the UK in non-compliance with Article 9(4) of the Convention. Moreover, in this case the Committee noted that the new rules on costs introduced in the CPR would not in principle prevent a situation similar to the one in the present communication from arising as “*the £10,000 cap applies to all the first instance stages, including the permission stage, providing a collective overall limit for these stages.*” A claimant who is refused permission to apply for judicial review in the permission stage thus could still face a cost order of up to £10,000, which if the courts were to apply the Civil Procedure Rules in this manner may lead to non-compliance in practice.

In light of the above shortcomings, CAJE supports *draft Decision V/90 concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention* and the Report by the Compliance Committee on *Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention*, both of which conclude that further action is necessary to bring the UK into compliance with Article 9(4) of the Convention.

3. Reforms to the process of Judicial Review in England and Wales

In addition to the above, the Government has made numerous reforms to the process of JR designed to “*tackle the burden that the growth in unmeritorious judicial reviews has placed on stretched public services*”. Despite a failure to provide any empirical evidence, the Government refers to the potential for the “*abuse*” of JR (principally by campaigners using JR as a delaying tactic) and the role of JR as a “*brake on economic recovery*”. In February 2014, the Ministry of Justice published the

¹³ In England and Wales, Practice Direction 25A 5.1B (1) provides: “*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.*”

¹⁴ See <http://www.unece.org/env/pp/compliance/compliancecommittee/77tableuk.html>

Criminal Justice and Courts Bill, Part 4 of which is concerned with addressing “*procedural defects*” in the JR process, notably via a strong package of financial reforms to “*limit the pursuit of weak claims*”. Measures introduced in 2013 /14 include:

- **Introduction of a new fee for oral renewal** - on 1st July 2013, the Government introduced a fee for an oral renewal hearing of £215 (where permission has already been refused by a judge on the papers but the claimant asks for the decision to be reconsidered at a hearing);
- **Increased fees for JR** – as of 22nd April 2014, the fee for applying for JR has risen from £60 to £140 and the further fee payable if permission is granted has risen from £215 to £700 (an increase of more than 100%). In the longer-term, the Government has reported that it will “*revisit whether judicial review fees are set at the appropriate level as part of a wider review of fees across the civil courts [ref]*” – which may include setting a fee at rates that reflect the full cost of a hearing;
- **Intervenors' costs** – part 4 of the Criminal Justice and Courts Bill¹⁵ includes measures that will introduce a presumption that intervenors will bear their own costs and any costs arising to the parties from their intervention, despite the Government’s recognition that “*intervenors can add value, supporting the court to establish context and facts*”. The Bill also includes a requirement for applicants to provide information on funding at the outset of the judicial review, and requiring the courts to have regard to this information in order to consider making costs orders against those who are not a party to the judicial review;
- **Abolition of the existing “Mount Cook” principles** – the Government also proposes to abolish principles whereby a claimant’s liability is generally limited to the defendant’s costs of preparing the Acknowledgement of Service, thus requiring unsuccessful claimants to pay the full costs of an oral renewal hearing;
- **Legal Aid** – the Government in England has implemented further restrictions to the availability of public funding arising from a consultation paper entitled: “*Transforming Legal Aid: delivering a more credible and efficient system*”. CAJE has consistently pointed out that restricting access to legal aid will undermine the UK’s ability to meet its obligations under the Aarhus Convention. Specifically, when taken as a package with cuts introduced through the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012, and changes to JR announced in 2013, CAJE highlighted a real risk of a significant and harmful impact on access to justice for the environment. In particular, by proposing to abolish Legal Aid for borderline cases and introducing a residency test, the Government is at risk of disregarding both the objective and the subjective tests for “prohibitive expense” laid down by the CJEU in *Edwards and Commission v UK*, since the change would expose claimants to the costs of the entire proceedings (as well the risk of paying their opponent’s costs should they lose) which potentially exceed any notion, whether objective or subjective, of what may be reasonable.
- **Totally Without Merit (TWM)** – on 1st July 2013 the Government removed the right to an oral renewal hearing in cases assessed by a judge to be “totally without merit”. In responding to this proposal, CAJE pointed out that in its experience, even cases deemed “wholly without merit” can ultimately be successful (see *R (on the application of Friends of the Earth Ltd) v Secretary of State for Energy and Climate Change*¹⁶);

¹⁵ Further information here: <http://services.parliament.uk/bills/2013-14/criminaljusticeandcourts.html>

¹⁶ [2011] All ER (D) 190 (Dec)

- **Time limit for lodging cases in planning decisions** - as of 1st July 2013, the time period for commencing a JR claim for planning decisions has been reduced from three months to six weeks and the requirement that the claim be commenced “promptly” has been removed. Two-thirds of the stakeholders responding to a consultation paper on this proposal opposed this amendment¹⁷ and practising lawyers and NGOs are already finding the six week deadline problematic, particularly if public funding is being sought as this is rarely confirmed within the relevant timeframe. The corollary of this is that cases are being brought prematurely – which seems to be the exact opposite of what the Government sought to achieve.

Thus, while the UK NIR states that it will “*continue to look for ways to improve access to justice and to provide fair and simple means of resolving disputes*”, in reality the UK is going in the opposite direction of travel.

CAJE is also disappointed to find that the Ministry of Justice in England and Wales is not monitoring the effect of the new costs regime in terms of the number and/or success rate of environmental cases. Recent changes to the process of JR appear to have been implemented in the absence of any form of evidential base and the failure to collect data about environmental claims lodged after 1st April 2013 will render it impossible for the UK to conclude whether it has addressed the findings of the Compliance Committee and the CJEU with regard to Article 9(4) of the Convention.

4. Article 9(2) – Substantive Review

Article 9(2) of the Convention requires contracting Parties to ensure that “*members of the public concerned ... have access to a review procedure ... to challenge substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention*”.

The UK’s obligations in this respect were examined by the Compliance Committee in the context of Communication C33 concerning costs. The Committee concluded that the UK allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to Articles 9(2) and (3) including, for example, material errors of fact, errors of law, regard to irrelevant considerations, failure to have regard to relevant considerations, jurisdictional error and *Wednesbury* unreasonableness. However, the Committee was not convinced that the UK, despite these exceptions, meets the standards for review required by the Convention as regards substantive legality. While it did not find the UK in non-compliance with Article 9(2) or (3), it suggested that the application of the ‘proportionality principle’ by the courts in England and Wales could provide a more appropriate standard of review in cases within the scope of the Convention.

Shortly afterwards in the case of *Evans*¹⁸, the Court of Appeal categorically confirmed that *Wednesbury* unreasonableness is the correct standard of review to apply in cases concerning EIA screening decisions. Representations were made to the Compliance Committee (by WWF-UK and the Environmental Law Foundation) in this respect shortly after the judgment.

While it is recognised the UK has not yet been found to be in non-compliance with Article 9(2) of the Convention concerning substantive review, a number of stakeholders, including the Compliance Committee, are questioning the UK’s position on this issue. This point was raised specifically by both CAJE and Link in responses to the draft NIR, but no concerns were reflected in the final Report.

¹⁷ See ‘Reform of Judicial Review: The Government Response’ page 32 available at <https://consult.justice.gov.uk/digital-communications/judicial-review-reform>

¹⁸ *Evans –v- Secretary of State for Communities and Local Government* [2013] EWCA Civ 115